



# AMO 2018

## Annual Human Resources Update

Presented by Hicks Morley LLP

August 21, 2018

# Human Resources Law Update



Hicks  
Morley

A professional headshot of Craig Rix, a man with short dark hair, wearing a dark suit jacket, a light blue shirt, and a dark tie. He is smiling slightly. The background is a plain, light grey.

Craig Rix | Partner, Toronto



Hicks  
Morley

A professional headshot of Leanne Fisher, a woman with blonde hair styled in a low bun. She is wearing a dark blazer over a light-colored top. She is smiling. The background is a plain, light grey.

Leanne Fisher | Partner, Ottawa



Hicks  
Morley

A professional headshot of Anne Lemay, a woman with curly brown hair. She is wearing a dark blazer over a white top. She is smiling. The background is a plain, light grey.

Anne Lemay | Associate, Ottawa

# Agenda

- Introduction
- Bill 148 – Bad News/Good News
- Cannabis – A Burning Issue
- WSIB Update – Chronic Mental Stress
- Case Law Update
- Bargaining Update
- #MeToo
- Odds and Ends



# Bill 148 Update

# New Government – New Opportunities

- Commitment to amend ESA re minimum wage

# Equal Pay for Equal Work – April 1 2018

1. Cannot pay an employee at a rate less than the rate paid to another employee because of employment status
2. How is employment status defined?

a)

a) Difference in the number of hours regularly worked

b)

a) Difference in the term of employment including permanent, temp, seasonal or casual

# Equal Pay for Equal Work

## 3. What do Applicants have to prove?

a)

a)they perform substantially the same kind of work in the same establishment;

b)

a)their performance requires substantially the same skill, effort and responsibility; and

c)

a)their work is performed under similar working conditions.

(“substantially the same” ≠ “necessarily identical”)

# Worksheet

	Part Time Employee	Full Time Employee
<b>Step 1:</b>		
Difference in Employment Status?		
<b>Step 2:</b>		
(a) perform substantially the same kind of work?		
(b) substantially the same skill, effort and responsibility?		
(c) similar working conditions?		
<b>Step 3: Exceptions</b>		
(a) Seniority		
(b) Merits		
(c) System that measures earnings		
(d) Any other factor other than sex and employment status		



# Vacation Entitlement – January 1 2018

- Vacation entitlement to increase after period of employment of 5 years:

**3 Weeks' Vacation Time**



**6% Vacation Pay**



# Public Holiday Pay – January 1 2018 to July 1 2018

Based on regular wages  
from previous pay period



No longer prorated

**Holiday Pay =**

Regular wages from previous pay period

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Days worked in that period

# New Regulation – 375/18

- Return to the old way of calculating stat pay
- Effective – July 1, 2018
- Revoked – December 31, 2019
- Purpose – to allow for further consultation and review as this has been a major point of contention

# Bill 148: Personal Emergency Leave

# Personal Emergency Leave

- 10 days (2 paid and then 8 unpaid)
  - Employees qualify after 1 week of employment
- Previously only available where 50+ employees – now applies to all workplaces

# Greater Right or Benefit



If an employer provides a greater right or benefit under an employment contract or collective agreement than a specific employment standard, the employment contract or collective agreement applies and the Act does not.

# Greater Right or Benefit – Prevailing View



# Greater Right or Benefit





# Labour Relations Act

- Early implications arising out of Bill 148 Changes

# Cannabis – A Burning Issue

# Legalization of Cannabis

Impact on the  
workplace?

Importance of  
Policies

Special  
challenges

# Workplace Safety & Insurance Board (WSIB) Update – Chronic Mental Stress

# Proactively Managing WSIB Mental Stress Claims



- Understand the new WSIB policy

- Prevent and address stressors in the workplace

- Note shift in claims from private insurance to WSIB



# Case Law Update

# *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 (CanLII)

## Facts

- Former employee worked for IBM for 15.5 years
- Terminated without cause
- Motion judge divided termination provision into three parts and concluded that the clause was unenforceable because it was not clear the parties intended to rebut the common law entitlements

# Amberber v. IBM Canada Ltd., 2018 ONCA 571 (CanLII)

## Issue

- Was termination clause in written contract of employment enforceable: YES

## Decision

- Ontario Court of Appeal reversed decision
- Found that a clause in an employment contract which stipulated the amounts owing to an employee upon termination was enforceable
- There was no ambiguity in the clause and it should be read as a whole
- Clause should not be divided into individual parts
- Also concluded that a “failsafe provision” in the clause was not a severability provision but ensured that any non-compliant part of the clause could be “read up” to comply with the *Employment Standards Act* (ESA)



# Key Takeaways



A termination clause must be read as a whole



Properly written “failsafe provision” may cure a clause that appears to go against *ESA*

# Wood v. CTS of Canada Co., 2017 ONSC 5695 (CanLII)

## Facts

- The employer determined in early 2014 that it would be closing in 2015 and gave notice of termination to the 77 affected employees in April 2014
- The termination date given was March 2015, later extended to June 2015
- Section 58 of the ESA states:
  - Where notice of termination involves 50+ employees, employer must submit Form 1 to the Ministry of Labour and post it in the workplace
  - Until the Ministry receives the Form 1, notice “shall be deemed not to have been given”
- The employer did not file and post the Form 1 notice until May 2015, much closer to scheduled termination date

# Wood v. CTS of Canada Co., 2017 ONSC 5695 (CanLII)

## Issue

- Do employers have to respect the ESA? YES

## Decision

- Court held that the employer violated the ESA when it failed to file Form 1 with the Ministry of Labour on the same date that the employer provided approximately 12 months' working notice of termination to 77 employees
- As a result, the employer was not given any credit for the working notice period that preceded the date it filed the Form 1 with the Ministry – a period of over one year
- Instead, common law damages will be assessed on the basis of a much smaller working notice period of less than 8 weeks

# Key Takeaways



When terminating over 50 employees, ensure that proper notice is given



- Failure to respect requirements of ESA may give rise to unanticipated cost consequences

# *Klonteig v West Kelowna (District)*, 2018 BCSC 124 (CanLII)

## Facts

- Assistant Fire Chief drove over the limit while off-duty
- Received a driving suspension
- Immediately reported suspension to his Chief
- Terminated for cause
- Termination letter indicated that incident reflected poorly on the Department and the District

# *Klonteig v West Kelowna (District)*, 2018 BCSC 124 (CanLII)

## Issue

- Was there cause for dismissal? NO

## Decision

- No basis for cause
- Other firefighters and public unaware of driving suspension
- Plaintiff was not representing employer when engaged in conduct, even though Plaintiff was driving employer's (unmarked) vehicle
- If career firefighters did not lose confidence in Plaintiff, unlikely public would
- Conduct was not of same moral reprehensibility as e.g. possession of child pornography, which was present in other cases
- Off-duty conduct was not incompatible with faithful discharge of duties

# Key Takeaways



Reputational harm matters



Does the incident render employee incapable of discharging his duties?

# Talos v. Grand Erie District School Board, 2018 HRTO 680 (CanLII)

## Facts

- In 2005, the government of Ontario passed Bill 211, amending the *Human Rights Code* and eliminating mandatory retirement
- Bill 211 did not end all age-based differential treatment in the workplace
- Preserved employers' ability to provide age-differentiated benefit and pension plans to employees aged 65 and older
- Intent was “to maintain flexibility for the workplace parties to make arrangements that would respect the financial viability of those plans”



# Talos v. Grand Erie District School Board, 2018 HRTO 680 (CanLII)

## Issue

- Does s. 25(2.1) of the Code infringe s. 15 of the Charter? YES

## Decision

- The HRTO found that section 25(2.1) of the Ontario *Human Rights Code*, which effectively permits employers to cease providing employees with benefits at age 65, is unconstitutional
- HRTO held that this age-based “carve out” from Code protection violates the equality guarantee under section 15 of the Canadian *Charter of Rights and Freedoms* and cannot be justified under section 1 of the Charter as a reasonable limit

# Application of Ruling



Limited Impact



Applicant's allegations were expressly limited to group health, dental and life insurance plans



The HRTO's decision on the constitutional issue was an interim decision

# *Middlesex London Emergency Medical Services and OPSEU, Local 147, Re, 2018 CarswellOnt 1107*

## Facts

- Grievor was a paramedic
- Grievor was unable to perform certain tasks due to her pregnancy, and asked for accommodation
- Employer's policy: accommodated work provided based on date of the employee's disability and regardless of the cause of the disability
- Employer usually accommodated by placing employees in non-union position
- Among other things, Union suggested Grievor be accommodated by riding third

# Middlesex London Emergency Medical Services and OPSEU, Local 147, Re, 2018 CarswellOnt 1107

## Issue

Whether the employer accommodated the Grievor's pregnancy to the point of undue hardship?

## Decision

- By identifying non-bargaining unit work, the employer arguably exceeded its obligations under the *Human Rights Code* in that respect
- Riding third – cost implications are not insignificant, especially for a 4-month accommodation
  - riding third would impose undue hardship
  - would amount to creating non-productive work

# Key Takeaways



**No need to create non-productive work**



**Consider all available options**

# City of Toronto v. Josephs, 2018 ONSC 67 (CanLII)

## Facts

- A paralegal trainee of Afro Caribbean descent went to Courthouse to pay a fine on behalf of a client
- Another customer yelled at the paralegal to wait his turn and racially slurred the paralegal, made an inappropriate racial gesture
- A non-managerial clerk said he would call security if it became physical
- The paralegal asked for assistance, and a security guard asked the customer to leave; a court officer then arrived and spoke with the customer
- Paralegal filed a human rights complaint alleging the City violated the *Human Rights Code*

# City of Toronto v. Josephs, 2018 ONSC 67 (CanLII)

## Issue

- Corporate responsibility for lack of meaningful response? YES

## Decision

- Tribunal found that all but one of the City staff and security officers at the court office had acted promptly and appropriately when they learned of the racial slur
- Tribunal ordered \$1,500 in damages for clerk's inappropriate response
- City of Toronto sought to overturn Tribunal's decision
- Court noted it was reasonable to find the City, as a services provider, had an obligation to take prompt, effectual, and proportionate action when it became aware of the racial slur
- Court agreed with the Tribunal that the "response need not be perfect but it did need to be reasonable in the circumstance."
- But "disproportionate weight" given to the non-managerial employee's inaction

# Key Takeaways



Service providers have an obligation to take prompt, effectual and proportionate action when they become aware of client-on-client harassment in a services environment



Employers are not responsible for inappropriate outbursts made by clients, but they are responsible for how their employees respond to such incidents



**Review policies, provide training to staff, and ensure compliance in addressing incidents between customers**



# *Hale v. Innova Medical Ophthalmics Inc.*, 2018 ONSC 1551 (CanLII)

## Facts

- Hale was 59 years old, with just under 7 years service as the President of the company
- Employee had 3 year term contract and thereafter continued working without new contract
- Terminated without cause and without notice
- Cause was not alleged until after the termination

# *Hale v. Innova Medical Ophthalmics Inc., 2018*

## ONSC 1551 (CanLII)

### Issue

- Length of reasonable notice

### Decision

- No cause was established
- Court found Hale had made concerted effort to find another job but the nature of termination – which was for cause – and the fact no references were provided made that search difficult.  
Hale did not find another job after 30 months
- Hale was entitled to 18 months' reasonable notice

# Key Takeaways



Ensure that employees have a valid employment agreement



- Ensure termination provision limits entitlement upon termination

# Bargaining Update

# The Macro-Economic Picture

## Ontario

- GDP - 2017/2018 Annualized 1.4%
- CPI – June 17 to June 18 – 2.4% (2017 – 1.6%)
- Unemployment Rate – June 2018 5.9% (2017 – 6%)

# The Prevailing Wage Settlement Pattern

## Ontario's Nurses – Kaplan Award

- 2018 – 1.4%
- 2019 – 1.75%

# Q1 - 2018 - Average Wage Increase

- Private Sector 1.8
- Federal Sector 1.3
- Municipal 1.6
- Provincial 1.6

# 2018 - Leading Indicator Negotiations on the Horizon 2018

- City of Toronto Fire
- City of Toronto Police
- OPP and OPPA



# Comparability With Police

- It used to be that police settled first and fire followed the police
- The Association wanted fire-policy parity
- The municipalities wanted to pay fire less than police

# Historically for the Last 25 Years

Fire compared to Fire:

- ✓ Association pushed for comparison to police
- ✓ Police were often higher
- ✓ Resisted by municipalities

## And then 2016 and 2017

**Municipalities  
negotiated fire deals  
that were higher  
than police**

**Association  
dropped police  
comparisons since  
they were lower**

**Arbitrators  
awarding between  
fire and police  
but higher than police**

# Strategic Considerations Going into 2018/2019

- Should I Stay or Should I Go?
- The Cost of Doing the Deal
- Retirement Incentive vs Retention Pay
- Is Retirement Incentive a Risk at Interest Arbitration?
- Interest Arbitration Reform

# EMS Bargaining Summary

- ✓ Wage increases – similar to other municipal employee groups
- ✓ Term – reasonable 2-3 year minimums and current agreements (majority)
- ✓ Lack of union provincial focus still predominant
- ✓ Benefits – there is some ability to obtain reasonable cost containment initiatives
- ✓ Operational flexibility can be maintained

# #MeToo Movement

# #MeToo Movement

## Impact

- ↑ complaints
- ↑ investigations
- ↑ consequences?

## Strategies

- Education
- Policies
- Act Promptly

# Odds and Ends



# Bill 68 – Integrity Commissioners and Codes of Conduct

- All municipalities required to have a Code of Conduct as of March 1, 2019
- Code of Conduct – Mandatory Content includes Respectful Conduct including conduct toward officers and employees of the municipality.
- Possible intersection or overlap between the Code of Conduct and Workplace Harassment Policy.

# Bill 68 – Integrity Commissioners and Codes of Conduct

- What happens if a simultaneous complaint is filed?
- Who has jurisdiction?
- The Integrity Commissioner's report is public. The report of a third party investigator appointed to deal with an allegation of harassment may be received in camera.
- Council may wish to consider whether its Code of Conduct expressly incorporates its Workplace Harassment policy.

# Double-Hatters

- Is there interest in enhancing protection for double-hatters?

# Questions & Answers





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**Craig Rix | Leanne Fisher | Anne Lemay**

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