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COURT UPHOLDS ARBITRATOR'S RULING THAT UNION REPRESENTATION WAS REQUIRED DURING INVESTIGATION

The Divisional Court recently upheld an arbitral decision nullifying three terminations for failure to provide Union representation during an investigative interview, even when representation was not explicitly required by the collective agreement.

THE FACTS:

This case involves the termination of three individuals from Medis Health and Pharmaceutical Services, a distributor of medical supplies and prescription and non-prescription drugs. Following the discovery of products in areas the products ought not to have been, the Employer installed video cameras which ultimately captured several employees in the area placing goods into their coat pockets.

The Employer's Loss Prevention Director interviewed three videotaped individuals outside the presence of either the Union or other members of management. When asked whether they had ever taken product from the facility, two out of the three employees admitted that they had and then completed and signed written statements to that effect.

When the matter proceeded to arbitration, the Union brought a preliminary objection, claiming that the terminations should be voided because Union representation was not present during the investigatory meeting. The Employer argued that the collective agreement did not require Union representation at the investigation stage, and therefore the absence of a Union steward should have no bearing on the validity of the terminations.

The collective agreement contained the following provision:

> Any employee covered by this Agreement when being disciplined will be accompanied by the employee's shop steward or, if not available, a member of the Union committee, if he so chooses.

THE ARBITRATOR'S DECISION:

The arbitrator was asked to determine whether the investigatory meeting with the Director of Loss Prevention was captured by the phrase "when being disciplined".

The Employer argued that the meaning of the language was clear - that an employee was entitled to Union representation only when discipline was actually being imposed. Accordingly, since all three grievors had Union representation present at the time they were discharged, there had been full compliance with the collective agreement.

The Union argued that the concept of Union representation would be meaningless if the Union's participation was restricted to simply attempting to persuade an Employer to change its mind once it had already decided discipline was appropriate. The Union contended that Union representation clauses were to be given a broad interpretation.

Arbitrator Kirkwood agreed. She concluded that the phrase "when being disciplined" extended beyond the mere imposition of the penalty, and included the act of coming to the determination that an offence had occurred and a penalty ought to be imposed. Put another way, Arbitrator Kirkwood found that a broad interpretation of the right to Union representation extended the disciplinary process to whenever the interaction between management and the employee affected substantially, or impacted critically, the rights of the employee in the discipline process.

> *"To ask the grievors to make a written or oral statement confessing to theft, without any representation, is to take away the essence of union representation for these employees."*
>
> - Arbitrator Belinda Kirkwood

On the facts of this case the Employer's intention upon entering into the investigatory meeting had gone far beyond mere fact-finding. Here the Employer had already videotaped the individuals involved. However, since the videotapes were not sufficiently clear to rely upon them exclusively, the purpose of the meeting was not to investigate, but to

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attempt to obtain confessions. On that basis the arbitrator concluded that the Employer had embarked on the 'investigation' with the purpose of imposing discipline for theft.

That having been decided, Arbitrator Kirkwood cautioned that this broad interpretation of the right to Union representation did not go so far as to require representation during any and all discussions that might lead to conflict between an Employer and employee. She stated that the requirement for Union representation was triggered *"...when the company is using and relying on the investigatory process to build its case, so that the sole or substantive basis of the case is going to be the inculpatory statements of the employee and the purpose of the interview is to obtain these statements, the Employer has crossed the line from the investigation fact-finding process and its actions are then affecting the substantive rights of the employee in the discipline process."*

Having found that the Employer in this case had crossed the line into the disciplinary process without providing the required representation, Arbitrator Kirkwood ruled that the discharges were null and void, and all three employees were ordered reinstated with full compensation.

THE DIVISIONAL COURT:

The Employer judicially reviewed the decision which was upheld by the Divisional Court on the grounds that the arbitrator's award was not "patently unreasonable".

WHAT DOES THIS MEAN TO EMPLOYERS?

While arbitrators are only required to follow decisions of other arbitrators in very limited circumstances, they are bound to follow decisions of the Courts.

Therefore, absent the clearest of language restricting or circumscribing the circumstances in which Union representation is required, this decision sends a signal to Employers that they ought to consider allowing Union representation earlier in the disciplinary process than they might have done in the past.

Given that the right to Union representation is generally considered to be substantive - not technical or procedural - there is risk to Employers that an arbitrator may reverse any discipline imposed if it is found that the Employer failed to broadly interpret and apply a Union representation clause.

DID YOU KNOW...?

Parties can now access the available dates of 50 arbitrators in Ontario by visiting www.arbdates.com.

ONTARIO LABOUR RELATIONS BOARD DECLARES "SICK-IN" UNLAWFUL

In a recent decision, the Ontario Labour Relations Board declared that employees of Penetanguishene Mental Health Centre (the "Centre") were engaged in an unlawful strike when the majority of employees called in "sick" on the same day.

The "sick-in" took place a short time before the Ontario Public Service Employees Union ("OPSEU") was in a legal strike position, and after OPSEU had advised its employees to resist efforts by management to encourage them to "complete additional duties in order to prepare them for the labour dispute". Typically the Centre's rate of absenteeism due to illness was approximately 7%. However, on the date in question, approximately 50% of the day shift, 87% of the evening shift and 27% of the night shift called in sick.

The Union's explanation for the significant increase in absenteeism was "coincidence".

The Board disagreed, citing the absenteeism rates as "extraordinary". The Board confirmed that the right to sick leave was an individual and not a group right and stated clearly that it was prepared to draw reasonable inferences from statistical probabilities.

On the facts of this case the Board had little trouble concluding that there was a planned and concerted action on the part of some - if not all - employees who had called in sick, and that the OPSEU officials were aware of the planned activity and condoned if not supported and encouraged it.

The Board issued declarations that the activity was unlawful, and ordered OPSEU to communicate that information to its members.

HOW TO MAKE *WORKWELL* WORK FOR YOU

In 1989, the Province of Ontario launched an initiative called Workwell under Section 82 of the *Workplace Safety and Insurance Act*. The purpose of Workwell is to promote health and safety initiatives in Ontario workplaces by conducting workplace safety audits.

HOW DOES AN EMPLOYER BECOME SELECTED FOR AUDIT?

Employers are identified for a Workwell audit in one of two ways:

1. By the Ministry of Labour as an Employer with a history of non-compliance with the *Occupational Health and Safety Act;* or

2. By the Workplace Safety and Insurance Board (WSIB) as an Employer with an accident record in excess of the accident records of comparable Employers in the appropriate rate group.

Meeting the "non-compliance" or "accident" criteria of either the Ministry of Labour or the WSIB does not guarantee that an Employer will be selected for an audit, but it does increase the chances. Employers will receive written notification of an impending audit prior to the arrival of the auditor.

WHAT TO EXPECT IF YOU ARE BEING AUDITED

During a Workwell evaluation, an auditor from the WSIB - with an Employer and a worker representative - will tour the facilities for the purpose of evaluating the occupational health and safety program at the worksite. The tour will take place during a production day so as to obtain a practical view of the operations.

During the evaluation, the auditor will look at written records such as rules, work procedures, job descriptions and minutes of health and safety committee meetings, and will also observe workplace practices. The auditor may also conduct interviews with employees to ensure that workers are aware of the health and safety practices and policies and understand their practical application.

To successfully pass the audit, an Employer must achieve a score of 75% or better. Failure to attain a passing score of 75% or better will result in a financial penalty of up to $500,000, based upon the Employer's annual premium.

Employers must achieve a score of 75% to pass a Workwell Audit, failing which they may receive substantial penalties.

There are approximately 200 practices an auditor can evaluate during the course of a Workwell audit, including:

The Health and Safety Policy

- Does it contain a management commitment to prevent occupational illness and injury?
- Does it outline the responsibility of workers to work safely and to report all unsafe or unhealthy condition?
- Is it signed by senior management?
- Is it distributed to the workforce?
- Is understood by the workers?

Reporting

- Does the Employer have defined and written standards and procedures for reporting injury and illness and for reporting hazardous conditions?

Standards and Protocols

- Are there written standards and protocols for emergency planning, refusal to work, modified work, employee certification, lock-out procedure, confined space entry, hygiene surveys and Contractor activities?

Health and Safety Committee

- Does one exist and operate according to the requirements of the *Occupational Health and Safety Act* (re: composition of the committee, posting of member names and work locations, meeting frequency, hazard identification procedures and posting of minutes and reports)?

Performance Reviews

- Do they include a section related to health and safety performance?

Accident and Investigation Procedure

- Is it written?
- Does it provide for worker and witness interviews, on-site accident scene assessment, the use of standard forms and documentation and a system for ensuring that recommendations for accident prevention are generated and communicated to employees?

WHAT HAPPENS AFTER THE AUDIT?

After the audit an evaluation report will be mailed to the workplace, copied to the Ministry of Labour.

The report will be detailed and contain recommendations for improving workplace health and safety practices

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and policies.

An Employer that does not attain a passing score of 75% will be given six months to improve its health and safety practices and policies. After six months the Employer will be re-evaluated. At the conclusion of the second audit, if the workplace again fails to attain a passing score of 75%, an additional premium charge will be levied. This charge can reach as high as 75% of the Employer's base annual premium and must be paid in addition to the initial penalty levied.

CONCLUSION

A Workwell audit need not be daunting, so long as Employers understand and put into practice the requirements of the *Occupational Health and Safety Act*, the *Workplace Safety and Insurance Act* and the criteria of the Workwell audit itself. To that end, planning for a Workwell audit makes not only good business sense, but most importantly it makes good safety sense. For more infor-

Breakfast Seminar

Sherrard Kuzz LLP invites you to join us for our ongoing series of employment and labour law update seminars.

TOPIC: **Ontario's Proposed Privacy Legislation: How Will It Affect Your Workplace?**

DATE: Wednesday, September 18, 2002, 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast will be provided)

VENUE: Wyndham Bristol Place Hotel (Toronto Airport); Carlyle Room
950 Dixon Road, Toronto, ON

Watch for your faxed invitation the week of August 26, 2002 or contact Jennifer Ainsworth at 416.603.0700 to request an invitation.

HRreview Seminar Series

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Providing management with practical strategies that address workplace issues in proactive and innovative ways.