Legal Update 2019

Unifor Telecommunications Conference

February 26-28, 2019 – Niagara Falls

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Legal Update 2019

Canada Bill C-86

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Bill C-86

- For federally-regulated employees, employment standards are in Part III of the Canada Labour Code
    - Bill C-86 improves these labour standards
- Bill C-86 was part of the 2018 Budget
- Most provisions don’t come into force until September 2019 or later
- Some 2017 amendments also not yet in force

Bill C-86 Highlights

- Ban on treating employees as contractors when they are not.
    - Onus will be on employer to prove person is not an employee.
- Rest periods
    - Unpaid 30 minute break after five hours
    - Eight hours rest period between shifts

Bill C-86 Highlights

Scheduling

- Employee must have 96 hours notice of their work schedule
- Right to refuse short notice without discipline
- Exceptions for emergencies, and collective agreement may set other rules

Medical and nursing breaks

- Unpaid breaks as necessary for medical reasons, or for nursing or to express breast milk

Bill C-86 Highlights

Equal Treatment

- No pay differences and no job posting differences based on employment status if employees do substantially the same kind of work under similar conditions
    - Seniority, merit and other allowable differences preserved.
- No pay differences by Temporary Help Agencies where employees are doing substantially the same work as client's employees

Bill C-86 Highlights

Personal leave (similar to old Ontario PEL)

- Flexible leave
- Five days total
- Three of five days paid after three months of employment
- For personal and family illness and other family needs
    - Also for attending citizenship ceremony
- Employer can require evidence of entitlement that is “reasonably practicable”.

Bill C-86 Highlights

Group termination of employment

- If 50 or more employees terminated, up to 16 weeks notice to Minister is required.
- Also 8 weeks notice or pay to individuals who are “redundant employees”

Individual termination of employment

- Notice of up to eight weeks to be required depending on length of employment.
    - Two weeks after three months
    - Up to eight weeks after eight years
    - Up from two weeks.

Bill C-86 Highlights

- Family Violence Leave
  - Previously ten days total, unpaid, now five of ten days are paid
- Vacation Entitlement
  - Three weeks after five years instead of six years
  - Four weeks after 10 years
- Holiday pay
  - Uses Ontario formula for holiday pay
  - 1/20th of wages in four weeks before holiday

Bill C-86 Highlights

Pay Equity Act

- Major enactment was new Pay Equity Act
- Presentation scheduled on February 28 with Laura Johnson

Legal Update 2019

Bell Arbitration - Attendance Management Program

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Bell Canada Arbitration - Attendance Management Program

Arbitration award in January 2019 declared that the policy was an unreasonable exercise of management rights and therefore un-enforceable.

- Declaration was suspended for 90 days to let Bell fix their policy
- Now waiting to see what Bell will do

Bell Canada Arbitration - Attendance Management Program

What is an attendance management program (“AMP”)?

- Arbitrator said first purpose of an AMP is to reduce costs and productivity losses from absenteeism.
- AMP does that by “supporting and assisting” employees to keep regular attendance
- AMP typically tracks absences and responds.

- Employers don’t need to have an AMP.
  - Employers can make an AMP without union’s involvement or approval.

Bell Canada Arbitration - Attendance Management Program

Employer Rules

- An AMP is a kind of employer rule.
- Employers can make rules as long as they are:
  - consistent with the collective agreement
  - reasonable
  - clear

Bell Canada Arbitration - Attendance Management Program

An AMP is a kind of employer rule and it typically will have to:

- Define what is an absence for purposes of the Polic
- Distinguish between culpable and non-culpable absenteeism
- Tell employees when and how they will have to provide medical information
- Include absence tracking
- Have clear thresholds for when employees enter the program and how they progress through the program.
- Preserve discretion

Bell Canada Arbitration - Attendance Management Program

In the case of Bell Canada:

- There was not a single AMP document
- There was a “Policy on Presence at Work” or PAW Policy
- And a variety of other documents and policies were identified by witnesses. Some were for distribution to employees and some were for management eyes only.
- Some were not even accessible by employees.

Bell Canada Arbitration - Attendance Management Program

Decision of the Arbitrator

- This was a policy grievance
  - It was about whether there was anything legally wrong with the Bell AMP
  - Not about any individual case.
- There was no clarity about what the AMP was, or what it required employees to do.
- Some of the basic elements of an AMP were absent:
  - No description of absences that did or did not count
  - No distinction between culpable and non-culpable absences
  - No clear absence reporting system
  - No clear thresholds

Bell Canada Arbitration - Attendance Management Program

Bell's approach was "aggressive and paternalistic"

- Entry into the program was triggered by first absence.
  - Program did not recognize that some level of absence is normal and expected
- Program did not clearly or adequately distinguish between blameworthy absences and non-culpable absences
- Bell demanded too may medical verifications.
  - Arbitrator made interesting comments about effect on health system of excessive employer requests for notes.

Bell Canada Arbitration - Attendance Management Program

Remedy was a declaration that the AMP was unreasonable and unenforceable

- Arbitrator decided that a declaration could leave a vacuum and labour relations chaos. So he suspended the declaration for 90 days to give Bell time to fix it.
- Expect that Bell will revisit the issue and make a more coherent AMP.
- Whether a new policy will be reasonable will have to be determined by way of a future assessment and challenge if necessary by our union.

Legal Update 2019

Bell Canada and BIMS - Judicial Review Decision

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Bell Canada and BIMS

Ontario Court decision in February 2019 about “BIMS”

- BIMS is Bell Internet Management Services
- Local 6004 was successful at arbitration
- Bell Canada sought judicial review of the arbitration decision
- Link to Court decision is here

Bell Canada and BIMS

History of this case goes back to 2011

- Union identified that Bell Canada was operating call centres in Ottawa and Montreal under a different business name
- 600 employees
- Union filed a single employer application at CIRB
- CIRB issued a single employer declaration in 2013

Bell Canada and BIMS

Bell Canada's collective agreement had outsourcing language

- No outsourcing if it would cause layoffs
- BIMS laid off 31 employees
- Local 6004 filed a grievance

Bell Canada and BIMS

Union said at arbitration that layoffs contravened the outsourcing language in Bell's collective agreement

- Bell said that the Bell Canada language didn't protect BIMS employees
- Arbitrator determined that BIMS employees were always Bell Canada employees
- Nothing in the outsourcing language suggested that they were not supposed to enjoy those protections

Bell Canada and BIMS

Judicial Review of arbitration awards is very limited

- Arbitration awards are supposed to be final
- Judges can only determine if the award is unreasonable
- Judges might disagree with result but if it is reasonable, the decision stands
    - Unreasonable means not supported by transparent and intelligible reasons
    - Unreasonable means not within the range of possible outcomes that facts could support

Bell Canada and BIMS

In this case, three judges unanimously decided that the award was reasonable

- This is an example in which the Union found good facts, got a good result at arbitration, and successfully defended the result
- Though Bell Canada is trying to appeal, we think they will not win