

## THE IMPACT OF THE CREATION OF FAMILY DAY ON EMPLOYERS

On October 11, 2007, newly re-elected Ontario Premier Dalton McGuinty announced the creation of Family Day, the ninth public holiday under the *Employment Standards Act, 2000* ("ESA"). Family Day will be observed on the third Monday in February, beginning in 2008.

An important issue for provincially-regulated employers in Ontario is whether or not they will be required to give their employees a day off with pay on Family Day if the holiday is not included in their collective agreement or employment contract/policy.

The *ESA* is the minimum standard for all Ontario employees, both non-union and union. As such, subsection 5(1) of the *ESA* prohibits an employer from contracting out of the *ESA* and states that any such contracting out is void. However, subsection 5(2) provides an exception to this general rule, in that if one or more provisions in a collective agreement or employment contract/policy directly relate to the same subject matter as the employment standard and provide a greater right or benefit to the employees, those provisions will apply instead of the employment standard. Therefore, in order for employers to not have to provide its employees with a paid holiday on Family Day, the employer will have to show that the collective agreement or employment contract/policy provides a greater right or benefit in respect of holidays than does the *ESA*.

The leading authority on the issue of greater rights or benefits as they relate to public holiday pay is *Queen's University and Fraser et al.*, (1985), 51 O.R. (2d) 140 (Div. Ct.) ("*Fraser*"). In that decision, an arbitrator held that the lack of an alternative day off or pay in lieu thereof in the collective agreement for three statutory holidays violated the *ESA*. On judicial review, the Divisional Court found that the Arbitrator used the improper approach. At p. 144 Justice Van Camp described how to analyse whether a collective agreement provides a greater right or benefit:

One must look at the entirety of the terms in the agreement respecting holidays and not compare each individual item.

At p. 155 of his concurring judgment, Justice White made the following oft-quoted statement:

In my opinion, the arbitrator erred in ruling that he could not compare all of the benefits apropos of holidays and holiday pay as found in art. 18 with the standard found in s. 26(4) of the *Act*. A proper comparison, which in my opinion involves placing in one pan of the metaphorical scale the minimum standards set out in s. 25(4) and placing in the other pan the totality of rights or benefits or lesser hours of work provided for in art. 18, would fully preponderate the scale in favour of art. 18.

The approach set out in the *Fraser* decision has been applied consistently over the past two decades. Adjudicators have accepted that when determining whether a collective agreement or employment contract/policy provides a greater right or benefit, he/she must look at the terms of the collective agreement or employment contract/policy in their entirety and not compare each individual item. The Ministry of Labour's position is also that employers may only contract out of public holidays if they provide a greater totality of rights or benefits under their applicable collective agreement or employment contract/policy.

The *Fraser* decision was applied by arbitrators in the early 1990s when the Ontario government added Boxing Day to the list of statutory holidays. In *National Steel Car Ltd. and U.S.W.A., Loc. 7135* (1990), 10 L.A.C. (4<sup>th</sup>) 353 and *Asea Brown Boiveri Inc. and U.E.* (1990), 16 L.A.C. (4<sup>th</sup>) 226, arbitrators held that employers did not have to provide an additional paid holiday for Boxing Day if they already provided paid holidays in the collective agreement for such as holidays as December 24<sup>th</sup>, December 31<sup>st</sup> and the Civic Holiday.

Employers should be cautioned that adjudicators do not simply compare the number of paid holidays in their collective agreement or employment contract/policy with the number of statutory holidays under the *ESA*. Arbitrators have consistently placed a number of factors into the "metaphorical scale" referred to by Justice Wilson, such as:

- 1) The rate of pay for working on a paid holiday;
- 2) Any qualifying conditions for entitlement to a paid holiday (i.e. length of service and/or working the day before and/or the day after the paid holiday);
- 3) The hours of pay received for a paid holiday (i.e. where employees who regularly work 10 hour shifts only receive 8 hours pay during a paid holiday);
- 4) The effect of a public holiday falling on a designated day off; and
- 5) The employer's rights in requiring an employee to work (for a premium) during the public holiday.

Arbitrators consistently ensure that they are comparing "apples with apples". The fact that an employer provides better vacation entitlements, paid leaves of absences or other employment benefits unrelated to public holidays is irrelevant.

A point of arbitral debate in this regard surrounds "floating holidays". Prior to 2000, adjudicators generally counted floating holidays as part of a collective agreement or employment contract/policy's package of public holiday benefits. However, in 2000, the *ESA* language regarding greater rights or benefits was amended to limit its application to provisions in an employment contract (including a collective agreement) "that directly relate to the same subject matter as an employment standard". In *Toronto Zoo and C.U.P.E., Loc. 1600* (2001), 102 L.A.C. (4<sup>th</sup>) 397 ("*Toronto Zoo*"), Arbitrator Tacon found that this subtle change in language had the effect of precluding floating holidays from being counted as part of the comparison. Some of the reasons for her decision may be distinguishable in other cases. In *Toronto Zoo*, the two floating holidays had to be taken at a time "convenient to both parties". If they were not taken before the end of the year, the benefit would be lost. As well, the floating holidays were not

subject to any qualifying conditions regarding working before and after the day off, unlike the listed holidays. Finally, the floating holidays appeared in a different subsection of the collective agreement.

Conversely, in *Bilrite Industries v. United Steelworkers of America*, [2003] O.L.A.A. No. 772, Arbitrator Mikus included as “holidays” the floating holidays that appeared in the same section and were subject to the same qualifying conditions, despite the fact they were subject to mutual scheduling by the employer and the union. The *Toronto Zoo* decision does not appear to have been considered in that decision. As well, in *Abitibi-Consolidated Co. of Canada and I.A.M.A.W., Lodge 771* (2006), 151 L.A.C. (4<sup>th</sup>) 229, the Arbitrator found that floating holidays were treated the same as statutory holidays, distinguishing the treatment of floating holidays from what was found in the *Toronto Zoo* decision.

Finally, it should be noted that arbitral jurisprudence is somewhat divided regarding whether the comparison between the collective agreement or employment contract/policy and the *ESA* should be made on an all-employee basis or on an individual basis. In *Zehrs Market and U.F.C.W., Loc. 175* (2002), 107 L.A.C. (4<sup>th</sup>) 261, Arbitrator Howe found that the greater right or benefit calculations should be made for each individual employee. However, this contradicted the previous decision of Arbitrator Goodfellow in *GO Transit v. A.T.U., Local 1587*, [2000] O.L.A.A. No. 486 and, more importantly, has since been specifically rejected in *Dresden Industrial Co. v. Sheet Metal Workers International Assn., Local 540*, [2005] O.L.A.A. No. 424 and in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 251 v. Tilbury Assembly Ltd.*, [2006] O.L.A.A. No. 455. Accordingly, the prevailing view appears to be that comparisons between collective agreement or employment contract/policy benefits and statutory benefits should be made on an objective basis regarding the employees as a whole, and not by focussing on the particular circumstances of an individual employee.

In sum, in order to avoid providing its employees with Family Day as an additional paid holiday, an employer will have to demonstrate that its collective agreement or employment contract/policy provides a total amount of benefits with respect to public holidays that is superior to the total amount of public holiday benefits provided under the *ESA*. It is also possible that an adjudicator would find that floating holidays do not count when determining which set of benefits is superior.

Should you need assistance in addressing this issue in your particular circumstances, please contact a member of the firm.