"IT (HASN'T) BEEN SUCH A LONG TIME." ACCRUING SENIORITY DOES NOT EQUAL EMPLOYED FOR SEASONAL EMPLOYEES

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Categories: Insights, Publications

On January 1, 2018, the *Employment Standards Act*, 2000 ("ESA") was amended to provide for increased vacation entitlements for employees whose "period of employment" is five years or more.

The term "period of employment" is not defined in the ESA. This resulted in some confusion among employers with respect to how to calculate an employee's period of employment for the purposes of the ESA vacation entitlement, especially in cases involving intermittent and/or seasonal employees.

The recent Ontario arbitration decision, *University of Ottawa v Association of Part-time Professors of The University of Ottawa*[1], provides some guidance for employers.

Background

The decision involved unionized part-time academic staff (the "Employees") at the University of Ottawa (the "University"). The Employees were represented by the Association of Part-time Professors (the "Union").

The University had three, 13-week trimesters per academic year. The Employees were required to bid for each teaching appointment based on their seniority. On average, each Employee was appointed to teach for one trimester per year, which meant they did not teach for the remainder of the year.

The collective agreement provided that seniority is accumulated "for each course that is taught and for every year in which a course is taught", and that seniority previously accumulated would be retained for 24 months even if the Employee does not teach any course during that period.

At issue was whether the "period of employment" under the ESA included the up-to-24-month period between teaching appointments during which the Employees retained their accumulated seniority under the collective agreement.

The Union's position was that each Employee's "period of employment" was continuous and uninterrupted from the end of each teaching appointment to the beginning of the next, provided the time between appointments is less than 24 months. As such, the Union's position was that the Employee would become

entitled to additional vacation entitlement under the ESA after continuously accruing seniority for five years.

The University's position was that each Employee's "period of employment" was limited to the duration of each appointment; that is, each new appointment marks the beginning and end of a new and separate employment relationship, which would mean that the Employees would remain "unemployed" between teaching appointments. As such, the University's position was that the Employees would become entitled to additional vacation entitlement once the total teaching time hits the five-year mark.

Decision

The arbitrator sided with the University and held that the Employees were not "employed" between teaching appointments. According to the arbitrator, while the employees possessed the "right to apply for future employment, utilizing seniority", there was no continuing employment relationship in between teaching appointments and the Employees' "period of employment" ended at the end of each teaching appointment.

In addition to other language in the collective agreement which indicated that each new trimester was a new period of employment, the arbitrator noted that the collective agreement required the University to issue a record of employment to the Employees at the end of each teaching appointment, which signified the parties' intention that the Employee's employment would cease at the end of each teaching appointment.

The arbitrator concluded that the fact that the Employees retained seniority under the collective agreement did not mean the employment relationship continued. As a result, the up-to-24-month period after the Employee's last appointment was not "inactive employment" as the Union submitted, but rather, it was "unemployment" as the University submitted.

Accordingly, it was held that such period could not be counted toward the Employee's "period of employment" for the purposes of determining the ESA vacation entitlement.

Takeaways for Employers

While each decision turns on its own facts and the language of the collective agreement, the above decision confirms that absent contractual language to the contrary, accrual of seniority under a collective agreement does not equate to being employed for the purposes of the ESA.

Unionized employers with seasonal and/or intermittent workforce should ensure that the collective agreement does not conflate accruing seniority with being employed. For non-union employers, carefully drafted agreements and policies, including ensuring that Records of Employment are properly issued at the end of each engagement, will help ensure that seasonal and occasional employees do not continue to be in an employment relationship while they are not performing duties.

If you have any questions relating to the above, please do not hesitate to contact a member of the Employment & Labour Relations Group.

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[1] 2020 CanLII 28645 (ON LA) [ps2id id='1' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.