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ESA Sale of Business - Muddied Waters or Uncharted Territory?

"..the legislative intent of the *ESA* and the *Labour Relations Act* are different within the context of a sale of business transaction affecting employees."

In a recent decision, the Ontario Court of Appeal considered the application of the *Employment Standards Act* ("*ESA*") to a business transaction involving a transfer of assets and employees. The decision addresses the question of whether an employee is entitled to severance pay under the *ESA* where employment with the original employer ends on the closing of a business transaction but then immediately continues with the company that has acquired the assets. The Court answered the question "no", but it is not at all clear whether the decision has muddied the waters or charted new territory (*Abbott et al. v. Bombardier Inc. (c.o.b. Bombardier Aerospace) - Ontario Court of Appeal, 2007).*

FACTS

In 2003, Bombardier transferred the assets of its Information Technology Services Group to CGI which agreed, among other things, to offer employment to Bombardier's affected employees. Bombardier gave to the employees eight weeks "working notice" that their employment would end on the closing. Approximately three weeks prior to closing, CGI offered full-time employment to the employees and agreed, as part of its offer, to use the employees' original date of hire at Bombardier for the purposes of calculating notice of termination and severance pay in the event of future termination of employment.

The employees accepted CGI's offers. However, six months after commencing employment with CGI, they filed a severance pay claim against Bombardier under the *ESA*. Their summary judgment motion was dismissed by a motions judge. The employees appealed.

ISSUE

Section 9(1) of the *ESA* provides as follows: "*If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.*"

The employees made a two-fold argument that they were entitled to severance pay under the *ESA*. First, they argued that section 9(1) does not apply when the new employment is fundamentally or radically different from the previous employment. To this end, they pointed to the absence at CGI of a defined benefit pension plan, and to the fact that certain benefits required higher employee contributions. Second, the employees argued that there had not been a sale of business or part thereof, but rather a mere outsourcing of technology work. Section 9(1), they said, should only apply where the effect of the

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transaction is to put the acquiring company in possession of a 'going concern'.

COURT OF APPEAL

The Court of Appeal disagreed with the employees on both grounds, holding that they were not entitled to severance pay under the *ESA*.

In respect of the employees' argument that section 9(1) did not apply because their employment at CGI was fundamentally or radically different from their employment at Bombardier, the Court found that CGI's employment offers had addressed the gap attributable to loss of pension by increasing employee salaries. As such, according to the Court, "*the appellants [employees] failed to adduce sufficient evidence of a fundamental or radical change*".

The Court also found that the transaction was, in fact, a sale of business or part thereof. To this end, the Court reaffirmed that the meaning of "business" under the *ESA* should be given an expansive interpretation because the statute is remedial legislation. Furthermore, although the 'going concern' test is used to determine if there has been a sale of business under the *Labour Relations Act*, the purpose of the *ESA* is different: to protect individual rights and to preserve continuity of seniority.

LESSONS LEARNED

The Bombardier decision is important for at least two reasons:

First, it confirms that the legislative intent of the *ESA* and the *Labour Relations Act* are different within the context of a sale of business transaction affecting employees. The *ESA* concept of sale of business will capture a much broader array of business transactions.

Second, and potentially groundbreaking, the decision leaves open the possibility that a "radical" change of employment terms and conditions could trigger a seller's termination and severance obligations to a departing employee who has accepted a purchaser's offer of employment. This is significant because the traditional interpretation of Section 9(1) of the *ESA* has not attributed relevance to the quality of the purchaser's job offer. Rather, employment is deemed not to have been terminated and severed provided that employment is continued with the purchaser following the transaction. By assessing the terms and conditions of the new offer, the Court appears to have applied a common law analysis to the *ESA*; specifically, under the common law if a purchaser's offer of employment is on terms and conditions substantially inferior to those of the seller this creates a tangible loss for the employee that may be actionable as wrongful dismissal.

Time will tell whether the Court of Appeal's reasons in Bombardier have merely muddied the interpretive waters, or laid the groundwork for a more nuanced approach to the termination and severance provisions of the *ESA* within the context of business transactions. We will keep our readers posted as this important issue evolves.

In the interim, to discuss how this decision may affect your workplace, please contact a member of the Sherrard Kuzz team.

Next in our series of employment and labour law updates:

HReview Seminar Series

TOPIC: ***Employer Strategies to Improve Employee Attendance and Manage Medical Information.****

1. Employer Rights.
2. Culpable v. Innocent Absenteeism: The significance of the distinction and appropriate approaches.
3. Medical Information: When, what and how?
4. Balancing the Employer's Need For Information Against the Employee's Expectation of Privacy.
5. Severance Strategies.
6. Top Ten Tips To Manage Employee Absenteeism.

DATE: Wednesday, September 19, 2007, 7:30 – 9:00 a.m. Program to start at 8:00 a.m.; breakfast provided.

VENUE: Holiday Inn Hotel & Suites, 7095 Woodbine Avenue (Hwy. 404 & Steeles Avenue), Markham 905.474.0444

RSVP: **By Monday, September 10, 2007 to 416.603.0700 (Tel.) or info@sherrardkuzz.com**

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

UFCW v. Wal-Mart: B.C. Supreme Court Says 'No' To A Fragmented Bargaining Unit.

In recent years legislative protections for employees have evolved and expanded, particularly within the areas of employment standards, occupational health and safety and human rights. The result, according to some commentators, is a diminished role for unions and in turn, fewer unionized workplaces.

Our experience, as a labour and employment law firm representing the interests of management, is that the union movement is very much alive and well. Indeed, unions have recently successfully certified workplaces previously impervious to unionization including, for example, a handful of stores operated by retail giant Wal-Mart.

However, the news isn't all bad for employers. On April 30th, the B.C. Supreme Court released a much-anticipated decision affirming the B.C. Industrial Relations Board's (the "B.C. Board") cancellation of the certification of the UFCW as the representative of a group of employees at a Wal-Mart store in Cranbrook. In that case, the union sought to certify a *portion* of the Cranbrook store's workforce as opposed to an *all employee* unit. This tactic would allow the union to get a 'foot in the door', thereby gaining access to the remaining workforce for subsequent certification.

The B.C. Supreme Court refused to interfere with the B.C. Board's finding that, to the extent possible, a bargaining unit should not fragment or cut across classification lines in a single, functionally integrated workplace.

BACKGROUND

In 2005, the UFCW set its sights on the Wal-Mart store's automotive division ("Division 6"), including the sales associates working there. The union did not seek to represent the store's remaining sales associates even though they shared the same terms and conditions of employment.

Generally speaking, when an application for certification is filed, the Board will apply the 'community of interest test' to determine whether the proposed bargaining unit is appropriate. Where the union would not be conducive to collective bargaining or would cause other labour relations issues, such as a fragmented workforce, the unit will not be certified.

However, the Board will relax the 'community of interest test' if the union can demonstrate that the workplace falls within the 'difficult-to-organize' doctrine. A workplace will be considered 'difficult-to-organize' where the union can show that there is "*a low-union density either in the particular industry or among the group of employees which reflects structural or systemic aspects of the workforce which have made it difficult to organize*"[1]. The retail department store industry was among the first to be recognised as a difficult to organize sector.[2]

In the case of the Cranbrook store, the B.C. Board applied the 'difficult to organize doctrine' and accepted the bargaining unit despite the fact that it included only Division 6 employees and would divide the sales personnel in the store. This represented the first time the B.C. Board had agreed to certify a unit that cut across a classification of employees at a single, physically integrated site.

Wal-Mart sought reconsideration of this decision - twice. The first time it was successful and the issue was remitted back to the B.C. Board, which again certified the unit. Wal-Mart applied for a second reconsideration and this time the panel recognized that the bargaining unit violated the firmly established principle that wherever possible a bargaining unit should not cut across a classification, particularly where all members of the classification are in the same physical location. The certification was therefore cancelled.

> "This tactic would allow the union to get a 'foot in the door', thereby gaining access to the remaining workforce for subsequent certification."

The UFCW sought judicial review of the cancellation of certification, and on April 30th the B.C. Supreme Court upheld the cancellation.

IMPLICATIONS FOR ONTARIO

Much like the B.C. Board's second decision in *UFCW v. Wal-Mart*, the Ontario Labour Relations Board has shown reluctance to cut across classification lines and has a "*generally circumspect attitude towards departmental carve-out units, and a deep concern for the fragmentation which may result if departmental units are found to be appropriate.*"[3] Indeed, the Ontario Labour Relations Board has held that, for a variety of labour relations considerations affecting all parties to an application for certification, as well as the public, generally "bigger is better'."[4]

Despite this philosophy, the Board in Ontario, as in B.C., remains cognizant that it may be necessary to accept smaller units in industries that 'historically have been difficult to organize'.[5] In such industries, the Board will lean towards the bargaining structure that best facilitates organization.[6] In Ontario, the difficult to organize doctrine has been applied to department stores such as K-Mart.[7]

LESSONS LEARNED

The B.C. Board's decision and the Supreme Court's confirmation of it is important for two principal reasons:

First, it establishes that an individual employer's imperviousness to unionization cannot be grounds to apply the 'difficult to organize' doctrine. It is the sector or industry as a whole that must

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be considered, not the employer or workplace.

Second, even where a group of employees is 'difficult to organize' the Board must still consider whether serious labour relations problems are likely to arise in a fragmented workplace. If so, the bargaining unit should not be certified, even where the result would deprive the employees of the opportunity to collectively bargain.[8]

> **"... a bargaining unit should not fragment or cut across classification lines in a single, functionally integrated workplace."**

The *UFCW v. Wal-Mart* decision bodes well for large retailers that integrate sales, operations and business systems across product and service lines. For these employers in particular, a union seeking 'a foot in the door' will have to step all the way in and win-over a much larger group of employees in order to successfully certify the workplace.

To learn more about these issues, please contact a member of the Sherrard Kuzz team.

1. *Island Medical Laboratories Ltd. et al.*, no. B308/93, September 21, 1993 (B.C.I.R.B.) at p. 37.
2. *Woodwards Stores (Vancouver) Limited*, BCLRB No. B129/74, [1975] 1 Can LRBR 114.
3. See *Lionhead Golf & Country Club*, [1996] OLRB Rep. Mar./Apr. 271 at 282.
4. *National Trust*, [1986] OLRB Rep. Feb. 250, at p. 263.
5. *Orangeroof Canada Ltd.*, [1974] OLRB Rep. Nov. 761.
6. *K-Mart Canada Ltd.*, [1981] OLRB Rep. Sept. 1250.
7. *Ibid.*, at para.18.
8. *University Hospital*, [1996] OLRB Rep. July/Aug. 694.

DID YOU KNOW?

Most group disability insurers do not provide coverage to terminated employees beyond their statutory notice period. Please speak with your benefits provider to ensure you have coverage which adequately meets your needs.

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