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EMPLOYMENT LAW: QUIRKY ISSUES IN THE *EMPLOYMENT STANDARDS ACT*

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EMPLOYMENT LAW: QUIRKY ISSUES IN THE EMPLOYMENT STANDARDS ACT

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I. THE EMPLOYMENT STANDARDS ACT, GENERALLY

The stated purpose of employment standards legislation, including the British Columbia *Employment Standards Act* (ESA), is to promote the fair treatment of both employers and employees in the workplace. Among its goals, the ESA aims to ensure minimum standards of compensation and employment conditions for employees. The ESA confers rights on both employees and employers and, as a result will usually be interpreted broadly when the need for such interpretation arises.

II. QUIRKY EMPLOYMENT STANDARDS

While the ESA guarantees minimum employment standards and employment conditions, those standards and conditions are not extended to workers in B.C. without exception. The ESA is rife with quirky rules of application, a few of which will be discussed below, the most noteworthy of which is found in section 31 of the ESA's regulations which exempts certain professions and occupations from the Act in its entirety. It is worth noting that the BC ESA is the only piece of employment standards legislation in Canada which contains a blanket exception, a reality that inter-provincial employers must be alive to.

III. THE BLANKET EXEMPTION OR EXCLUSION

Section 31 of the regulations to the ESA contains a list of those occupations and professions that are generally excluded from every provision of the Act. Included on that list are those professionals licensed and working as: architects, accountants, lawyers, chiropractor, dentists, engineers, insurance agents, land surveyors, physicians, naturopaths, optometrists, podiatrists, realtors, securities brokers, veterinarians and foresters. The net result of this blanket exclusion is that these professionals are not afforded any of the guaranteed minimum standards of compensation or employment conditions set out in the legislation.

At first blush this may not seem to be particularly noteworthy however when one considers that statutory holidays, overtime, and leave are generally conferred by the act, this blanket exclusion is extremely powerful.

It is important to consider the implications of the blanket exclusion or exemption and for employers that operate in more than one Canadian jurisdiction. The practical reality for such employers is that one policy manual may not be either sufficient or in compliance with the relevant statutory authorities. Further, the content of employment contracts may have to change from jurisdiction to jurisdiction to address the application of the Act to particular professionals.

But, the blanket exclusion ought not be the employer's sole consideration there are other quirks to the ESA that will impact both the compensation of employees and the conditions of employment in B.C.

IV. THE CONSTRUCTION WORKER AND THE *EMPLOYMENT STANDARDS ACT*

While it is true that an employer cannot contract out of the minimum standards of the ESA, including an employee's entitlement to compensation when the employer terminates the employment relationship without cause, the amount payable as compensation in such instances will depend on a number of factors, including the length of the employment relationship. According to the ESA, severance pay, as it is often called, is compulsory following the termination of an employment relationship that has lasted three or more months in B.C.

However, construction workers are one notable exception to the ESA's provisions for compensation on termination. The ESA excludes an employee who is "employed at one or more construction sites by an employer whose principal business is construction". Why are construction workers exempt from this benefit? The answer seems to be that construction workers, like temporary and fixed-term employees, are well aware that the employment relationship will end at a specific time. They are hired for a single project and leave when their role in that project is over.

Construction workers assume that, as is dictated by the nature of their job, they will move from work site to work site and from employer to employer throughout their career. In that respect, their work is different from most other employment situations. Like fixed-term and temporary employees, construction workers ostensibly have notice of termination when they start a particular job; that being so, when that employment relationship ends, they too are not entitled to more notice.

The ESA defines "construction" as "the construction, renovation, repair or demolition of property or the alteration or improvement of land". It is therefore reasonable to assume that individuals employed at one or more construction sites by a contractor would fall immediately into the "construction worker exemption"; however, the Employment Standards Tribunal seems to be reading the construction worker exemption narrowly.

The opportunity to remove an employee out of the construction worker exemption has recently presented itself in two identifiable situations:

- Where the employer is unable to bring itself within the definition of "construction" set out in the ESA.
- Where the employee can demonstrate that his or her employment has achieved a degree of permanence that does not accord with the statutory purpose and intent of the ESA's Section 65 exemptions.

In the first instance, the Tribunal exempts work that is only ancillary to construction, such as gravel extraction, concrete coring and testing for road work. In the second, an employee who has remained with one employer from construction project to construction project can likely argue that the employment relationship in question was permanent and therefore outside the scope of the construction worker exception. For example, the Tribunal recently held that a plumber, who had a five-year exclusive working relationship with a construction company and worked on multiple projects over that time, was not subject to the construction worker exemption; consequently, the employer had to pay severance.

V. OVERTIME PAY AND *THE EMPLOYMENT STANDARDS ACT*

The ESA claims for overtime must be filed within six months of termination and the employer's liability is generally limited to six months of wages. Overtime, as contemplated by the ESA, encompasses working more than eight hours a day or more than 40 hours in a week.

Until recently, the law in British Columbia regarding the enforceability of these minimum standards, through a civil action, was well settled and clear that courts did *not* have jurisdiction to hear claims for overtime pay based solely on an employee's statutory right to overtime; rather, the Employment Standards Tribunal retained the *exclusive* jurisdiction to deal with claims for overtime pay under the enforcement mechanisms of the ESA.

However, two recent decisions of the Supreme Court of British Columbia have fundamentally changed two aspects of the law regarding overtime pay:

An employee disputing his or her claim for overtime pay can either (1) choose to file a complaint with the Tribunal or (2) sue the employer in Court.

If an employee files a complaint with the Tribunal for resolution of a dispute over the wages, and it is determined the employee is entitled to overtime pay, s. 80 of the ESA limits the employer's "back pay" liability to the amount of wages that were payable to the employee in the six months prior to termination of employment.

If, however, the employee sues the employer in a civil action, the employer may be liable for payment of up to six years of overtime wages. This is because the action is subject to the general six year limitation period applicable to bringing an action for a contractual claim.

Compounding the issue is that an employer is only required to keep payroll records for two years under the ESA and may not, therefore, have records to disprove an employee's claim going back six years. In addition, according to the definition of overtime under the ESA an employee may be entitled to overtime that is unauthorized if it can be concluded that the employer "indirectly allowed" the overtime.

Now the law in British Columbia is that the terms of any employment contract which fail to meet the minimum statutory requirements of the ESA will be replaced by either the common law or the ESA requirements, whichever is more generous. If no right exists at common law, the void provisions will be replaced by the ESA requirements.

What this means for the employer is that the overtime benefits conferred by the ESA will be implied, by law, into employment agreements regardless of any other express or implied agreements to the contrary. In other words, the employer cannot contract out of minimum overtime benefits. For example, an employee and employer may agree that the employee can work in excess of a 40 hour week for straight pay, so that the employee can maximize their income. The agreement is technically void under the ESA and the employer may be exposed to a significant claim for overtime wages.

In order to manage this risk employers are well advised to implement and adhere to an overtime policy which provides that overtime will only be payable if approved, in writing, in advance of the hours being worked.

Finally, employers often ask if their managers are entitled to overtime pay. In British Columbia “managers” are excluded from the ESA’s overtime entitlements. But employers should know that determining who is a manager is not based on the title given to a position, whether other employees refer to the person as a manager or the form of payment (e.g., salary, hourly wage, commission). The ESA Regulations defines a “manager” as:

- a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
- a person employed in an executive capacity.

To determine if an employee is a manager, the Tribunal will consider:

- how much an individual can materially and substantially affect the employment conditions of those for whose work they are held responsible by the organization; and
- what kind of responsibilities the employee does have with regards to company resources, even if there are certain checks on their authority.

It is important to note, however, that in some circumstances managers *are* entitled to be paid “straight time” for all hours worked. This means that a manager may be entitled to additional compensation if there is evidence to support findings that the employer and the manager agreed that a specific number of hours of work would be compensated by a specific amount of wages or salary. For example “the employee will be paid ‘x’ and the normal hours of work are ‘y’”. In an effort to guard against such a conundrum for managers, employers may include a clause in an employment agreement which limits compensation, for example:

“the employee agrees that the compensation referred to in section x of this agreement will constitute the entire compensation paid for any and all hours worked”.

VI. CONCLUSION

While these are merely three examples of the quirks of employment standards, it is true that there are certainly more. The ESA must be read with an eye open to the potential that the words in the Act may not extend either as far as anticipated or with the restrictions anticipated.