



Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

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EMPLOYMENT STANDARDS ACT, 2001

As noted in May's TALKING UNION, the Government passed *Bill 57*, the *Government Efficiencies Act, 2001*, which replaced the *Employment Standards Act* with the *Employment Standards Act, 2000*. While the parental/pregnancy leave provisions of the *ESA 2000* have been in force since January, 2001, the remaining provisions were only proclaimed effective September 4, 2001. Enclosed is a TALKING UNION, SPECIAL EDITION summarizing its changes.

The *ESA 2000* is deemed to be part of every collective agreement and is enforceable by trade unions through arbitration. It is therefore important that trade unions know and understand the provisions of the *ESA 2000*. Employees represented by trade unions are bound by the decisions of their trade unions regarding their rights and are disallowed from filing individual complaints under the *ESA 2000*. However, the *Act* expressly reminds employees that they can complain against their trade unions under the duty of fair representation for perceived failures to enforce their statutory rights. Further, trade unions bargain for rights above those minimums defined by statute. It can be anticipated that, at the next round of collective bargaining, many unionized employers will seek concessions to reflect those provisions of the *ESA 2000* which they perceive give their competitors more flexibility and efficiency.

There is some good news in the *ESA 2000* for employees, and their unions. First, since last January, the *ESA 2000* matched the provisions of the *Employment Insurance Act* and permits a total of 52 weeks of pregnancy/parental leave. Secondly, for the first time, the *Act* recognizes the conflict between work and family pressures by providing 10 days of unpaid emergency family leave per year. Thirdly, the enforcement provisions have been significantly strengthened. Employment Standards Officers can now order reinstatement where employer reprisals against employees are proved and courts can order significant fines or even imprisonment for violations of the statute. Unpaid wages now take priority over unsecured creditors to a maximum of \$10,000.00 per employee. The question remains whether the Ministry of Labour will have the budget, and the will, to aggressively enforce the new standards.

In spite of these few bright spots, the bulk of the *ESA 2000* is more business-friendly than protective of employees. It builds in the potential for greater employer flexibility about scheduling hours, overtime, and vacations by assuming that employees can bargain meaningfully with their employers about these matters. The *ESA 2000* replaces the old statute's requirement for Ministry permission to exceed statutory maximums with "employer/employee agreements". While the old maximum of 48 hours of work per week continues, employees may now "agree" to work 60 hours per week and to average their hours over 4 weeks so that overtime premiums can be avoided. Similarly, employees can "agree" to take holidays in increments less than a full week, such as one day at a time. While some employees will have the skills and security to actually bargain freely with their employers, or refuse employer requests for concessions, the majority of workers continue to be vulnerable to the demands of their employers; given the inequity in bargaining power, the "agreements" contemplated by the *ESA 2000* may not be freely entered into by existing employees and may, in practice, become mandatory for new job applicants.

Of interest to trade unions is the *ESA 2000*'s new exemption from its application to elected officers of voluntary organizations, specifically including trade unions. Accordingly, trade union officers have no statutory rights to termination or severance pay, no guarantees of maximum hours of work, overtime pay, etc. Of interest to construction trade unions is a new section in the Regulations which mandates that "off-site" employees are treated identically to "on-site" employees, hence exempting them from the normal weekly maximums for hours of work and excluding them from receiving termination or severance pay. This raises a legitimate question that construction employers may attempt to use these Regulations to bar shop employees from the protections of the *ESA 2000*.

The enclosed SPECIAL EDITION of TALKING UNION provides more detail of the relevant changes. However, the Regulation-making power of Cabinet under the *ESA 2000* is unusually broad. Trade unions will have to ensure that they stay abreast of future new Regulations, which may significantly alter the minimum guarantees provided in this statute.

Criminal Convictions at Arbitration: The Latest Word

The Ontario Court of Appeal has dismissed the appeals brought by CUPE 79 and OPSEU of a decision of the Divisional Court in May, 2000 which quashed three arbitrators' decisions. The arbitrators had allowed relitigation at the arbitration of the Grievors' discharges of the facts underlying their criminal convictions for the same offence. See *City of Toronto v. CUPE 79*, an unreported decision of the OCA released August 10, 2001. TALKING UNION, September 2000, had reviewed the facts and the Div. Ct. decision.

Although it did not follow the Div. Ct.'s reasoning, the OCA has sent a strong message to the labour relations community. Mr. Justice Doherty, writing for a unanimous Court, clearly expressed the view that, while the public policy of finality in judicial decisions may not

prevail in every case, the person seeking to relitigate the facts associated with a criminal conviction will have to “demonstrate compelling circumstances” in order to be allowed to proceed with such relitigation. In arriving at this conclusion, the Court suggested a number of factors which could permit relitigation:

- Where new evidence is discovered after the final decision which conclusively demonstrates that the original finding of fact was incorrect;
- Where the initial decision is obtained by fraud or other dishonest practice;
- Where the criminal proceedings were tainted by fraud or any procedural failing that could cast doubt on the fairness of the criminal trial or the accuracy of the result;
- Where the outcome of the grievance arbitration had some significance to a broader constituency than just the Grievor's personal interest;
- Where the participation of the Union at the arbitration alters the essential nature of the inquiry;
- Where the finding of guilt arose out of a relatively minor prosecution in which the Grievor can argue that the stakes did not warrant his full attention; and
- Where evidence becomes available that had not been available at the criminal trial with due diligence and which is sufficiently cogent to be almost determinative of a different outcome had it existed in the first proceeding.

At least one of the unions involved in this proceeding has decided to seek leave to appeal the OCA's decision to the Supreme Court of Canada. Unless overturned by the SCC, however, the conclusions reached by the OCA will raise a substantial hurdle for any trade union seeking to introduce evidence at arbitration that refutes a criminal conviction arising from the same facts as the discipline.

WHAT'S NEW?

EMPLOYMENT STANDARDS ACT, 2000

The *Employment Standards Act, 2000* was proclaimed effective September 4, 2001. See the Special Edition enclosed with this edition of Talking Union.

At OLRB

New Chair: After 25 years of service, including six years as its Chair, **Rick MacDowell** is retiring from the Ontario Labour Relations Board. Mr. MacDowell continues to be

available for appointment as an arbitrator. **Kevin Whitaker** has been appointed as the new Chair. Mr. Whitaker brings extensive experience to the position, as a labour lawyer, a former Vice Chair, and a well-known arbitrator.

Non-Renewal: The appointment of Vice Chair Bram Herlich has not been renewed. Mr. Herlich has been with the Board for over 10 years and continues to be available for appointment as an arbitrator.

At GSB

New Chair: **Susan Stewart**, also an experienced arbitrator and a former Vice Chair of the GSB, has assumed the position of Chair of the Crown Employees Grievance Settlement Board. Her predecessor, **Owen Shime**, after over 20 years of service in the public sector, is continuing his private arbitration/mediation practice.

Education Day: The GSB is holding a full day seminar on November 27, 2001, updating the parties who appear before it on recent developments and decisions at the GSB.

At KOSKIE MINSKY/ PUBLIC PERSPECTIVES

Treasurer of the Law Society:

In the spring, 2001, KM's tax counsel, **Vern Krishna**, was elected the Treasurer of the Law Society of Upper Canada. The Law Society is the governing body for Ontario's lawyers and Treasurer is its highest position.

President of the Labour Sub-Section: Our **Ursula Boylan** has been elected the President of the Labour Law Sub-section of the Ontario Bar Association, an organization involved in the continuing education of labour practitioners.

Class Action Lawyer: In October, 2001, KM is expanding our services by adding a Class Action lawyer, **Kirk Baert**, to our civil litigation practice. Mr. Baert's specializes in representing large groups of plaintiffs with a common action.

Communications Update: Does your trade union have materials to distribute during organizing campaigns? Do they need up-dating? Do you need help with making effective oral presentations? Our labour lawyers, teamed with PPI's communications consultant, **Denise Riposati**, may be of assistance. Contact the Editors.

ESA 2000 Seminars: KM labour lawyers are available to trade unions for training seminars on the changes brought by the *ESA 2000*. Contact the Editors.

Do you want your issues of *TALKING UNION* by e-mail? Do you have an issue you would like discussed in *TALKING UNION*? Do you have additions or corrections to our mailing list? If so, please contact the editors:

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