INTRODUCTION

This issue of our Newsletter covers a number of different topics that are important for trade unions and their members.

As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter.

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"BONA FIDE CHILDCARE PROBLEM" FEDERAL COURT OF APPEAL RULES ON FAMILY STATUS THE JOHNSTONE DECISION

Melissa Kronick

Ms. Johnstone is an employee of the Canada Border Services Agency (CBSA). Ms. Johnstone and her husband have two children. They both worked for CBSA at Pearson Airport. The work schedule for employees in Ms. Johnstone's position is a rotating shift with no predictable pattern. Her husband worked as a supervisor, but also had variable shifts. Upon her return from her maternity leave, Ms. Johnstone asked CBSA for accommodation to her work schedule at Pearson Airport.

Specifically, she asked to work full-time hours working three days per week, 13 hours per day. CBSA refused even though they had historically accommodated scheduling for religious grounds and for medical issues.

Ms. Johnstone complained to the Canadian Human Rights Tribunal that her employer was discriminating against her on the ground of family status by refusing to accommodate her childcare needs in scheduling her shifts. Ms. Johnstone showed that she could not, based on her variable schedule and her husband's, obtain (either through family or otherwise) childcare arrangements on a reasonable basis. The Tribunal agreed and upheld Ms. Johnstone's complaint. CBSA applied for judicial review to the Federal Court and lost, and then appealed to the Federal Court of Appeal. On May 2, 2014, they issued their decision.

In upholding the lower court's decision (in part), the Federal Court of Appeal found that the ground of Family Status in the *Canadian Human Rights Act* includes parental obligations which engage the parent's legal responsibility for the child, such as childcare. The Federal Court of Appeal also set out the criteria to make out a case of workplace discrimination on the ground of family status from childcare obligations. Worth noting is what the Court called "a bona fide childcare problem".

Essentially, and among other things for the duty to accommodate to arise, the employee must show that "neither they nor their spouse can meet their legally enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs". In essence, the court said "the Complainant must demonstrate that he or she is facing a *bona fide childcare problem*".

The court was also clear that each case is highly fact specific and must be reviewed on an individual basis. In our view, this does not mean that every request to have a static schedule to pick up your kids from school will meet the test. But it does require employers to accommodate *bona fide child* care problems.

UPDATE ON PROPOSED CHANGES TO THE CANADA LABOUR CODE

Aleisha Stevens

On April 9, 2014, the Conservatives passed the controversial Bill C-525 in the House of Commons. The Bill affects federal sector unions by facilitating decertification under federal legislation, while making the process of certification more onerous. Both union and management groups have expressed strong concerns about Bill C-525, due in part to the fact that there are no identified problems with federal legislation as it exists to justify the changes that would be imposed by this private member's bill.

When initially introduced, Bill C-525 proposed replacing the single-step automatic card-check process under the current legislation with a two-step process. The first step required signed cards by 45% of the proposed bargaining unit, to be followed by a secret-ballot vote. Failure on the part of an employee to vote was counted as an active vote against certification. Conversely, in the decertification process, the failure of an employee to vote was counted as a vote in favour of decertifying the Union.

Subsequent committee recommendations have resulted in modifications to some of the more draconian portions of the Bill; for example, as the Bill stands now, unions can be certified by a majority of voters rather than a majority of total proposed members. Not all committee changes brought the Bill closer to traditional Canadian labour values, however; for example, the threshold for triggering a decertification vote was actually reduced in committee.

Furthermore, the two-step certification process remains, and poses a significant barrier for federal unions. Federal union membership is often spread across the country rather than being contained in single location or region. Also, the proposed bargaining unit may be in the transport industry; aviation, trucking, and trains are common examples of federally regulated sectors. Given the geographical spread and sometimes transient nature of the workers, organizing a vote representative of the employees' wishes will be an onerous task under the Bill in its current form. Similarly, guarding against employer interference prior to the voting process under such conditions appears an insurmountable impossibility. The potential for employer interference is aggravated by the fact there appears to be no requirement that the vote be held in a timely fashion, or under private and neutral conditions, as exists in provincial legislation.

The Bill remains a significant concern for unions in the federal, public and private sectors, and sets a dangerous precedent for labour relations generally in Canada. The fate of federal labour relations under Bill C-525 now rests with the Senate.

SUPREME COURT UPHOLDS RIGHTS OF UNIONS TO ACCESS MEMBERSHIP INFORMATION FROM EMPLOYERS

Micheil Russell

In a recent Supreme Court of Canada Decision, *Bernard v. Canada*, the Supreme Court issued an important decision concerning the limits of privacy rights of unionized employees. The Court also restated its position that the *Canadian Charter of Rights and Freedoms* cannot be used as a basis to undermine legal requirements for employees covered by a collective agreement to pay union dues.

Ms. Bernard's employment was subject to a collective agreement and she was represented by a Union. However, she was not a member of the Union. Ms. Bernard claimed that her employer was violating her rights under the *Canadian Charter of Rights and Freedoms* by providing her home contact information to her Union. The Supreme Court dismissed her claim and concluded that this information was required by the Union in order to provide an effective means of contacting employees to ensure that they are properly represented. The Supreme Court stated the following:

> The union's need to be able to communicate with employees in the bargaining unit cannot be satisfied by reliance on the employer's facilities. As the Board observed, the employer can control the means of workplace communication, can implement policies that restrict all workplace communications, including with the union, and can monitor communications. Moreover, the union may have representational duties to employees whom it cannot contact at work, such as employees who are on leave, or who are not at work because of a labour dispute.

In coming to its conclusion, the Supreme Court considered the fact that the Union has a duty of fair representation to its members because it is the exclusive bargaining agent for employees covered by the applicable collective agreement. This is the case whether or not the employee is a member of the Union. In order to fulfill its duty of representation, the Union is required to represent its members through the grievance process, and in collective bargaining. In light of these representational duties, the disclosure of home contact information is a reasonable requirement for a Union to fulfill these duties.

Underlying these issues, the case represents the most recent attempt to attack the "Rand formula" which permits employees not to be members of unions but requires them to pay union dues as required by a collective agreement. In supporting this principle, the Supreme Court continues to find that the payment of union dues is not a violation of the freedom of association protections provided by the *Canadian Charter of Rights and Freedoms*.

KEEP CALM AND CARRY ON – MENTAL STRESS AND WORKERS' COMPENSATION

By Ken Stuebing

It has long been the case that mental stress claims are among the most stringently-adjudicated form of workers' compensation claims to advance. Provincial workers' compensation legislation in jurisdictions across Canada uniformly set out exacting thresholds for mental stress claimants to surpass before their claims will be approved. The reason for such strict legislative design is fairly obvious: most workers experience stress in the course of their employment. Most forms of occupation are inherently stressful, at least from time to time. If it were relatively easy to claim compensation benefits associated with job-related stress, there may well be an unwieldy influx of stress claims. Workers' compensation schemes are simply not designed with ordinary such occupational stress in mind.

One of the most creative recent efforts to broaden the scope of mental stress claims adjudication was argued before the Supreme Court of Canada. In *Martin v. Alberta (Workers' Compensation Board)* 2014 SCC 25, the appellant Mr. Martin advanced a novel and unique jurisdictional challenge to the Alberta WCB's denial of entitlement for his chronic onset stress.

Mr. Martin is a long-service park warden employed by Parks Canada. For many years in the course of his employment, Mr. Martin was involved in significant and stressful health and safety conflicts with his employer centred on his contention that wardens should be armed when carrying out their duties. In late 2006, Mr. Martin's employer issued a letter requesting compliance with an access to information request for his work computer data, under threat of discipline. This threat (potentially discharge) triggered Mr. Martin's psychological condition and he initiated a claim with the WCB for chronic onset stress in early 2007.

Mr. Martin's claim was denied by all levels of workers' compensation authorities in Alberta, by application of the relevant WCB's mental stress policy. The Alberta WCB's work-related chronic stress Policy (formulated under the Alberta *Workers' Compensation Act*) identifies four criteria which must be met in order to establish eligibility for compensation for chronic onset stress.

The third and fourth criteria for entitlement under Alberta WCB's work-related stress Policy require that the work-related events are "excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation" and that there is "objective confirmation" of the events. The WCB and the subsequent levels of appeal denied his stress claim on the basis that Parks Canada's demand that he comply with an access to information request was not an event that exposed Mr. Martin to excessive or unusual pressure.

On his appeal to the Supreme Court of Canada, Mr. Martin argued that, among other things, that the Alberta workers' compensation authorities had run afoul of the *Government Employees Compensation Act* (*GECA*). In essence, Mr. Martin argued that the terms of *GECA* were inconsistent with the Alberta stress Policy as adjudicated in his case. The Supreme Court, in a unanimous decision, disagreed. The Supreme Court held that the Alberta WCB's Policy's interpretation of "accident" in the context of psychological stress claims does not conflict with the *GECA*. The Supreme Court affirmed that *GECA* and provincial workers' compensation law were consistent in the realm of chronic stress claims. Moreover, the Supreme Court held that, save for cases of conflict of laws, federal workers are subject to the provincial workers' compensation scheme that applied to provincially-regulated workers.

At the end of its decision, the Supreme Court of Canada confirmed that the Alberta workers' compensation authorities' denial of Mr. Martin's claim for entitlement for mental stress was reasonable, in light of the requirements of the Alberta *WCA* and Policy. A demand for compliance with an access for information request, no matter how personally stressful in context, was not a sufficiently "unusual" stressful event in the course of employment to give rise to a compensable stress claim.

For Ontario workers, the Traumatic Mental Stress Policy-- WSIB Operational Policy 15-03-02—remains in force and unaffected by the Supreme Court's decision in *Martin*. Section 13(5) of the *Workplace Safety and Insurance Act* limits entitlement for Traumatic Mental Stress to relatively narrow sets of circumstances. Specifically, a worker is entitled to benefits for traumatic mental stress that is an "acute reaction to a sudden and unexpected traumatic event arising out of and in the course of [a worker's] employment." Alternately, under WSIB Operational Policy 15-03-02, benefits are allowed for mental stress that is an acute reaction to multiple, sudden and unexpected traumatic events resulting from criminal acts, harassment, or horrific accidents.

While the *prima facie* requirements of this Policy were usually understood to require an objectively traumatic event akin to a violent hostage taking or a horrific injury/fatality of some kind in order to give rise to entitlement, over recent years the Workplace Safety and Insurance Appeals Tribunal has released a series of decisions on mental stress cases that have confirmed that WSIB Operational Policy 15-03-02 is a fundamentally inclusive policy.

While mental stress cases remain relatively difficult cases to prove, workers' advocates continue to secure entitlement for more kinds of sudden and unexpected traumatic events than are spelt out on the face of the current Traumatic Mental Stress Policy. Such successful results have not yet unleashed the dreaded floodgates of mass work-related stress claims, while nonetheless providing jurisprudential support for an eventual (some say long overdue) refinement of Ontario's Traumatic Mental Stress Policy. For now, Ontario workers experiencing expected forms of work-related stress can only keep calm and carry on.

KEEPING "CURRENT" IN THE ELECTRICAL POWER SYSTEMS SECTOR OF THE CONSTRUCTION INDUSTRY

Michael Church and Simone Ostrowski

The Ontario Labour Relations Board recently clarified the circumstances when it will consider construction work done on a power generating facility to be in the Electrical Power Systems ("EPS") sector of the construction industry rather than the ICI sector. On February 12, 2014 the Board issued *Eastern Power Ltd.*, [2014] O.L.R.D. No. 211, which resolved a sector dispute at the Green Electron Power Project (the "Project") in Board Area 2 near Sarnia. The owners and developers of the Project had applied to the Board for a determination that the work being done at the Project was within the EPS sector. The responding parties and intervenors, which included several trade unions and the Sarnia Construction Association, all took the position that work being done at the project fell within the ICI sector.

The Project is a new natural gas fired combined cycle electricity generating facility in Lambton County. The applicants did not engage a general contractor (or in fact many subcontractors) at the Project and instead directly hired many of the tradespeople themselves.

In a previous sector dispute, *Barclay Construction Group Inc.*, [2008] OLRB Rep. Mar./Apr. 136, the Board (differently constituted) decided that construction of a natural gas fired steam powered electric generating station on property that is not, and was not, owned by Ontario Hydro was within the ICI sector. The Board also made clear in *Barclay* the criteria to be considered when deciding a sector dispute – the work characteristics associated with the project at issue, the bargaining patterns associated with the work at the project, and the project's end use. In *Barclay*, the Board found that the end use of the power generation project at issue was consistent with an electrical power systems project. However, the Board stipulated that that conclusion could change in different economic circumstances, and in any event was subject to a number of qualifications.

However, the applicants argued that *Barclay* ought not to be followed in *Eastern Power* as it was wrongly decided. They also asserted that the ultimate end use of the Project, one of the factors to be considered suggested that construction work at the Project was within the EPS Sector. This was because sole purpose of the Project is the generation of electricity that will be connected to the provincial electricity grid.

The Board agreed with the applicants that the "end use" factor pointed to the project being in the EPS sector. However, the Board also noted that the end use of all electrical generation construction projects is the same – to produce electrical power. So, the fact that the "end use" factor suggested that the project was in the EPS sector was hardly determinative, held the Board.

The Board also found that the Project was, for purposes of analysing the work characteristics, virtually the same as the project examined in *Barclay*. So, the "work characteristics" factor pointed towards work at the Project being in the ICI sector, as was the case in *Barclay*. In addition, the Board held that the bargaining patterns that have developed in Ontario in respect of the construction of natural gas fired steam powered electric generating stations demonstrated that that the construction work on those projects has almost always come within the ICI sector. The Board ultimately found that the work characteristics and end use of the Project could not be distinguished from the analysis used by the Board in the *Barclay* case.

Given that the significant similarities between the Project and the facility at issue in *Barclay,* the Board adopted the reasoning and result from the *Barclay* decision. The Board issued a summary determination in *Eastern Power* that the work being done at the Project was within the ICI sector.

The fact that the Board ruled that work done at the Project was in the ICI sector is welcome news for the building trades unions that supported each other throughout this case. For those who already have members working on the site this means that the employers are obliged to apply the terms of their provincial ICI agreements to the working conditions, jurisdiction, etc. of these members at this site - not just the wage rates and benefits which had been applied to date.

For those building trades who did not yet have members on the jobsite, the Board's ruling may give them the opportunity to either enter into voluntary recognition agreements with the employers or to certify the employers if and when members are required on the site to perform work within their traditional jurisdiction. We do expect that as work progresses on the site the employers will reach out to the other unions who have yet to refer members to the site to provide skilled local manpower. This is particularly so because the employers are for the most part hiring tradespeople directly and not subcontracting out work to other contractors or subcontractors in the normal course.

This decision is also helpful for similar future projects in that it finds that a work done at a project which is a natural gas fired combined cycle electricity generating facility would be found to be work done within the ICI sector of the construction industry. Therefore traditional building trades provincial ICI agreements would normally apply to such projects if you either have contractual relations with the owner-client, general contractor or other contractors who perform work on such projects.

This decision is a welcome decision for the building trades community. It clarifies the distinction between the scope of the ICI sector and the scope of the EPS sector. Fortunately, it also provides stability and certainty for these types of projects in the future.

ONTARIO LABOUR RELATIONS BOARD RETHINKS REPRISAL COMPLAINTS

Micheil Russell

In a recent decision, the Ontario Labour Relations Board has reversed its previous caselaw with respect to whether or not it has jurisdiction to hear reprisal complaints filed by employees who claim they were terminated as a reprisal for filing workplace harassment complaints.

Bill 168 amended the *Occupational Health and Safety Act*, and required employers to develop a workplace harassment policy that would permit employees to make complaints about incidents of workplace harassment. The Board has concluded that terminating an employee for making a complaint of workplace harassment may be an unlawful reprisal.

In a recent case considered by the Board, *Ljuboja v. Aim Group Inc.*, 2013 CanLII 76529 (ON LRB), the complainant indicated that a co-worker had screamed and sworn at him in relation to some work assignment decisions that he had made. The complainant reported the issue to the employer's human resources department and shortly thereafter he was terminated. A complaint was filed at the Board and the employer argued that the complaint should be dismissed relying on previous Board decisions in this area.

The Board decided that its prior decisions were flawed. The Board determined that the purposes of Bill 168 would be undermined if an employer was able to retaliate against the employee for making a complaint and the employee had no recourse. In order to fulfill the purposes of the amendments in Bill 168, it is essential that employees have a right to bring a harassment complaint to an employer, and are able to do so without fear of reprisal or other retaliation.

In coming to this conclusion, Vice-Chair Nyman stated on behalf of the Board that unless the situation with respect to protection from retaliation were reversed, that "only the most intrepid or foolish worker would ever complain" about workplace harassment. Protection against reprisal is necessary in order to realize the objective of the Bill 168 amendments.

The decision is important for employees and trade unions in that it provides an important safe guard for employees who are considering making a harassment complaint at their workplace. Employees may do so knowing this if they are subject to reprisal for making the complaint, they can file a complaint with the Board.

CANADA INDUSTRIAL RELATIONS BOARD ORDERS ARBITRATION AND AWARDS $15,000 IN COSTS TO EMPLOYEES IN DFR COMPLAINT

Robert M. Church

The Canada Industrial Relations Board issued a decision on January 31, 2014 arising out of a Duty of Fair Representation complaint (or 'DFR' complaint") ordering the union, the International Association of Machinists and Aerospace Workers ("IAMAW"), to pay a lump-sum legal costs award of $15,000.00 to four long-term employees of United Airlines as a result of the IAMAW's decision not to refer the employees' terminations to arbitration. In deciding in favour of the employees in this decision, *Re United Airlines, Inc.*, 2014 CIRB 710, the CIRB also ordered that the IAMAW pay a portion of the employees' counsel fees to conduct the arbitration hearings. The awarding of costs against parties in labour board proceedings, both federally and provincially, is uncommon but permitted under various Boards' remedial authority. This decision demonstrates that in representing employees, unions must not only consider the issues in dispute in arbitrations, but also communicate the reasons behind their decisions to employees and, if appropriate, permit the employees a chance to respond to union concerns.

In March, 2011, United Airlines terminated seven employees, including the four complainants (with 12-18 years of service), over alleged ticketing irregularities. Following the terminations, the IAMAW negotiated with United to reinstate three employees, leaving the four employees who ended up filing the CIRB complaint. During the Board proceedings for the DFR complaint, it became known to the complainants for the first time that the employees who had been reinstated had apparently blamed the complainants for the ticketing irregularities; allegations that were never discussed with or put to the complainants for an explanation. Although the CIRB found that the IAMAW had initially met the duty of fair representation it owed the complainants (in part, by having stewards attend the investigation meetings and filing grievances on the seven employees' behalves), it subsequently violated this duty by advocating for the three employees who were reinstated and ceasing almost all contact with the complainants, based on allegations that the four complainants were responsible for the irregularities, and without giving the four a chance to respond.

The four terminated employees filed a complaint at the CIRB alleging that the IAMAW had breached its duty of fair representation. The Board ultimately found that although the complainants had been told that a written letter would be provided reasons for the union's decision not to refer the four grievances to arbitration, the letter which went out to the employees did not give any details beyond simply stating the decision not to refer and outlining the employees' internal appeal options.

The Board, in line with its prior jurisprudence on DFR complaints, did not review whether or not the IAMAW was 'correct' in its decision not to refer to arbitration, but

whether the union violated its duty in coming to its decision. The CIRB held that the lack of timely communication with the complainants and failure to seek a response to the allegations against the four violated the duty, and that the lack of written records from the union at the relevant periods was not a failure to disclose documents but instead was evidence of the lack of proper record-keeping, another flaw in the union's internal process. The CIRB also held that the failure to provide reasons for the non-referral of the grievances was a further violation, as it raised the "troubling question of whether long service union members must file a complaint with the Board in order to learn, at even a basic level, the specific reasons why their grievances did not go to arbitration." The union should have provided a more thorough explanation to the complainants, in the CIRB's view.

The CIRB ultimately allowed the complaints and ordered that all four grievances be referred to arbitration. The CIRB *also* ordered the IAMAW to pay 'reasonable' legal costs of the complainant's choice of counsel (in other words, the IAMAW could not retain carriage of the arbitrations). Finally, the CIRB noted that in 'exceptional situations' it may award costs, including against a union. The CIRB found that the failure to communicate with the employees and failure to respond to a letter from the lawyer they retained seeking reasons justified costs in this case. The CIRB ordered the IAMAW to pay a lump-sum of $15,000.00. Cost awards are a permitted remedy under section 99 of the *Canada Labour Code*, but awards of such magnitude (and indeed, at all) are uncommon.

This decision has not yet been cited by any further decisions of the CIRB or provincial labour relations boards, but it clearly shows the consequences that unions may face if they fail to properly communicate with employees or document their own internal decision-making processes. The CIRB seems to imply that had the employees been given reasons in a timely manner as to why their grievances were not proceeding to arbitration, the duty of fair representation would have been be satisfied. Unions in Canada should be sure to keep appropriately detailed records of deliberations relating to grievances, especially where the process may result in a non-referral to arbitration.

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