

**NO DOUBLE DIPPING: ABSENT AN AGREEMENT TO THE CONTRARY,
EMPLOYEES MAY NOT BE ENTITLED TO HOLIDAY PAY AFTER
AN ABSENCE GREATER THAN FOUR WEEKS**

Toronto Transit Commission v The Amalgamated Transit Union, Local 113, 2011 ONSC 3604.

The Divisional Court recently allowed the Toronto Transit Commission's (the "TTC") Application for Judicial Review, with respect to an arbitration award that provided employees receiving WSIB benefits for six months or more were entitled to payment for statutory and designated holidays.

Background

In an award dated August 12, 2009 (the "Decision"), Arbitrator Brunner held, in part, that employees transferred to Inactive Status after being in receipt of benefits provided by the Workplace Safety and Insurance Board for six months were entitled to holidays with pay. The TTC applied for judicial review of this one aspect of the Decision.

In rendering the disputed aspect of the Decision, Arbitrator Brunner found that certain sections of the Collective Agreement in question had been superseded by corresponding provisions of the *Employment Standard Act, 2000* (the "ESA"), Accordingly, Arbitrator Brunner embarked on an interpretation of the relevant provisions of the *ESA*.

In his decision, Arbitrator Brunner failed to refer to a key provision of the *ESA* and failed to address the TTC's submissions with respect to that provision. Specifically, Arbitrator Brunner did not address section 24(1) of the *ESA*. Section 24(1) of the *ESA* provides that public holiday pay will be calculated as "the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20". An employee on WSIB for the previous six months would not have earned any regular wages or vacation pay in the four weeks prior to the public holiday; therefore, the quantum of any public holiday pay would be zero under the *ESA*.

The Argument

Oral argument before the Divisional Court was based on two grounds.

First, the TTC argued that the Arbitrator's award regarding holidays constituted a denial of procedural fairness and a denial of nature justice because the Decision failed to take into account or even refer to section 24(1) of the *ESA*, which was the cornerstone of the TTC's submissions on the issue.

Second, the TTC argued that in failing to deal with section 24(1) of the *ESA*, the Arbitrator failed to provide adequate reasons.

The TTC argued, based on one or both grounds, that the award could not stand and must be quashed.

Divisional Court Findings

In upholding the Application for Judicial Review, the Court accepted the TTC's second submission (lack of adequate reasons), rendering it unnecessary for the Court to make a finding as to whether or not there had been a denial of natural justice.

After reviewing the 2008 Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, the Court stated as follows at paragraph 16:

It is uncontroverted that the Commission's argument before the arbitrator was centred on s. 24(1) of the ESA. There is no provision in the collective agreement that provides a formula for the calculation of statutory holiday pay and as there is no factual finding importing the alleged past practice of paying eight hours into the collective agreement, it is, in our view, not possible to discern a line of logic that results in an employee being entitled to payment of money for statutory holidays where he or she was not worked the four weeks referred to in s. 24(1). The decision does not meet the standard of reasonableness in *Dunsmuir* in that it is lacking in justification and intelligibility. [Emphasis added].

In the result, the Court allowed the TTC's Application for Judicial Review and set aside this aspect of the award. The Court referred the matter to a new arbitrator for determination and awarded the TTC costs fixed at \$5,000.

For employers, while not determinative, the Decision suggests that absent contrary language in an applicable collective agreement or an estoppel, it may be permissible to not pay employees holiday pay after an absence of more than four weeks where no wages have been earned. Notably, however, in this case, the parties agreed that the *ESA* prevailed over the applicable collective agreement provisions. On that basis, the effect of the Decision may be limited. This Decision is also a reminder that arbitrators and tribunals are required to provide adequate reasons or else the decision may not withstand an application for judicial review.

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Deborah J. Hudson
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