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Employment and Labour Law Update
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OLRB REVIEWS VOTE DISTRIBUTION WITHIN OPERATING ENGINEERS EBA

The Ontario Labour Relations Board recently issued a decision clarifying the obligations a provincial Employer Bargaining Agency ("EBA") has to its member groups.

In *Sarnia Construction Association and Operating Engineers Employer Bargaining Agency*, the Board concluded that, absent evidence of arbitrariness, the Board could not alter the allocation of votes within an EBA and could not give votes to an organization that was not designated as a member of the EBA.

BACKGROUND

In 1978, the provincial government instituted provincial bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry. This meant that each trade could have only one collective agreement governing their work in the ICI sector. The agreements are referred to as "Provincial Agreements" because they apply throughout the Province.

THE "SARNIA" DISPUTE

The Operating Engineers EBA is charged with the responsibility of negotiating the Operating Engineers ICI Provincial Agreement. The Sarnia Construction Association ("SCA") is not a member of the EBA, and as such does not officially have a vote when it comes to acceptance or rejection of the Provincial Agreement. However, the SCA is a member of the Construction Labour Relations Association of Ontario ("CLRAO"), which in turn is a member of the EBA. CLRAO has five of the EBA's 32 votes which it casts following a vote among the 14 CLRAO members.

At the hearing before the Board the SCA argued that because of its unique role within the sphere of provincial labour relations, it should be allocated votes directly. More specifically, since employees of its members work a substantial number of hours under the Provincial Agreement the SCA argued that it should be entitled to specific representation (in the form of approximately four votes) when it came to voting on amendments to the Provincial Agreement. Failure to allocate the votes proportionally, it argued, meant that the EBA had violated its obligation under the *Ontario Labour Relations Act* (the "Act") to treat all of its members in a manner that was not arbitrary, discriminatory, or in bad faith.

> "... the (Ontario Labour Relations) Board could not alter the allocation of votes within an EBA and could not give votes to an organization that was not a designated member of the EBA."

Other organizations which were direct members of the EBA also intervened (the Crane Rental Association and Earth Movers). In essence, they too argued that the vote allocation was not fair and should be reallocated in their respective favours

Ultimately, all of the claims failed.

THE OBLIGATIONS OF AN EBA

To the SCA:

Under the Act, because an EBA is mandated by statute as the exclusive representative of employers in negotiating a Provincial Agreement an EBA owes an obligation to each of its members to represent them fairly.

However, in the case of the SCA, it was not a member of the EBA; it was *a member of a member* of the EBA. In the circumstances, the Board found that the EBA owed no direct obligation to the SCA. To the contrary, by imposing such an obligation on the EBA, this would indirectly make the SCA a member of the EBA, something only the Minister of Labour has the power to do.

On this basis, the Board concluded that the best the SCA could achieve in its application was to obtain a greater number of votes for CLRAO which in turn could distribute addi-

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OPERATING ENGINEERS
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tional votes to the SCA (if it so chose). Unfortunately for the SCA, CLRAO opposed the SCA's application. As such, the SCA was without a remedy.

To The Other Direct Members:

The Board also refused the request of the Crane Rental Association and Earth Movers to alter the voting structure.

The Board held that, although it may have structured the EBA votes differently, these members were unable to demonstrate that the relative voting strengths of the various members had *"become so divorced from any lawful, legitimate or rational basis on which bargaining is performed that it can be described as arbitrary"*. That is, the Board confirmed that when seeking to change the relative voting structure within an EBA, the test is very difficult to meet.

FINAL THOUGHTS

This is an important case for EBAs and their members. It provides a thorough review and commentary of an EBA's duty to act fairly to its members, as well as a sense of when the Board may find that duty to have been breached. Every EBA would be well advised to consider the Board's decision within the context of their own practices and relationships with members.

Breakfast Seminar

Next in our series of employment and labour law update seminars:

TOPIC: UPDATE ON RECENT & CRITICAL EMPLOYMENT LAW DEVELOPMENTS

- o **Amendments to Ontario's *Employment Standards Act*:**
  - **Weekly Hours of Work**
  - **How to Seek the Director's Approval**
  - **Compassionate Leave**
  - **How to Obtain Valid Employee Agreements**
  - **Overtime Averaging**
- o **Pregnancy Leave**
- o **Release Forms - Essential Do's and Dont's**
- o **Evolving Constructive Dismissal Principles**

DATE: Thursday, September 9, 2004 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast provided)

VENUE: Toronto Board of Trade Country Club
20 Lloyd Street , Woodbridge , ON 416.746.6811

Watch for your faxed invitation the week of August 9th, 2004 or call 416.603.0700 to request an invitation.

QUEBEC'S LABOUR STANDARDS ACT PROTECTS EMPLOYEES AGAINST "PSYCHOLOGICAL HARASSMENT"

Most everyone is familiar with the concept of constructive dismissal. It allows an employee to allege that he or she has been terminated from employment due to the employer's unilateral alteration of a fundamental term or condition of the employment relationship.

Typically, the unilateral alteration relates to salary, bonus, benefits and/or job position/title - that is, concrete monetary or quasi-monetary terms and conditions of employment.

CONSTRUCTIVE DISMISSAL HAS EVOLVED

However, over the years the concept of constructive dismissal has evolved and expanded. Today courts of law have found that treating an employee without respect, to the extent of creating a poisoned or unwelcome workplace, may constitute constructive dismissal. For instance, an employee who is repeatedly harassed by co-workers may have a constructive dismissal claim if the employer fails to take action to stop or prevent the harassment. So too may an employee have a constructive dismissal claim where a manager or supervisor continuously belittles, demeans, criticizes and/or humiliates an employee.

> Today in Québec, an employee can seek relief under the Québec *Labour Standards Act* on the grounds of "psychological harassment" even where there is no constructive dismissal.

Recently the Province of Québec has taken the concept of the poisoned workplace one step further. Today in Québec, an employee can seek relief under the Québec *Labour Standards Act* on the grounds of "psychological harassment" even where there is no constructive dismissal. That is, the psychological harassment itself is sufficient to warrant relief.

This is a significant change in the law. Previously, where there had been inappropriate treatment that did not constitute dismissal, an employee who wanted relief had no option but to commence a law suit in the courts or bring a claim under human rights legislation if the treatment constituted discrimination on prohibited ground. Both routes could be very time consuming, costly and risky. The Québec amendments allow an employee to avoid these traditional routes by creating a separate route through the Province's *Labour Standards Act*.

PSYCHOLOGICAL HARASSMENT: DEFINITION

Under the Québec Act the term "psychological harassment" may apply to a variety of acts or omissions as between co-workers, or employees and managers/supervisors, and includes comments, gestures and actions which

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DID YOU KNOW...?

On Tuesday June 29, 2004, Ontario's Bill 56, *Employment Standards Amendment Act (Family Medical Leave), 2004*, came into effect. For more information, please see our previous newsletter (June 2004, Vol. III No. 3), or contact any member of Sherrard Kuzz LLP.

PSYCHOLOGICAL HARASSMENT...
Continued

cause harm to the dignity or psychological or physical integrity of the employee and create a harmful environment. Some examples include, but are not limited to, repeated public criticism, badgering, bullying, belittling, humiliating an employee and unfairly criticizing their work.

REMEDIES UNDER THE ACT

A finding that an employer has violated the Québec Act may result in any one, or a combination, of the following remedies to the employee: payment of damages; reinstatement (where the employee had been terminated); payment of costs incurred by the employee for psychological counseling; a letter of apology; and reimbursement of legal fees. The adjudicator may also order that the employer undergo management training or retraining

Although currently limited to the Province of Québec it is essential for all employers to appreciate this important legislative initiate. Québec is the first province to pass this type of legislation, but it may not be the last.

WHAT EMPLOYERS SHOULD DO

Proactive employers should therefore consider steps to identify, avoid and address psychological harassment in the workplace, including:

1) Develop and/or amend a harassment policy to include the express prohibition of conduct which creates a poisoned workplace,

2) Set a "Zero Tolerance" standard for harassment in the workplace,

3) Train and retrain management to identify inappropriate conduct and/or interpersonal conflicts and to respond in a timely, consistent and transparent manner,

4) Train or retrain management to ensure they appreciate and respect the harassment policy. There is no substitute for leading by example. Management should also:

(a) Encourage and support open and honest communication among employees and management, and

(b) Apply the harassment policy in a timely, consistent and transparent manner.

The legal team at Sherrard Kuzz LLP has extensive experience assisting clients to become or remain harassment free. For more information or to discuss these issues further, please give us a call.

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