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## EMPLOYMENT NOTES AND NEWS

*Dear Friends;*

*Happy Spring! I trust that 2002 finds you well, both personally and professionally. Let us hope that this year unfolds uneventfully, without the horrifying events as were experienced in late 2001.*

*The three articles represent my legal and human resources perspective on topics that may be of interest as you meet the daily challenges of management. If anyone wants to suggest a future topic that they would enjoy having addressed, please email or phone with your ideas. Moreover, any feedback or comments will be cheerfully received. All best regards.*

*Sincerely;*

*Jay Josefo*

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I

### ***“BUT...MY BOSS TOLD ME SO!”***

***Employers accountable for their representations, even if these contradict the collective agreement. When is a probationary employee no longer considered as such? Employer lapses lead to high cost and poor result...***

### ***Kingston Regional Ambulance Service and Ontario Public Service Employees Union, Local 462***

This Board of Arbitration decision demonstrates how employer lapses can “snatch defeat from the jaws of victory”, and cost an employer the benefit of favourable provisions in a collective agreement that were obtained after hard bargaining. The decision reviewed whether a representation made by

an employer to an individual employee should take priority over terms in an existing collective agreement.

THE FACTS:

The grievor, Kane, alleged that on June 26, 2000 she was wrongfully dismissed from her employment as a regular part-time paramedic 1 with Kingston Regional Ambulance Service at Hotel Dieu Hospital. Kane was hired in December 1999. The grievor sought reinstatement with back pay.

The employer asserted that the grievor was terminated during her probationary period because she was unable to perform the job satisfactorily. They raised a preliminary objection that the Arbitrator was without jurisdiction to hear the merits of the grievance because the grievor was a "probationary" employee; and the collective agreement specified that a probationer has no access to the grievance or arbitration provisions of the agreement.

The union stated that the grievor was a seniority-rated employee at the time of discharge and that the matter must proceed to a hearing on the merits. Counsel for the union maintained that, at the time of the termination of her employment, the grievor had completed the 480-hour probationary period specified in her orientation record dated December 8, 1999. Accordingly, the employer is therefore not able to rely upon the 600-hour probationary period agreed upon by the parties during negotiations in June 1999, months before Kane was hired.

The Collective Agreement:

The parties agreed that, until June 1999, article 9 of the collective agreement, entitled "Probationary Period", read as follows:

9.01 A full-time employee shall be a probationer until having worked a total of four hundred and eighty (480) hours or having completed three (3) months of employment, whichever comes first. A part-time employee shall be a probationer until having worked a total of four hundred and eighty (480) hours or having completed nine (9) months of employment, whichever comes first. A probationer shall enjoy all of the rights and privileges prescribed in this agreement except that he shall not have access to the grievance or arbitration provisions of the agreement in the event that he is discharged or disciplined.

On June 29, 1999 the parties agreed to increase the probationary period for part-time employees from 480 to 600 hours.

EMPLOYER LAPSES TO LEARN FROM :

The grievor was given the employer's Policies and Procedures at orientation. These, however, contained no reference to the probationary period. This inexcusable lapse was the first of several.

The grievor was also not provided with the collective agreement. Moreover, no union representative was present during the orientation session. The orientation record identified the grievor's regular, part-time status, rate of pay, shift hours, and a probationary period of 480 (and not 600) hours.

The grievor testified that, after she reviewed and signed the record, she noted the length of the probationary period. She testified that during the course of her employment no one told her that the probationary hours were other than 480 hours.

Kane claimed her union representative first advised her after she was terminated on June 26, 2000 that the collective agreement provided for a probationary period of 600 hours. According to the local union President, the union was not given notice of the orientation session, which was another violation of the collective agreement:

5.07 A representative of the Local shall be granted fifteen (15) minutes during the orientation period to the Kingston Regional Ambulance Service and the Quinte Thousand Islands Central Ambulance Communications Centre, to meet with new employees.

On May 5, 2000, a supervisor advised Kane that the employer had concerns about, and had received a number of written complaints from staff regarding, her lifting ability. The grievor acknowledged that it was made clear to her that she had to improve her lifting qualifications. On May 30, 2000 the grievor's lifting ability was formally tested.

The grievor testified that she believed that she had successfully completed the 480-hour probationary period near the end of May. Thus, she complied with the employer's request for a second lift test on June 26, 2000 to improve her lifting technique. Kane added that, had she known that she was still probationary, she would have requested union representation for the second lift test. The grievor was very upset when, later that evening, she was told by phone that she failed the second test and that her employment was terminated, allegedly during the probationary period.

ISSUE:

Was Kane a probationary or a seniority-rated employee? The parties agreed that, when the grievor was dismissed in June 2000, she had worked a total of 569 hours, 31 hours short of the required 600 hours specified in the version of the Collective Agreement in force.

DECISION:

The Arbitrator reflected on the judgment of the Ontario Divisional Court in O.P.S.E.U. v. Ontario (Ministry of the Community and Social Services). This case made it clear, at least in Ontario, that an individual employee can use the doctrine of estoppel in appropriate circumstances. The Board was satisfied that the evidence before it was a proper case for the application of the doctrine of estoppel. The Board based its finding on the following reasons:

- The probationary period of 480 hours stated in the grievor's orientation record clearly and unambiguously set out the employer's intention through a written representation to Kane by the employer, which representation was intended to be relied upon. Kane could thus rely on it.

- Had the union been given the 15-minute time allotment with the grievor as a new employee during the orientation session, as required in article 5.07, it was conceivable that the 480-hour probationary period may have been questioned.
- Further, the employer would have been in a stronger position had the grievor been provided with a copy of the collective agreement. According to the grievor's evidence, which the Board accepted, she was never provided with a copy of the collective agreement during the course of her employment.

The Arbitrator also concluded that the grievor was led to believe that she had passed the first lift test on May 30, given the encouraging words from her supervisors. In addition, the employer did not provide a copy of the written performance evaluation to the grievor after the evaluation. In conclusion, the grievor had reason to believe that she had passed the probationary period near the end of May of 2000 and that the proposed re-testing in June was for the sole purpose of correcting perceived deficiencies which the employer believed posed a safety risk to the grievor.

The Arbitrator essentially found that the grievor was misled by the employer, however innocently, into believing that the probationary period was 480 hours worked; and that she was entitled to rely on that representation. In these particular circumstances, fairness required that equitable estoppel was applicable to prevent the employer from enforcing its strict contractual rights to the probationary period provision in the Collective Agreement.

In the result, the preliminary objection of the employer was dismissed. Accordingly, the Board found that the grievor was at the time of her dismissal a seniority-rated employee.

LESSONS TO BE LEARNED:

This case demonstrates the importance of proper administration of and adherence to the terms of a Collective Agreement. Unambiguously telling employees where they stand also is shown to be important. Had the employer complied with the various terms it was found to have violated, the employee likely could have been dismissed within the actual probationary period, with little fuss or expense. Instead, after the expense of this arbitration, leaving aside the poor use of management time, the employer faces the "Hobson's Choice" of taking back an incompetent employee, going through another arbitration on the issue of "cause", or negotiating a settlement package. All of this could have been avoided, however, with even a dollop of pro-active HR management.

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**II**

**BON VOYAGE...**  
***EVERY COMPANY NEEDS A TRAVEL POLICY***

Many of my regular clients know that I like the few remaining "joys" of business travel...that is, if I ever can avail myself of them. Moreover, as most of my travels involve flying on a Dash 8 aircraft, in the one class of service available (proletariat class), upgrade coupons are of little use.

When travelling for clients, my rule is to enquire as to the preference of whoever is paying. Does the client have a travel policy that permits upgrades to Business Class on trips of over three hours? Is it company policy that all staff, and outside service providers, should travel on the cheapest available ticket, even if that requires several connections and a Saturday stay-over? Or, is the company travel “policy” whatever the individual person booking the ticket decides it to be at that given moment?

ADDRESS THE BASICS – HOW, WHEN, WHERE & WHETHER TO TRAVEL:

Unlike the Rabbit in Alice in Wonderland, who decided that a word could mean whatever he wanted it to mean, a travel policy should unambiguously establish how, when, where and whether employees can travel. While larger corporations do have such policies, smaller businesses often do not. Yet, implementing a straight-forward travel policy can save money and avoid acrimony.

Inconsistent approaches to business travel can cause ill will. Acrimony results when some employees parsimoniously pursue the cheapest ticket, even if that means travelling at inconvenient times and on certain weekend days. Yet those employees who jealously guard company money understandably feel aggrieved when they note other employees enjoying Business Class. The absence of a policy can lead to such anomalous results. It is smart planning to ensure that all employees know their individual responsibilities with respect to business travel.

The question of whether to travel also needs to be considered before planning any trip. Prior to approving a formal trip request (in writing in an ideal world), determine whether old or new technology would serve the purpose. Video-conferencing may in some situations work just as well as being there. At other times, there is just no substitute for a face-to-face meeting.

DISASTER-PROOFING YOUR POLICY:

It is proactive to ensure that key employees do not travel together, on the same plane and even in the same taxi to and from the airport. If that last observation strikes some of you as my lawyerly caution overwhelming practicality, consider that, statistically, the most dangerous part of any business trip is the travel to and from the airport. Consider also how your company would cope with the loss of 2 or more key individuals, particularly if from the same department.

While most businesses do have “key personnel” insurance, and do back up data, it is prudent to avoid difficulties where possible. Key individuals travelling to the same meeting can divide the group for separate flights, as well as separate taxis to and from the airport and meeting location. Just as precautions were taken for Y2K, so should businesses continue to take precautions at all times.

THE ESSENTIALS:

A basic travel policy will, in addition to disaster-avoidance provisions, also discuss whether and when an employee should travel; as well as what level of management must pre-approve any business trip. A travel policy will also outline the class of air or train fare permitted, usually dependent upon the duration of the trip. A trip of 2 to 3 hours and less usually limits employees to the cheapest fare that still allows any necessary flexibility in their schedule.

If a company imposes the cheapest fare regardless of other conditions, then consider whether your human resources are well deployed if staff spends excessive time in travel, away from their core function. Using remote communication devices is often no substitute for being on the scene and managing responsibilities in person. Consider also the toll on family life, and on employee morale, if employees are required to routinely spend Saturday nights away from home. Is it worth it?

Whilst on the road, employees should be provided with a budget for meals and other incidentals. Such a per diem might vary depending upon the travel location. New York, Los Angeles and other high cost centres likely demand a higher per diem than would travel to regional centres in Canada.

Depending upon the number of times you stay at a particular hotel, it may be possible to negotiate a group rate or discount that is substantially lower than regular rates. Once the necessary service level and importance of location of any hotel or motel is considered, negotiating an ongoing rate based upon a longer-term relationship makes good business sense. Similarly, depending upon the annual travel budget, discounts with airlines should be attempted. The route being flown, and whether there is or is not a monopoly of service, will determine the success of these negotiations.

A good travel agent also might be able to obtain lower rates on hotels, car rentals, and airline tickets. Such lower costs would be in exchange for a commitment to a certain amount of business.

With respect to car rentals and other sundries, again, your travel policy should dictate when and what class of car should be rented, if one need be rented at all. If, for example, the person travelling will only go to and from the airport and hotel, why would a car be needed? It might be more efficient, less expensive, and a reduction of risk if the traveller relies on taxis.

#### SAFETY AND LIABILITY CONSIDERATIONS:

A number of jurisdictions have now banned the use of cellular telephones while driving. Travel policies should direct employees to not use cellular telephones while driving. For employers to limit any potential liability that may exist through third party victims of a car accident caused by an employee on a cell phone, this restriction makes sense. Employees should be directed to use their cellular telephones only when off to the side of the road or before or at the end of their journey. I foresee the trend restricting, if not banning, the use of cellular phones while driving to be on the increase. It is also only a matter of time before a corporation is found partly responsible, in Tort, for encouraging such cellular phone use, should one of the corporation's employees become involved in what is found to be an otherwise avoidable accident.

Finally, your travel policy should warn of the effects of an over indulgence of alcohol. Employees should be strongly cautioned, particularly when travelling to jurisdictions where the rules regarding alcohol consumption are different, about drinking. Particularly after a long trip, and all the attendant delays of modern travel, anyone is more susceptible to one or two drinks than would perhaps normally be the case.

Yet, that is precisely when accidents happen—when one is tired after having one or two drinks on the plane or train and while driving on unfamiliar roads. Neither the corporate entity nor the

employee wants to be involved in any tragic accident, let alone all the problems that such an accident will cause to all parties involved, including the employer. It is better to plan to avoid such problems, before they have the potential to arise. Have a good trip, and send me a postcard from the road!

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### III

#### **ABSENCE MAKES THE (EMPLOYER'S) HEART GROW...AGGRAVATED *ATTENDANCE MANAGEMENT ISSUES***

Employees may not realize the cost to their employer of their benefit packages, including payment despite being absent from work. Some employees believe they have a right to use these “sick days”, regardless of whether they are legitimately sick and unable to work, or not.

Thus, employers may need to better communicate that these important benefits are provided only for legitimate need. Begin the discussion by drafting an attendance policy. Once implemented, the employer must ensure that all levels of management, as well as staff, adhere to the policy.

Such a policy need not be, and indeed should not be, complex. It should make clear the general proviso that employees are paid to work, and are thus expected to, as a general rule, attend work regularly and punctually. Only when an employee has a legitimate medical reason is he or she excused from their general obligation to attend work.

#### **EMPLOYEE FAILURE TO ATTEND – MANAGEMENT RESPONSE:**

A probationary employee, who has received the company policy which clearly describes the requirement of regular attendance, and who fails to attend with regularity, may be subject to dismissal. The only *caveat* is if the poor attendance is due to a “disability”, as this is defined in the Human Rights Code or other applicable Human Rights legislation. If the employee has a disability as is defined in Human Rights legislation, then the employer would have a “duty to accommodate” such an employee, up to the point of “undue hardship”. The ability to demonstrate what constitutes “undue hardship” will, of course, vary depending upon the actual impact that the employee’s irregular attendance has on the business, as well as the size of the employer and the employer’s ability to temporarily replace or temporarily do without the disabled employee.

These same Human Rights considerations would also arise for a non-probationary employee. If there is a legitimate disability causing irregular attendance, then an employer is obliged to accommodate the employee. Of course, from a common sense perspective, an employee who is suddenly afflicted with a serious illness or involved in an accident, and thus unable to work for a period of time, should be accommodated. Treating employees harshly when they are vulnerable will almost certainly lead to condemnation by the courts, or by Human Rights Tribunals.

But, what of a long serving employee, without any legitimate disability, and with a generally spotty attendance record? What can the employer do in this common circumstance? Once the attendance policy is properly implemented, the employee with poor attendance should be subject to ordinary progressive discipline. The employer should certainly bring the policy to the attention of the employee (and his or her manager), and set out clear expectations of better attendance.

If attendance does not improve, then management may warn and subsequently discipline the employee for failure to improve. In addition, the employee should be clearly warned of the fact that his or her job is jeopardized by the failure to maintain regular, consistent attendance.

In some cases the employer should require a medical note documenting why the employee required time off. A medical note from the family physician that states, however, that “[name of employee] tells me that he was sick on Tuesday and could not attend work”, is of no value. Medical notes, to have value, must objectively confirm the inability to work. Accordingly, if a habitually absent employee claims to be sick enough to need additional time off work, then he or she must need doctor’s care at that time—and not three days after the fact.

An employee habitually absent without legitimate excuse may, after having been warned of the consequences of failure to improve attendance, arguably be dismissed for just cause. Before attempting this, however, it is essential that the employer obtain fact-specific legal advice. The longer that the now complained of conduct has been condoned by the employer, the longer the period of warning that will be required to allow the employee to improve attendance. One could not hope to justify the dismissal of a 15-year employee with a habitually spotty attendance record after only one-month worth of warnings and discipline.

A disabled employee may also be dismissed in rare cases where a medical report indicates that this employee will not be able to return to work in the foreseeable future, notwithstanding all possible accommodation that the employer can document having attempted. So long as the dismissed employee can continue to receive any long-term disability benefits that may be part of the benefits package, such a termination for “frustration” of the employment contract would, in clear cases, be arguably upheld.

A good reason to maintain attendance management is to ensure that those employees who do attend with regularity not be affronted both by their colleague’s failure to attend, but also by management’s failure to address this situation. Ignoring such abuses could lead to the problem spreading, along with an impact on employee morale.

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