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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A. CONSTRUCTION INDUSTRY CERTIFICATION APPLICATIONS: THE OLRB REJECTS AN EMPLOYER'S CONSTITUTIONAL CHALLENGE TO THE "DATE OF APPLICATION" TEST

Douglas Wray

The Chair of the OLRB, Bernard Fishbein, has issued an important decision involving a Charter challenge to the Board's longstanding "date of application" test in construction industry certification applications. Pursuant to this test, the Board decides whether to certify based on the trade union's level of membership support amongst the employees working on the date of application only.

The case is Govan Brown, Decision dated March 26, 2018.

In this case, the Labourers' Union filed an application for certification on a Sunday when only two or three labourers were working. The Company's position was that it regularly employed a dozen or more labourers and that the number of employees on the date of application was not representative. The Board indicated it would apply its usual and longstanding "date of application" test and decide whether to certify based on the Union's level of membership support amongst the employees working on the date of application only.

The Company (and a group of employees) then brought a Charter challenge to the Board's date of application test. They argued that the test violated the Charter, and specifically Section 2(d) – Freedom of Association – and Section 2(b) – Freedom of Expression.

Our firm was retained by the Provincial Building and Construction Trades Council of Ontario to intervene to support the Labourers' position and to oppose the position of the Company and the group of employees.

The case was heard by Board Chair, Bernard Fishbein.

Mr. Fishbein issued his Decision dated March 26, 2018. In lengthy reasons (155 paragraphs over 121 pages), Mr. Fishbein analyzes the Charter arguments and rejects the Company's challenge, accepting the arguments raised by the Labourers, the Council and the Attorney General of Ontario. Certificates were issued to the Labourers.

The Company and the group of employees may very well pursue their Charter challenge in the Courts.

In the meantime, the Board has upheld, and will continue to apply, the date of application test.

B. DISCRIMINATION "REGARDING EMPLOYMENT" – BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL V. EDWARD SCHRENK, 2017 SCC 62

Melissa Kronick

This Decision of the Supreme Court of Canada rendered on December 15, 2017 finds that Section 13(1)(b) of the BC *Human Rights Code* is not limited to protecting employees solely from discriminatory harassment by their superiors.

The Court found that discrimination under the BC *Human Rights Code* can be found where the harasser is not in a position of authority over the complainant and an employee is protected from discrimination related to or associated with his or her employment, whether or not he or she occupies a position of authority.

As such, the Court tells us that all "persons" who share a workplace are prohibited from engaging in discrimination, and preventing employment discrimination is a shared responsibility among those who share a workplace.

Background

The case started with a complaint by Mr. S-M to the BC Human Rights Tribunal. Mr. S-M was a civil engineer working for Omega and Associates Engineering Ltd., an engineering firm hired by the municipality of Delta British Columbia to oversee a road improvement project. He was originally from Iran and was Muslim.

Mr. Schrenk was the site superintendent for Clemas Contracting Ltd., the primary construction contractor engaged by Delta to carry out the project.

Mr. S-M filed a complaint with the BC Human Rights Tribunal alleging that Mr. Schrenk repeatedly made derogatory comments to him, mocking his place of origin, religion and purported sexual orientation.

Mr. Schrenk and Clemas Contracting were named as Respondents. They made a preliminary objection to the Tribunal's authority to hear the complaint because they argued that the complainant was not in an employment relationship with either of them.

The tribunal dismissed the preliminary objection. The Tribunal found that discrimination "regarding employment" can be perpetrated by someone other than the complainant's employer or superior in the workplace.

The Respondents applied for judicial review to the BC Supreme Court.

The BC Supreme Court agreed with the Tribunal. The Respondents then further appealed to the BC Court of appeal.

The BC Court of Appeal overturned the lower court and the Tribunal.

The Complainant appealed to the Supreme Court of Canada.

The Supreme Court of Canada agreed with the Tribunal and upheld the appeal.

CaleyWray lawyers, Doug Wray and Jesse Kugler, appeared at the SCC on behalf of the Canadian Association of Labour Lawyers, one of the intervenors supporting the appeal.

The SCC noted that "while employers have a special duty and capacity to address discrimination, this does not prevent individual harassers from also potentially being held responsible, whether or not they are in authority roles".

In addition, the SCC noted that section 13(1)b) of the BC *Human Rights Code* prohibits discrimination against employees whenever that discrimination has a sufficient nexus with the employment context which may include discrimination by their coworkers, even those co-workers who have a different employer.

Conclusion

Fundamentally, the case is about the protection of human rights of employees in the workplace regardless of who their employer is in that workplace or their relationship to the wrongdoer. Where there is a sufficient nexus with the employment context, the *Code* prohibitions against discrimination and harassment regarding employment will apply.

C. SWOOPED

Maeve Biggar

On March 2, 2018, the Air Line Pilots Association, International ("ALPA") was successful in obtaining interim relief at the Canada Industrial Relations Board against WestJet Airline regarding its unlawful attempts to recruit its members to fly for Swoop, a new WestJet-affiliated non-union airline.

In 2017, WestJet announced the creation of a new "ultra-low-cost" airline called Swoop. Though WestJet and Swoop are sister companies, Swoop is not covered by ALPA's certificate. As a result, any pilots who are hired by Swoop will not be in the bargaining unit.

At the beginning of 2018, WestJet began aggressively recruiting the pilots in the bargaining unit to fly for Swoop through mass email communications and online bulletins. Most egregiously, WestJet offered highly beneficial "Leave of Absence" deals to those pilots who would fly for Swoop without any union involvement.

ALPA filed an unfair labour practice and application for interim relief against WestJet alleging that the company's sharp recruitment tactics were undermining the union's representational rights and violating the statutory freeze, as the parties were in bargaining for a first collective agreement. The union argued that the company was obligated to negotiate the Leave of Absence arrangements for pilots who want to fly for Swoop with the union, not with the individual members. The company claimed that it was merely communicating information about the pilots' current terms and conditions of employment in a lawful manner. ALPA requested, among other things, that the Board order the company to immediately cease and desist bargaining individually with its members and rescind the Leave of Absence offers related to Swoop employment opportunities.

The Board granted the union's requested interim remedies pending the resolution of the underlying unfair labour practice complaint, citing the risk of substantial irreparable harm to the union in the context of first collective agreement negotiations.

The Board's decision affirmed its commitment to protecting federally regulated unions from damage to their representational authority.

ALPA was represented by Denis Ellickson and Maeve Biggar in the proceedings.

D. WORKPLACE SAFETY AND INSURANCE ACT AND THE DUTY TO ACCOMMODATE

Micheil Russell

The Supreme Court of Canada released a landmark decision in February 2018 which is likely to significantly change how the WSIB administers the return to work sections of *Workplace Safety and Insurance Act*. The relevant section of the *Act* has long required employers to provide accommodation to the extent that it does not cause undue hardship. This mirrors the requirement under the Ontario *Human Rights Code*. However, in practical terms the WSIB does not enforce this provision, but generally provides retraining opportunities and/or benefits to injured workers when employers simply state that they cannot accommodate the employee.

The issue under appeal in the decision was the extent to which an employer's duty to accommodate someone with a disability need to be applied. While the appeal directly

related to the legislation in Québec, the legislation at issue is substantially the same as in Ontario. The Supreme Court determined that the duty to accommodate disabled employees is a fundamental principle of Canadian labour and human rights law. The court determined that, this principle needed to be applied and concluded that compensation adjudicators have the authority to require employers to do what is reasonably possible in order to accommodate disabled employees.

In a decision with far reaching implications the court stated that the rights and entitlements of an injured worker must be interpreted and implemented in accordance with an employer's duty to reasonably accommodate an employee who is disabled because of a workplace injury. The court stated that this included a right to impose measures upon an employer to take whatever action is reasonably possible to accommodate a employee who is disabled from a workplace injury.

The decision is important as it will certainly be relied upon in interpreting the extent to which the WSIB can impose significant return to work expectations upon employers its efforts to return an injured worker to employment with the accident employer. In the return to work process injured workers and their representatives can now request that the WSIB demand of employers that they "do what ever is reasonably possible to accommodate" workers who have become injured in the course of their employment.

E. ONTARIO INTRODUCES PAY TRANSPARENCY LEGISLATION

Brooke Auld

Currently, women in Ontario on average earn approximately 30% less than their male counterparts. The provincial government recently introduced Bill 3, *Pay Transparency Act* as part of a strategy to close the gender wage gap and ensure equality for women across the province. If passed, this legislation would place obligations on employers to take steps to ensure gender pay equity. This bill also introduces new enforcement measures for employers that do not comply with the changes. There are also new inspection powers for the Ministry of Labour.

If passed, some of the changes would include:

Employers would be prohibited from asking potential employees about their previous compensation.

Employers advertising jobs publicly would be required to include the expected compensation for the position or the range. This requirement does not include internal postings or general recruitment campaigns.

Employers covered by the legislation would be required to prepare and submit a "Pay Transparency Report" to the Ministry of Labour detailing information about the workplace composition, differences in compensation with respect to gender and other characteristics. The legislation explains that the exact requirements to be reported on would be set out later in a regulation. The employer would also be obligated to post the report online or in a conspicuous place in the workplace.

Employers would be unable to intimidate, dismiss or penalize an employee or threaten to do so because the employee asked about compensation; disclosed their compensation to another employee, made inquiries about the Pay Transparency Report or asked the employer to comply with the *Act* or regulations.

If passed, the *Act* would also ensure that any issues with the above criteria could be settled by the Arbitration process in the Collective Agreement, or alternatively, a complaint to the Ontario Labour Relations Board could filed. Specifically, section 96 of the *Labour Relations Act* would apply to these changes.

In terms of compliance, the Ministry of Labour would be given authority to appoint compliance officers to inspect workplaces to determine if they are following the Act.

Coupled with the recently passed *Fair Workplaces, Better Jobs Act,* there are many new obligations that employers must comply with. As a result, it is important to ensure that employees are receiving the protections and benefits that are now put in place. For example, the equal pay for equal work provisions are law as of April 1, 2018, and if passed, the *Pay Transparency Act* would ensure that gender and other characteristics are not the reason for differences in wages and treatment in the workplace.

The *Act* has only passed First Reading, and would require debates at Second and Third Reading as well as referral to a Standing Committee for further review. If passed, the Bill currently states a coming into force date of January 1, 2019.

Although not yet announced, there will be an opportunity for Unions to submit amendments to the Standing Committee. If passed, this legislation could also have ramifications during Collective Bargaining.

F. BILL 148 AMENDMENTS: APPLICATIONS FOR EMPLOYEE LISTS AT THE OLRB

Robert M. Church

In late 2017, the Ontario legislature passed Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*, which made a number of significant changes to the *Labour Relations Act,*

1995 (the "*LRA*") and the *Employment Standards Act, 2000*. One of the changes to the *LRA* was a new option granted to trade unions for the right to apply to the OLRB during an organizing campaign for an order that the employer provide a list of potential bargaining unit employee names, including contact information and job titles.

The benefits to unions in being able to obtain employee contact information during an organizing drive is obvious, but the union will still need to be able to demonstrate a significant level of support (20%) before being able to make an application for a list. These changes also do not apply in the construction industry, and cannot be used where there is already a collective agreement in place (in other words, cannot be used as a tool for raiding).

In order to obtain a list, a union must apply to the OLRB and demonstrate that it has at least 20% membership support in its proposed bargaining unit. The union would file a membership list application with the OLRB that sets out a proposed bargaining unit description, an estimate of the number of employees in the unit, and membership evidence. Membership evidence provided to the OLRB will take the same form as in certifications applications, and is not disclosed to the employer. If the employer disputes either the bargaining unit description or size, it must file a response with the Board within two days of the union's application.

If the OLRB concludes that the proposed unit is appropriate for collective bargaining and the union has demonstrated that at least 20% of the estimated employees in the proposed bargaining unit are members, it will order the employer to provide the union with a list of employees. The OLRB does not have to hold a hearing to issue the order.

The contact information required will include the employees' telephone numbers and personal email addresses, but will not include home addresses, which are exempted. The Board may use its discretion and require that the list also include:

- other information relating to the employee, including job title and business address; and,
- any other means of contact that the employee has provided to the employer (except for a home address).

Where an order for a list is granted, a union also has duties on how the information is used, including:

- The list must only be used by the trade union for the purpose of a campaign to establish bargaining rights.
- The list must be kept confidential and must not be disclosed to anyone other than the appropriate officials of the trade union.

- The union must ensure that "all reasonable steps" are taken to protect the security and confidentiality of the list and to prevent unauthorized access to the list.

- If the union makes an application for certification and the application is dismissed less than one year after the Board's direction to provide the list, the list must be destroyed on or before the day the application is dismissed. If the list is not destroyed in accordance with the above, it must be destroyed on or before the day that is one year after the Board's direction to provide the list was made.

- Where the list is required to be destroyed, destruction of the list must be in a way that it cannot be reconstructed or retrieved.

The trade union is not required to use the same proposed bargaining unit in a subsequent certification application that it used in its application to obtain the employee list (however, a significant change to the bargaining unit description would certainly raise questions by the OLRB). A request for an employee list alone will not impose a statutory freeze, but if an application for certification is also brought within one year by the same union after a list was requested and is dismissed, a one year bar would apply.

As of this writing, the OLRB has issued over a dozen decisions granting orders for employee lists, and it appears that this tool is already being used extensively by unions in Ontario. Recently, an employer raised a Charter of Rights challenge in the context of an application. The matter is currently pending before the Board.

CaleyWray is recognized as one of Ontario's and Canada's leading labour law firms representing trade unions and their members, with a record of providing quality service for over 40 years.

We are a "full service" labour firm, providing experienced and effective representation to our clients in all areas of law that impact on trade unions and their members, including WSIB, Human Rights and Pay Equity.

This includes acting on behalf of Boards of Trustees of pension plans, health and wellness plans, apprentice plans, etc.

We pride ourselves on providing the highest quality legal representation at reasonable rates.

Our goal is to obtain the best results possible for our clients in a cost-efficient manner.

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