MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Keeping up with Canada's fast-changing employment and labour laws.

Just because you can, doesn't mean you should!

Raymond MacKinnon
416.603.6957
rmackinnon@sherrardkuzz.com

2018 was a year of change for employers across Canada. The legalization of recreational cannabis coupled with seismic shifts in employment standards and labour relations legislation required many employers to change the way they do business. In Ontario, for example, Bill 148 (enacted by the former Liberal Government) ushered in a wide-range of "employee/union-friendly" amendments, only to be reversed (in part) by Bill 47 (enacted by the current Conservative Government).

This back and forth has left many Ontario employers wondering whether they should roll back their own workplace policies and practices and, if so, how to accomplish this. The short answer is – rolling back policies and practices **can** be done, but there are important practical and legal considerations.

Practical considerations

Remember the old adage, *just because you can doesn't mean you should*. Rolling back a workplace policy perceived by employees to be a benefit can cause unnecessary backlash. If you wish to minimize this backlash, ask yourself two questions: "Do we need to do this? Is there another way to achieve our operational goals that might cause less disruption?"

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For example, you may be thinking about rolling back the wage parity among full and part-time employees brought in under Bill 148. Can you? Should you? The analysis is both practical and legal. Practically, consider the negative impact a rollback might have on employee morale. One possible option might be to implement different rates of increases *moving forward* and adjust the rates for new employees as they enter the organization (subject, of course, to any collective agreement obligations). In this way, you might work towards your operational goal of differentiating pay among full and part-time employees, but perhaps with less disruption.

Legal considerations

The legal consideration is whether a rollback could be considered constructive dismissal.

In a non-unionized workplace, a unilateral and substantial change to an essential term of employment can, in some cases, be considered a constructive dismissal. This can be triggered by a change to compensation, hours of work, duties and responsibilities, and/or reporting structure (for example), and can arise from a single act or a course of conduct on the part of an employer. An employee who claims to have been constructively dismissed may be entitled to the same amount of damages as a wrongfully dismissed employee.

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Before implementing a change to a term or condition of employment, the first question a non-unionized employer should ask is, "Does this unilateral change breach the employment contract?" If the employment agreement provides the employer the right to alter the term at issue, or if the employee consents to the change, the answer is 'no'. If the answer is 'yes', the second question is, "Would a reasonable person in the employee's circumstances consider the change to have substantially altered an essential term of employment?" Not every change to a term and condition of employment is substantial. For example, a two per cent (2%) salary decrease is not likely to be sufficiently substantial to justify a claim of constructive dismissal.

In a unionized workplace, depending on the terms of the collective agreement, a change to a workplace policy or practice may fall within management's unilateral authority under its management rights clause, or it may require the involvement of the union. In either case, a new or amended policy must be reasonable and not conflict with the existing terms and conditions of the collective agreement.

Once you decide to make the change...

If you decide to make the workplace change, there are a few different ways to approach this. First and foremost (shameless plug), you should get legal advice from experienced employment/labour counsel to minimize the chance you find yourself defending a constructive dismissal claim or grievance from a union.

If the proposed change is not substantial or does not impact an essential term of employment, in most cases you will be good to go (again, subject to a collective agreement or other contractual term restricting management's right to make such a change). If the proposed change will be implemented unilaterally and substantially alters an essential term of employment, the employee must be given sufficient notice. If the change is to take place sooner and the employee agrees to the change, the employee must be given "consideration," which can be monetary, non-monetary, or a combination of both.

How much notice is sufficient depends on the circumstances of the individual employee, but is generally determined based on the amount of notice of termination to which the employee would be entitled at common law. If consideration is provided, the adequacy of the amount is not a relevant factor in deciding whether agreement to the change is enforceable. However, even where consideration is adequate adjudicators have been known to look for creative ways to strike down an agreement they consider "unfair" to the employee. As such, out of an abundance of caution, an employer might want to offer more than a nominal amount as consideration when seeking an employee's consent to a change.

Final thoughts...

The times they are a changin'. To keep pace, maintain flexibility to manage your workplace, and minimize your exposure to risk, you need to understand the law, critically assess your operational goals, seek legal counsel and move forward strategically.

To learn more and for assistance, contact the employment and labour law experts at Sherrard Kuzz LLP.

DID YOU KNOW?

On January 1, 2019, the entitlement under Ontario's *Employment Standards Act, 2000*, to personal emergency leave (including two paid days) was repealed and replaced with three new *unpaid* leave entitlements in each calendar year: 3 days Sick Leave, 3 days Family Responsibility Leave, and 2 days Bereavement Leave.

To learn more about these and other recent amendments, and to update your workplace policies, contact Sherrard Kuzz LLP.

When Resignation IS Resignation
- new Ontario decision good news for employers

Geoffrey Lowe
416.603.6236
glowe@sherrardkuzz.com

Can an employee provide notice of resignation (or retirement) and then take it back? In a recent Ontario decision - *English v Manulife Financial Corporation*, 2018 ONSC 5135 - the court answered that question "no", so long as the employer has accepted the resignation and it was not given in the heat of the moment.

Historically, the law in Canada has been that an employee can only rescind a notice of resignation if the employer has not taken a step in reliance on the resignation (*e.g.*, hire or appoint a replacement). Until the employer took such a step the employee could rescind a resignation and the employer had to comply or expose itself to a possible claim for wrongful dismissal. This created great uncertainty for employers seeking to efficiently and effectively run their businesses.

The Ontario Superior Court of Justice has now clarified the law, holding a resignation becomes effective once the employer accepts it even if the employer has not taken any other step (the exception being when resignation is given in the heat of the moment followed shortly thereafter by a change of heart). **Caveat:** An appeal of this decision is scheduled to be heard on March 25, 2019.

What happened in *English v Manulife*?

The employer, Manulife Financial Corporation ("Manulife"), sought to upgrade its customer service department by bringing in a new computer system. Elizabeth English, a 66 year old, 10 year employee, did not want to learn the new system and in September 2016 advised her supervisor she would retire on December 31, 2016. Manulife initially questioned her decision, but ultimately accepted it.

In October 2016, Manulife suspended the conversion to the new computer system. On hearing this, English advised her supervisor she no longer wanted to retire. While Manulife did not accept English's retraction, no one at Manulife expressly advised English of this. In December, English was asked to stop coming to work in accordance with her resignation. She sued on the basis of wrongful dismissal claiming damages equivalent to 16 months' compensation.

The court agreed with the employer

English argued she could retract her retirement notice at any time because Manulife had not taken a step after receiving it.

Manulife argued it was entitled to rely on its acceptance of the resignation without the need to take any further action. It relied on more recent cases from Nova Scotia and Ontario in which the courts held the mere acceptance of a notice of resignation is sufficient to make the resignation effective. Manulife also argued it had neither misled English nor given her any reason to believe her resignation had been rescinded; at most, Manulife had been silent.

The court agreed with Manulife, describing English's position contrary to basic principles of contract law:

> *… the Plaintiff's notice of retirement … reflects a clear and unequivocal intention … to retire/resign her position of employment … effective December 31, 2016. Her notice of retirement was accepted … after a discussion with the Plaintiff that would have allowed the Plaintiff to revoke … her resignation. …. In essence, what occurred … was an offer by the Plaintiff to retire as an employee effective December 31, 2016. Her offer was accepted … and a binding contract occurred between the parties.*
>
> *When the Plaintiff heard that the conversion was no longer going to take place she may have wanted to resile from her notice of retirement. It would have been open to the Defendant to have allowed the Plaintiff to resile from her notice of retirement had the Defendant chosen to do so. The Defendant had accepted the Plaintiff's notice of retirement and was under no obligation to allow the Plaintiff to rescind or resile from her notice. The Defendant could, perhaps, have handled the situation better, by advising the Plaintiff in mid or late October that her notice of retirement was binding on her. There is, however, nothing in the evidence that would suggest that the Defendant lead the Plaintiff along to believe that her intention to resile had, in fact, been accepted by the Defendant. At most, the Defendant was silent about her request. But silence does not equate to acceptance.*
>
> *The Plaintiff's argument that an employee's notice of resignation could be rescinded at any time up until the effective date of retirement, flies in the face of basic principles of contract law. Where there is a contract, i.e. an offer and acceptance, the contract - unless it is ambiguous and open to interpretation, will be enforced by the courts. This is not a case where the Plaintiff was induced in any way, shape or form to tender her notice of retirement. She chose to do so willingly and freely, and was in no way coerced... Once her notice of retirement was accepted she was bound by it.*

Takeaways for employers

As noted above, an appeal of the decision is scheduled to be heard on March 25, 2019. Until the law is settled, employers should remember this:

1. **A notice of resignation or retirement must be clear.**

   A hastily-given notice of resignation or retirement may not be upheld by a court. An employer that relies on such a notice does so at some risk.

   Best practice: If an employee "resigns" in the heat of the moment or shortly following an incident, proceed with caution. Consider allowing a reasonable period of time to pass, then confirm the resignation in writing.

2. **Acceptance of a resignation may be sufficient to create a binding agreement**

   Subject to point 1 (above), assuming *English v. Manulife* remains the law, an employer need only accept a resignation for it to be binding.

   Best practice: To minimize the opportunity for disagreement and/or misunderstanding down the road, ensure "acceptance" is clear (written confirmation) and consider taking a step or action in reliance on the resignation.

To learn more and/or for assistance, contact the employment law experts at Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Privacy and Surveillance: Understanding an Employer's Rights and Obligations

As arbitrators and courts continue to struggle to balance an employer's right to manage its business with employees' right to privacy, employers are often left wondering what they can and cannot do. Join us at this *HR*eview, as we address employer rights and best practices in the world of privacy, monitoring and surveillance, social media and IT-related misconduct:

1. **Is there is a "Right" to Privacy?**
   - Privacy legislation and its impact on your workplace
   - Unique considerations for unionized employers
2. **Employee Monitoring and Surveillance**
   - Can an employer monitor an employee's email, internet and smartphone use?
   - When can cameras be used in the workplace?
   - Surveillance outside the workplace - is it ever appropriate?
3. **Privacy and Social Media**
   - What is an employer permitted to learn about a job applicant?
   - Can an employer require access to an applicant's social media account(s)?
   - Is an employer permitted to act on what it sees on the social media account(s) of an *existing* employee?
4. **Addressing IT-Related Misconduct**
   - Recent trends in discipline and discharge for IT-related misconduct.

DATE: **Wednesday February 27, 2019; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)
VENUE: **Hazelton Manor, 99 Peelar Road, Concord, ON L4K 1A3**
COST: Complimentary
REGISTER: **By Monday February 18, 2019 at www.sherrardkuzz.com/seminars.php**

Law Society of Ontario, CPD Hours: This seminar may be applied toward 1.5 general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz