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Employment and Labour Law Update

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Wal-Mart: Breaking New Ground or Affirming Old Principles?

On August 2, 2004, a Wal-Mart store located in Jonquière, Quebec became unionized by the United Food and Commercial Workers Union ("UFCW"). For the next several months, Wal-Mart and the UFCW engaged in collective bargaining but were unable to reach a first collective agreement. On April 29, 2005, Wal-Mart permanently closed its Jonquière store, citing economic reasons. The employment of 190 employees was terminated.

Several employees filed complaints against Wal-Mart under the Quebec *Labour Code* alleging that their employment had been terminated due to their participation in union activity. They asked the *Commission des relations du travail* ("Commission") - the Quebec counterpart to the Ontario Labour Relations Board - to reinstate them to their former positions. The employees relied on Section 15 of the *Code* which states:

> *"[where] an employer … dismisses … an employee … because the employee exercises a right arising from this Code, the Commission may order the employer … to reinstate such employee in his employment … with all his rights and privileges …."*

By requesting reinstatement, the employees were effectively asking the Commission to force Wal-Mart to re-open and continue to operate the Jonquière store.

Having sought reinstatement under Section 15, Section 17 of the Quebec *Labour Code* imposed a reverse onus on Wal-Mart. That is, Wal-Mart was required to prove that it had dismissed the employees for "good and sufficient reason". If Wal-Mart could not demonstrate this, the employees would be entitled to reinstatement under Section 15 of the *Code*.

The Courts' Decisions

The employees' complaints were dismissed by the Commission, the Superior Court and the Court of Appeal of Quebec. Then, on November 27, 2009, a majority of the Supreme Court of Canada dismissed the complaints for the final time.

In a much awaited decision, the majority of the Supreme Court followed a line of cases which held that a closure of a business constituted "good and sufficient reason" to terminate employment for the purposes of Section 17 of the *Code*. It was therefore not necessary to look behind the reason for the closure to determine whether it was motivated by anti-union *animus*.

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Furthermore, even if the closure was not "good and sufficient reason" for termination, reinstatement under Section 15 was not appropriate in this case because the remedy presupposed an ongoing business, whereas the Wal-Mart store had already closed.

What Does This Mean For Employers?

The general consensus in the legal community is that the Supreme Court's decision does not fundamentally change the law governing unfair labour practices. However, practically speaking, a number of questions are now being asked by employers regarding the impact of the *Wal-Mart* decision:

1. **Does this mean that a labour board or court will not scrutinize the reason behind the closure of a business to determine whether there was anti-union *animus*?**

   No. In this case, the majority of the Supreme Court did not look behind the reason for the closure because of the interpretation of Sections 15 and 17 of the Quebec *Labour Code*. These provisions are specific to Quebec and do not have equivalents in the Ontario *Labour Relations Act*, for example. The Ontario Labour Relations Board has always examined the reason(s) behind any operational decision made by an employer where it is alleged that the employer committed an unfair labour practice.

2. **Did the Supreme Court say that it is not an unfair labour practice to terminate an employee's employment if the termination was due to the closure of the business?**

   No. The majority of the Supreme Court held that the remedy of *reinstatement* provided by Section 15 of the Quebec *Labour Code* was not available because it presupposed an ongoing business. The Court also held that a closure constituted "good and sufficient reason" for the termination of employees for the purpose of Section 17. These holdings are specific to the language of the Quebec *Labour Code* and, as such, we see this aspect of the Supreme Court's decision as having limited, if any, application in other provinces such as Ontario.

   Indeed, the majority of the Supreme Court expressly stated that a closure does not wipe "*the employer's record clean and immunize[s] it from any financial consequences for associated unfair labour practices.…* [T]*he closure itself [may constitute] an unfair labour practice aimed at hindering the union or the employees from exercising rights under the Code*". In that case, the majority suggested that "*the appropriate remedies for employees as well as the union simply exist elsewhere under the Code, and in particular under ss. 12 to 14 relating to unfair labour practices*".

3. **If an employee asks me if our business will close if it becomes unionized, would it be an unfair labour practice to refer to the closure of the Jonquière Wal-Mart store? The closure is a fact that has been widely publicized.**

   Be careful. Labour boards in all jurisdictions take very seriously threats to an employee's economic security. Reference to business closure and linking closure to unionization will likely constitute an unfair labour practice. The fact that a statement is true does not immunize an employer from a finding that it has committed an unfair labour practice. The real question is: *would a reasonable employee perceive that statement to be a threat against his or her interests?*

   A finding that an employer has made a threat is likely to result in a severe remedial consequence up to and including certification of the trade union without a vote, and in some cases *despite* a majority vote against representation by the union.

4. **During a staff meeting, an employee says in front of fellow employees, "*don't be foolish – joining a union will get you a one-way ticket to unemployment; just look at what happened to those 190 employees at that Wal-Mart in Quebec*". If there are managers present at the meeting who say nothing to either agree or disagree with the employee's statement, is this an unfair labour practice?**

   It depends on the surrounding circumstances. If it is found that the managers were quietly condoning the employee's statement, a labour board may find (and the Ontario Labour Relations Board has found in prior cases) that the employer's silence constitutes an unfair labour practice. On the other hand, if both pro- and anti-union sentiments are expressed at the meeting and the managers treat the sentiments in a balanced and fair manner, the risk of an unfair labour practice finding is reduced. The practical difficulty for an employer is knowing what a labour board might consider to be balanced and fair in the circumstances.

To learn more about the rights of employers during union activity, contact Sherrard Kuzz LLP.

DID YOU KNOW?

The *Fairness for the Self-Employed Act* came into force on January 1, 2010. The Act extends Employment Insurance special benefits, including maternity, parental, sickness and compassionate care benefits, to self-employed individuals who voluntarily opt into the EI program. To learn more, contact Sherrard Kuzz LLP.

Enforcing A Minimum Statutory Notice Period Against a Long-Service Employee: Can It Be Done?

Can an employer enforce a statutory or contractually restrictive notice clause against a long-service employee?

Ontario courts have done so where the agreement is clear and unambiguous and the employee remained in the same position throughout the period of employment.

However, the result can be different where, during the period of employment, the employee was promoted to higher positions of responsibility. In those cases, courts have been reluctant to enforce a contractual restriction on notice entitlement unless a new contract had been signed or the restrictive notice period brought to the employee's attention at the time of the promotion(s).

A recent case from the Supreme Court of British Columbia, *Wernicke v. Altrom Canada Corp. and Genuine Parts Company*, offers guidance to employers seeking to enforce a statutory or restrictive notice provision against a long-service employee.

Facts

In 1997, Morris Wernicke, a chartered accountant, was hired by Altrom Canada Corp. and Genuine Parts Company ("Altrom Group") as a Controller. Prior to the commencement of his employment Mr. Wernicke was presented with a draft employment agreement. The draft restricted his notice upon termination to the greater of 30 days or his entitlement under the provincial employment standards legislation.

Mr. Wernicke reviewed the agreement, proposed a number of changes to other terms and had the final draft reviewed by his lawyer. He did not require any changes to the restrictive notice provision.

The job description identified Mr. Wernicke as the Controller, specified that he was responsible for all accounting and financial functions, set out his reporting requirements, and contained the following statement regarding possible future changes to his responsibilities:

> "…we reserve the right to require you to assume additional new and varied duties and responsibilities in the capacity of Controller or to alter your reporting relationships in the future…. You agree that any changes which may occur pursuant to this paragraph will not affect or change any other part of this agreement."

In January 2000, Mr. Wernicke was promoted to the position of Chief Financial Officer. No new employment agreement was signed. However, an *addendum* to the original agreement was later signed to reflect an increase in Mr. Wernicke's bonus structure.

Seven years later, following a change in corporate ownership, Mr. Wernicke received a letter confirming his employment and increasing his salary and bonus structure. The letter expressly stated that it was not a contract of employment.

The following year, the Altrom Group restructured its business and terminated Mr. Wernicke's employment without cause. Mr. Wernicke was offered pay in *lieu* of notice of approximately six months' salary – well in excess of the statutory minimum to which he had agreed in his employment agreement. The offer was conditional upon Mr. Wernicke providing a release which he refused to do. Instead, Mr. Wernicke sued for wrongful dismissal.

The Issues

At trial, Mr. Wernicki took the position that his original employment contract was not enforceable and that he should be entitled to reasonable notice at common law which he claimed was 14-16 months. He advanced three grounds:

1. The terms of the written employment agreement were ambiguous and did not express an enforceable notice period.
2. The employment agreement only contemplated his employment as Controller and should not be enforced given his promotion to the position of Chief Financial Officer.
3. Changes to the employment relationship over the years resulted in an erosion of the *substratum* or crux of the employment agreement. Hence, the original notice period was no longer enforceable.

The Decision

The trial judge disagreed with Mr. Wernicki on each ground.

First, the judge found that the original agreement was clear and unambiguous. Mr. Wernicki understood its meaning, had an opportunity to negotiate its terms and received legal advice before signing it. The trial judge also noted that, during the course of his employment, Mr. Wernicki reviewed the agreements of other Altrom Group employees, each containing the same restrictive notice clause. It therefore could not be said that Mr. Wernicki did not have every reasonable opportunity to understand what he had agreed to.

Second, the trial judge rejected Mr. Wernicki's argument that the employment agreement only contemplated the position of Controller. The agreement expressly stated that the employer may require Mr. Wernicki to take on additional, new and varied duties and that any such changes were not intended to alter any other part of the employment agreement.

Finally, while the court accepted that it is generally incumbent upon an employer to renegotiate terms of employment where a promotion results in a *fundamental change in the employment relationship*, in this case the differences between Mr. Wernicki's responsibilities as Controller and Chief Financial officer were minimal and did not fundamentally change the *substratum* of the employment relationship. As such, there was no requirement that the Altrom Group renegotiate the terms of the employment agreement at the time of Mr. Wernicki's promotion.

Lessons Learned and Best Practices

It remains to be seen whether this decision will be followed in similar cases in Ontario. Still, the decision provides useful guidance to an employer seeking to improve its chances of enforcing a restrictive notice clause against a long-standing employee, particularly one who may have been promoted during the period of employment. Consider the following:

- Ensure the wording of an employment agreement is clear and unambiguous. A clause that is vague or uncertain will

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almost always be interpreted against the interests of the employer.

- Specifically state that the contract's notice terms will continue to apply regardless of:
  - the duration of employment
  - changes in the employee's responsibilities
  - promotion(s) to a position of greater responsibility
- Draw the termination clause to the employee's attention when the employee is offered the position.
- Give the employee reasonable time to review the agreement.
- Include in the agreement a statement that confirms that the employee was given an opportunity to obtain independent legal advice and encourage the employee to obtain such advice. In certain circumstances, it may also be appropriate to contribute towards the employee's legal expenses to ensure the agreement is reviewed by independent counsel.
- Keep drafts of changes to the employment agreement suggested by the employee or his/her lawyer or advisor.
- In the case of an existing employment agreement (which does not include language to preserve the restrictive notice clause), at the time of promotion or significant change in employment duties, have the employee sign a new agreement clearly defining the notice provisions (if possible), or at the very least draw the employee's attention to the existing notice provisions and have the provision initialed.

To learn more, or for assistance preparing employment agreements to protect your workplace, please contact a member of our team.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Disability Related Misconduct: Discipline or Accommodation?

1. Can an employer dismiss an employee for misconduct caused by a disability, or does the 'duty to accommodate' apply?
2. Must an employer investigate whether a disability played a role in an employee's misconduct prior to imposing discipline?
3. Must an employee disclose a disability in order to trigger accommodation?
4. Are last chance agreements enforceable?
5. Can an employer require an employee who has been involved in addiction-related misconduct to undergo random drug testing?

DATE: **Wednesday June 2, 2010; 7:30 – 9:30 a.m.** (Program at 8:00 a.m. - breakfast provided.)

VENUE: **Mississauga Convention Centre,** 75 Derry Road, Mississauga, Ontario 905.564.1920

COST: Please be our guest

RSVP: By Friday May 21, 2010, to info@sherrardkuzz.com or 416.603.0700

HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HReview Seminar*.

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