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ONTARIO LABOUR RELATIONS BOARD ORDERS PERSONAL LIABILITY AGAINST DIRECTOR

In two recent decisions of the Ontario Labour Relations Board (the "Board"), the Board found that it has the jurisdiction to order damages, owed by a company, to be paid personally by one or more of the company's directors.

ALCOR INVESTMENT GROUP INC.

In Ontario, construction industry grievances under a collective agreement may be referred to the Board for adjudication and the Board has the same jurisdiction as a private arbitrator. In *Alcor Investment Group Inc.* ("*Alcor*"), the union alleged that the company failed to make certain remittances to the union on behalf of its employees. These remittances included vacation and holiday pay, payments to the health and welfare funds, pension contributions and certain union administration funds. In the aggregate, the union alleged and the Board found the sum of $7,256.54 owing to the union. The Board also heard evidence that the company was experiencing financial difficulty and was not able to satisfy the amount found owing.

The union sought an order that the sole officer and director of the company personally pay the damages.

In deciding the case, the Board addressed two principal issues:

1. Whether it possessed jurisdiction to make an order against a company director in his personal capacity; and
2. Whether a trade union could seek to enforce, through the grievance an arbitration provisions of a collective agreement, the right of an individual employee against an officer or director of the company.

In respect of the first issue, whether the board had jurisdiction to make an order against a company director personally, the Board first looked to the language of the Ontario *Labour Relations Act*, which gives the Board jurisdiction to interpret and apply employment related statutes. The Board then examined the provisions of the Ontario *Employment Standards Act* ("*ESA*"), specifically those sections that address directors' liability. Pursuant to the *ESA*, where a corporation cannot within a reasonable time meet its obligation to satisfy employee wages, directors may be held personally liable for payment. The *ESA* defines the term "wages" to include vacation and statutory holiday pay.

> *A union has the right to make a claim against a director personally, on an employee's behalf, through the grievance and arbitration procedures of a collective agreement.*

In respect of the second issue, the Board concluded that a union has the right to make a claim against a director, on an employee's behalf, through the grievance and arbitration procedures of a collective agreement.

This having been decided, on the evidence before it (including the testimony of the officer/director of the company regarding the corporation's financial situation), the Board concluded that the corporation was unable to pay the outstanding wages. The director was ordered to personally pay that portion of the damage award that constituted "wages" (*e.g.* vacation and statutory holiday pay).

RUBICAN CONSTRUCTION

The same day *Alcor* was decided so too was the case of *Rubican Construction*. In this case, the union (the same union as in *Alcor*) brought a claim for damages personally against two Rubican directors. As in *Alcor*, the Board found wages owing. However, unlike in *Alcor*, the Board in *Rubican Construction* initially refused to make an order against an officer/director personally. The Board based this decision on the fact that the union had not yet lead any evidence to demonstrate that the company could not satisfy its obligation to pay the outstanding wages. As such, the Board invited both parties to submit evidence regarding the company's alleged inability to pay. If the union was successful in demonstrating that the company could not meet its financial obligations, the Board indicated that it was prepared to make the personal order sought.

In response to the Board's invitation, the union filed evidence that the company had made no remittances since the date of the Board's initial decision finding that wages were owed, and that the union had filed a lien on one of the company's jobs. In response, the company filed no evidence whatsoever, nor did it respond to the union's submissions.

On the basis of this evidence the Board found that, although the union's evidence was not *conclusive* proof that the company was unable to meet its financial obligations, because the company had not responded to any of the Board's correspondence, or

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to the union's submissions, the Board was prepared to accept the union's evidence as uncontradicted. As such, the Board issued the order against the company's directors personally.

The decisions in *Alcor* and *Rubican Construction* reiterate the importance to construction industry employers that they respond to Board matters in a timely manner. The Board's Rules require employers to file a Notice of Intent to Defend within five days of receiving confirmation that a grievance has been referred to it for adjudication. Should an employer fail to file its Notice of Intent to Defend, the Board may decide issues of liability and damages on the basis only of the material submitted by the union.

Breakfast Seminar

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

TOPIC: Responding to Crime in the Workplace
DATE: Thursday, March 6, 2003, 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast provided)
VENUE: International Plaza Hotel, 655 Dixon Road, Toronto

HRreview Seminar Series

Watch for your faxed invitation the week of February 3rd, 2003 or call 416.603.0700 to request an invitation.

IS THE EMPLOYER'S DUTY TO ACCOMMODATE DWINDLING?

Seventeen years ago, two Ford Motor Company ("Ford") assembly line employees (the "Complainants") filed a human rights complaint against Ford and the Union alleging creed-based employment discrimination. Ford's collective agreement included a rotating schedule requiring each employee to work two Friday night shifts per month. The Complainants were observers of the Worldwide Church of God and as such prohibited from working from sunset on Friday until sunset on Saturday. They alleged that they had been discriminated against because Ford and the Union were unwilling or unable to make permanent changes to their shift schedules to allow them to adhere to the tenets of their religion. Eventually, as a result of their repeated Friday night absenteeism, the Complainants were terminated.

While attempting to accommodate the Complainants many options were considered and rejected by Ford and the Union. These included: granting leaves of absences, using Ford absentee allowance workers, seeking other employees to voluntarily work double shifts for premium pay, shift swapping with other employees, hiring students, temporary or part-time workers for two shifts per month, reassigning the Complainants to straight day positions, allowing for Sunday shifts in lieu of Friday nights, and permitting the Complainants to leave early on Friday night shifts.

The question for the Board of Inquiry (the "Board") [*Ontario (Human Rights Commission) v. Roosma*] was whether Ford and the Union had met their concurrent duties to accommodate the Complainants to the point of undue hardship. In assessing undue hardship, the following factors were considered, among others:

- financial cost to Ford
- disruption of the collective agreement
- the effect on the morale of other employees
- interchangeability of workforce and facilities
- size of Ford's operation
- safety

At the hearing, Ford lead evidence that despite a pool of 1250 workers on each shift, it was unable to implement a permanent solution to accommodate the Complainants. Ford advanced two principal reasons:

1. Ford was already experiencing a high rate of "absenteeism without leave" on Friday nights and was concerned about the quality of its product; and

2. The implementation of the available options would exacerbate Friday night absenteeism, causing a steep increase in production costs, employee fatigue and safety issues, reducing product quality due to inexperienced labour, increasing production shutdowns, infringing on seniority rights and fueling demoralization within the employee population.

After seventy-one days of hearing the Board found that the Complainants had not been discriminated against on the basis of their creed.

Significantly, despite Ford's and the Union's failure to actually implement or test any of the accommodation options (recall Ford only considered the options, it did not implement any of them), the Board held that the circumstances constraining Ford from acting were "suffi-

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ciently apparent", such that accommodating the employees' religious beliefs was unattainable without the Union and Ford suffering undue hardship. In reaching this decision, considerable emphasis was placed on Ford's systemic absenteeism problem.

The Ontario Human Rights Commission appealed the Board's decision to the Ontario Divisional Court. On September 19, 2002, in a 2:1 decision, the Court dismissed the appeal. The majority held that although there was a *prima facie* case of discrimination against the Complainants, they could not be accommodated without significant seniority, safety, cost and quality consequences to Ford and the Union, all of which constituted "undue hardship".

The Ford case is interesting for the following reasons: First, as reflected in the dissenting opinion, the decision appears to deviate from the high standard set by the Supreme Court of Canada in *Meiorin* and later affirmed in *Grismer*. In those decisions the Supreme Court held that before a discriminatory practice could be legitimately defended and/or continued, a company must *"incorporate every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost"*. In this case, Ford was not required to "incorporate" every possible accommodation. Rather the court accepted Ford's evidence of what could happen if it incorporated any of the accommodation options.

Second, it has caused some to wonder: If courts are prepared to accept that it was not possible for an enterprise of Ford's magnitude to accommodate the Complainants without experiencing undue hardship, how can it be expected that smaller employers will be able meet their duty to accommodate? The answer it would seem is *size does not matter*. To the contrary, what is important are the facts and the extent to which compelling evidence can be marshaled to demonstrate "undue hardship", even in the absence of the employer actually implementing the available options. As such, a smaller company, depending on its resources and employment protocols, may be *more* or *less* flexible in terms of accommodating an employee's needs. Similarly, as we have seen with Ford, it is often the largest employer's that are the most limited in their ability to accommodate the requests of employees. In short, whether the employer is large or small, the evidentiary standard should be the same. In most cases, of course, the difficulty is not in articulating the standard, it is in meeting it.

ARBITRATOR HAS JURISDICTION TO ORDER THE TERMINATION OF A SUPERVISOR

In a recent award an Ontario arbitrator has ruled that it is within her jurisdiction under a collective agreement to order an employer to terminate the employment of one of its non-union supervisors.

THE ALLEGATIONS

Arbitrator Elaine Newman's preliminary decision in *Tenaquip Ltd.* was released on October 23, 2002. In that case, the union alleged that a Tenaquip supervisor had engaged in a course of conduct against the grievor that amounted to harassment, assault and battery. The union further alleged that the supervisor had, through his conduct, "intentionally introduced and maintained in the workplace" unsafe conditions. The union sought a declaration that the employer had violated the collective agreement, damages in the amount of $10,000.00, and the "removal of [the supervisor] from the workplace".

THE COMPANY'S POSITION

As a preliminary matter the company requested that the arbitrator dismiss the grievance on the grounds that, among other things, she lacked jurisdiction under the collective agreement to award the remedies sought by the union. Specifically, the company argued that:

1. The arbitrator did not have jurisdiction to award the monetary damages sought by the union; and
2. To require the company to discipline or discharge a supervisor was an unjustified interference in the company's right to manage its business.

The company relied upon a line of cases in which arbitrators have found that while they may have jurisdiction to declare a supervisor's conduct in violation of a collective agreement, and to award damages, they do not have jurisdiction to order discipline against a supervisor. As one arbitrator put it "[to] impose discipline [on a supervisor] where none has been imposed is to create a remedy for which there is no right". That arbitrator, Belinda Kirkwood, went on to warn of the chaotic conditions and impossible relations that would result if arbitrators assumed jurisdiction to order discipline upon an employee in consequence of the grievance of another - regardless of whether one or both is a member of a bargaining unit. Such chaos could include a multiplicity of parties to each arbitration (because every employee whose rights are potentially affected could claim a right to participate), as well as the inherent uncertainty when arbitrators undermine the employer's right to assess and impose appropriate discipline.

In response, the union argued that if the allegations against the supervisor were proved, the arbitrator was required to fashion a complete and substantive remedy to address the

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ongoing violation of the agreement. That remedy could include direct action against the supervisor.

THE DECISION

In deciding the matter in favour of the union, Arbitrator Newman considered a line of cases commencing with the Supreme Court of Canada's 1995 decision in *Weber v. Ontario Hydro*. In that case, the Supreme Court considered the circumstances in which the court had jurisdiction to decide employment-related claims where the workplace was covered by a collective agreement. The Supreme Court held that where the essential character of the dispute arises out of the collective agreement the matter must be dealt with through arbitration, not the court, and the arbitrator has jurisdiction to fashion "an appropriate remedy".

Applying this principle in *Tenaquip Ltd.*, Arbitrator Newman found that:

1. An "appropriate remedy" included monetary damages; and

2. In circumstances where less invasive means did not provide an appropriate and effective remedy, an arbitrator could create an order that included discipline or discharge of a supervisor.

As such, Arbitrator Newman dismissed the employer's preliminary objection (Note: the hearing on the merits of the allegations against the supervisor has not yet commenced).

IMPLICATIONS

Given the Supreme Courts reasoning in *Weber* and the cases that have followed it is not surprising that arbitrators are, with greater frequency, finding that the scope of their jurisdiction is widening. In turn, unions are increasingly attempting to argue that torts such as intentional infliction of mental suffering or defamation should be litigated through arbitration, not courts, to avoid employees having to pursue claims in more than one forum.

However Arbitrator Newman's ruling leaves open some interesting questions: If the terminated supervisor files a common law wrongful dismissal suit, does the arbitrator's order constitute a complete defense for the employer? Is fulfilling an order of a board of arbitration "just cause" to terminate a supervisor? Could offending conduct on the part of the supervisor be sufficient to warrant an arbitrator's order that the supervisor be dismissed, but not sufficient to constitute "just cause" in the common law? While the courts have not yet addressed these issues, it is entirely possible that an arbitrator's order to dismiss a supervisor would not constitute "just cause" in the common law.

To date, the parties in *Tenaquip Ltd.* have not yet delivered their final arguments regarding the exercise of Arbitrator Newman's apparent jurisdiction. We will report on this issue again when matters have developed further.

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