INTRODUCTION

This issue of our Newsletter, like the last two issues, will continue to provide updates on the continuing legal developments related to the pandemic. It will highlight some of the continuing issues related to vaccination policies.

The issue will also provide updates regarding a range of other subjects including human rights issues, legislative updates and interest arbitration awards.

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. ONTARIO COURT HOLDS THAT TTC WORKERS' RIGHT TO STRIKE INFRINGED BY MANDATORY INTEREST ARBITRATION LEGISLATION

Raymond Seelen

Numerous employee groups in Ontario, including staff at hospitals and long-term care homes, firefighters, and certain government employees, are prohibited from striking during collective bargaining. If they cannot reach a deal at bargaining, they are required by legislation to resolve their collective agreements by mandatory interest arbitration. The policy reason behind mandatory interest arbitration is that a strike in one of these essential sectors would result in significant harm to those who depend on essential services. Given that the courts have recognized the right to strike as an indispensable part of the *Charter* right to freedom of association, this sort of legislation requires the courts to engage in an interesting balancing act. On the one hand is workers' right to engage in a strike and, on the other, is the risk to the public should a strike happen.

On May 8, 2023, the Ontario Superior Court (the "Court") issued its decision in *ATU Local 113 v Her Majesty the Queen in Right of Ontario*, 2023 ONSC 3618, grappling with workers' right to strike in essential sectors. Like the employees described above, Toronto Transit Commission ("TTC") staff have been subject to legislation – the *Toronto Transit Commission Labour Disputes Resolution Act, 2011* (the "*TTC Act*") – which prohibits them from engaging in strike action, and requires them to resolve their labour disputes by interest arbitration. The ATU Local 113 and CUPE Local 2 each challenged this legislation in court on the basis that it infringed on their right to strike, contrary to section 2(d) of the *Charter*.

In *Charter* litigation, courts must first consider whether the right in question was infringed. If it finds an infringement of a right, courts must then consider whether the infringement is justified.

In the case at hand, the Court found that the right to strike was infringed. In its analysis, the Court referred to prior cases which set out that section 2(d) of the *Charter* only protects against a *substantial* interference with the right to bargain collectively. In determining whether the interference was substantial, the Court considered the degree of interference caused by the loss of the right to strike and the substitution of interest arbitration as a dispute resolution mechanism. The Court found that the interference was substantial, noting that interest arbitration tended to be conservative in nature and made it difficult for the parties to resolve complex or difficult issues. The Court also noted that there was a chilling effect to interest arbitration which made employer's negotiators more willing to take aggressive positions, and less willing to compromise. The Court also noted that in practice, the parties had been unable to reach a voluntary collective agreement in 3 out of 4 rounds of bargaining since the *TTC Act* was passed in 2011.

Having found that the right to strike was infringed, the Court went on to consider whether that infringement was justified. The City of Toronto argued that increased congestion caused by a transit strike would impact emergency services. The Court relied on a 2008 report commissioned by the City which held that neither the police, fire, nor ambulance services reported any noticeable effect on their response times when the TTC was on strike, and found no basis for this concern. The Court also considered the economic impact of a transit strike, but rejected the City's evidence, which was all pre-pandemic, before working from home became common. Ultimately, the Court held that the Employer had failed to establish a risk of serious economic consequences flowing from a TTC strike.

For the reasons above, the Court ordered that the *TTC Act* be struck down.

This decision is worth reviewing for several reasons. First, it represents the first substantial decision by Ontario courts regarding the constitutionality of "essential services" legislation. The fact that the *TTC Act* imposed the standard model of interest arbitration, and yet was still found to be a substantial interference with the unions' right to strike, is extremely significant.

Does this mean that all future challenges to legislation of this sort will be successful? Probably not. While this decision does argue persuasively that interest arbitration is not a substitute for a freely negotiated collective agreement, the decision largely turns on the question of justification. In this case, the Court found no basis to infer that there was any risk to health or safety for the general public in the event of a transit strike. The same may not be true for all other groups that are prohibited from striking. It may be quite easy, for example, to establish a significant risk if firefighters or hospital workers were to go on strike. Any future challenges to other legislation will naturally turn on its own facts.

B. Harassment Investigations and Reporting Under *OHSA* – An Often-Overlooked, Often-Breached Rule

Robert Church

Unfortunately, one of the most common issues union representatives are called to deal with are workplace harassment allegations and the response to those complaints – if any – by the employer. Often, an employer's response will involve an investigation, and the results of that investigation may be conveyed to the complainant – but not always. Under the Ontario *Occupational Health and Safety Act* ("*OHSA*"), employers must do *some* form of investigation into every harassment complaint, and they must provide the results of that investigation in writing to both the complainant and the alleged harasser (if they are also an employee). *OHSA* also dictates that not every investigation need be of the same seriousness or scope, just that some sort of investigation must occur in every case.

Section 32.0.7 of *OHSA* sets out the duties of employers regarding harassment complaints, including steps that must be taken when a complaint is received:

> **Duties re harassment**
>
> **32.0.7** (1) To protect a worker from workplace harassment, an employer shall ensure that,
>
> (a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;
>
> (b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation;
>
> (c) the program developed under section 32.0.6 is reviewed as often as necessary, but at least annually, to ensure that it adequately implements the policy with respect to workplace harassment required under clause 32.0.1 (1) (b); and
>
> (d) such other duties as may be prescribed are carried out.

In our experience, this rule under *OHSA* is often overlooked, and often violated by employers, even where they did not mean to violate the rule. In other words, employers (perhaps because of ignorance of the law, or skepticism about the complaint) often simply fail to take the necessary steps. Arbitrators have found that even where the complaint was taken to arbitration and the evidence of harassment was insufficient to make a finding of harassment, and that part of the grievance is dismissed, the employer nonetheless may commit a breach of *OHSA* by failing to properly investigate the complaint

and failing to provide the results of that investigation to the necessary individuals (see: *Gemini-SRF Power Corporation v Unifor Local 89-04*, 2022 CanLII 79945, paras 101-105).

It is clear from the language of s. 32.0.7 (1) that not all harassment investigations must be alike. Rather, the need to conduct an investigation that is "appropriate in the circumstances" clearly implies that the employer (and the union) may investigate different complaints to different standards. If a complaint involves objectively less serious allegations, or if a complainant has a history of continuously bringing baseless allegations, the law does not require the employer to treat those complaints with the same degree of due diligence as other, more serious complaints. Nevertheless, the law is clear: an employer cannot do *nothing* in the face of a harassment complaint, even if all parties believe the complaint to be baseless.

Where a harassment complaint is investigated and shown to be without merit, trade unions should still be vigilant in enforcing the procedural requirements of harassment complaints under *OHSA*. These investigations and their results (or lack thereof) can be important pieces of evidence in any future appeal or arbitration hearing. While these procedural breaches may attract little damages or sanctions, an employer may nonetheless be in breach of *OHSA*, which may provide some leverage to trade unions in arbitrations and negotiating settlements.

C. IN-PERSON VS VIDEO HEARINGS

Erin Carr

With COVID-19 entering an endemic state, more workplace parties are asking to return to in-person arbitration hearings. In a preliminary decision released in late November 2023, Arbitrator Mark Hart considered the appropriate mode of proceeding in a discharge grievance after the City of Toronto requested to proceed in-person. The Union opposed the City's request, resulting in a helpful analysis by Arbitrator Hart.

Arbitrator Hart's analysis began with a list of factors to consider when deciding the appropriate mode of proceeding. The factors identified by Arbitrator Hart, which were based on previous arbitration awards and decisions from the Canadian Human Rights Tribunal, were as follows:

a) The specific nature of the issues to be addressed on the day(s) at issue, and the relative advantages and disadvantages of the modes of proceeding under consideration in relation to those specific issues;

b) The health and safety of participants and of those with whom they are likely to come into contact;

c) Any labour relations considerations that are relevant to determination of the mode of proceeding;

d) Any issues regarding fairness or accessibility; and

e) Considerations of cost, time, effort, and convenience.

After identifying the list of relevant factors, Arbitrator Hart addressed the issue of whether there is a presumption in favour of proceeding in any one particular fashion. The Union took the position that as COVID-19 continues to pose a health risk, caution should favour the presumption that hearings proceed by video-conference, unless there are good reasons to justify proceeding in person. Meanwhile, the City took the position that the presumption should be in favour of in-person hearings unless the opposing party can satisfy the arbitrator that some other mode of proceeding is the best way to proceed.

In Arbitrator Hart's view, as the pandemic waned, and as video-conference technology became more prevalent and accessible, there was no justification for any starting presumption either way. According to Arbitrator Hart, while proceeding in person may, prior to the pandemic, have been regarded as the "traditional gold standard" and a "superior" way of proceeding, the use of video-conference technology has proven to be just as effective and, at times, more flexible and readily available than an in-person proceeding. He noted a number of examples, including cases involving sexual violence, where a complainant's comfort in testifying may be enhanced if they testify from home.

With respect to the pandemic and ongoing health and safety issues, Arbitrator Hart noted that, while people are still catching COVID-19, the pandemic is over, and we are now in an endemic situation. He accepted that certain individuals may be immuno-compromised or at greater risk, but those considerations can be taken into account in the context of weighing the factors identified above, without creating a general presumption.

Arbitrator Hart then applied the factors to the case before him. He noted that the only date at issue was February 7, 2024, which the parties agreed to use for mediation/arbitration and possibly case management, to address timing for disclosure of documents, witnesses, whether any expert evidence is expected, and ways to expedite the hearing. He found it was unlikely that the parties would even start the hearing on February 7, 2024, given the issues that would need to be addressed if the matter did not resolve. He also noted that the City wished to schedule additional days in April of 2024, suggesting that the evidentiary hearing, if necessary, would only commence at that time.

In that context, Arbitrator Hart found that there was no advantage to proceeding in-person on February 7, 2024, as he has experienced no difficulty conducting mediations by video-conference as opposed to in-person.

Arbitrator Hart rejected the City's argument that when a grievor is at home, they are "too comfortable" both in the sense that they are not required to experience the inconvenience of commuting to spend a day in a specific location, and also, that they have greater access to outside influences. Arbitrator Hart disagreed, noting that having the grievor at home can just as easily be a positive influence for mediation purposes, as they may be more relaxed and open to an objective assessment of the pros and cons of their case. Regarding the City's latter point, if a grievor is susceptible to outside influences, Arbitrator Hart stated that this would be just as true in-person as by video-conference.

Finally, with respect to any issues regarding fairness, accessibility, cost, time, effort, and convenience arising from the mode of proceeding, Arbitrator Hart noted that none were raised before him. He stated that while this factor generally favours proceeding by video-conference, the Union had been clear that it relied primarily on general health and safety concerns to justify its position.

In the end, in weighing the various factors, Arbitrator Hart concluded that the parties would proceed by video-conference.

Comment

Arbitrator Hart's decision is consistent with a number of other decisions released over the past two years, including Arbitrator Anderson's decision in *Ontario Public Service Employees Union, Local 548 and Toronto Bail Program*, 2023 CanLII 1820.

While proceeding in person may, prior to the pandemic, have been regarded as the "traditional gold standard" and a "superior" way of proceeding, the use of video-conference technology has proven to be just as effective and can afford important flexibility that is not as readily available in an in-person proceeding.

At this point, as the pandemic has ended, the general consensus is that there is no presumption in favour of proceeding in any one particular fashion. Instead, the decision must be made on a case-by-case basis, weighing the factors identified above.

Citation: *Canadian Union of Public Employees, Local 79 v City of Toronto*, 2023 CanLII 103274 (ON LA).

D. CHANGING LANDSCAPE OF CONSTRUCTION LAW AND CONSTRUCTION LABOUR LAW

Jamie Corbett

2023 was a significant year for the *Occupational Health and Safety Act* ("*OHSA*"). *OHSA* has been the subject of two major developments that may alter the construction labour law landscape going forward. In the second half of 2023, legislative and judicial eyes tuned their focus on the regulation and application of *OHSA* with the result of increasing employer liability and laying ground for increased gender diversity on construction sites.

Beginning with regulations to *OHSA*, O. Reg. 61/23 has made several amendments to O. Reg 213/91 (Construction Projects Regulation). Firstly, it has amended section 29 by requiring that washroom facilities be located not more than 90 meters, where reasonably possible, and not more than 180 metres from a construction site.

Addressing women's access to washroom facilities, section 29.1 has been amended to include the following requirements:

> (2.1) Where the minimum number of toilets required at a project under subsection (5) or (7) is five or more, at least one facility at the project shall be for the use of female workers only, where reasonable in the circumstances.
>
> (2.2) If the facility is intended for use by males only or females only, it shall have a sign indicating that.
>
> (2.3) If the facility is intended for use by female workers, there shall be a disposal receptacle for sanitary napkins.

Additionally, section 29.2 has been amended to include requirements regarding handwashing facilities.

Lastly, section 21 has been amended by adding the requirement that personal protective clothing and equipment shall be a "proper fit" with respect to body types.

So far, the new regulations have not been met by any reported complaints or decisions at the Labour Board. Furthermore, the full impact of these new regulations on gender diversity in construction labour remains to be seen. It is, at least, a positive development that access to washroom facility access may be one fewer barrier to increased representation of women in the industry.

The second major development in construction labour law is *R v Greater Sudbury*, 2023 SCC 28 a decision from the Supreme Court of Canada. In a split decision (4-4), the SCC dismissed the City's appeal and upheld the Ontario Court of Appeal's decision that an "owner" of a construction project can be considered an "employer" within the meaning

of *OHSA*. In the absence of a majority decision from the SCC, the Court of Appeal decision is automatically upheld.

By way of background, the issue arose from a pedestrian death at a construction site in downtown Sudbury in 2015. The City, the project owner, had contracted with Interpaving Limited to repair a water main. The pedestrian was crossing at a traffic light when she was struck and killed by an Interpaving employee reversing a road grader through the intersection. At the point where the pedestrian was crossing, there was no fence separating the public way from the construction site, nor were there any signallers assisting the road grader, contrary to sections 65 and 104(3) of O. Reg 213/91. City inspectors were on site at the time of the collision.

Following the tragedy, Interpaving and the City were fined pursuant to section 25(1)(c) of *OHSA*. Interpaving pled guilty to the provincial offence and paid the fine, while the City objected on the grounds that it was not the "employer" under section 25(1)(c).

The Ontario Court of Justice dropped the charges against the City on the grounds that it was not an "employer" under *OHSA* and did not have control over the site. The Ministry of Labour appealed to the Superior Court, where the appeal was dismissed.

The Ontario Court of Appeal, however, found that the definition of "employer" includes the project owner. Because the City met the definition of "employer," it was liable for the violations of the Regulations that led to the pedestrian fatality, unless the City could provide a defence of due diligence. The City therefore had a duty to ensure safety despite not having "control" over the project site.

The Company appealed to the Supreme Court, where the lower Appeal Court's decision was upheld. Martin J, writing for the majority, found that section 25(1)(c) applies to project owners even in the absence of control over the site, since "employer" is defined in section 1(1) of *OHSA* without any reference to control.

Martin J noted that, as public welfare legislation, *OHSA* creates several overlapping obligations among various workplace entities to ensure health and safety or workers and the public. He continues to note that duties among owners, employers and contractors are "concurrent and overlapping: several different actors may be responsible for the same protective functions and measures" (para 10). With reference to (*Ontario (Minister of Labour) v. Enbridge Gas Distribution Inc.*, 2010 ONSC 2013 ("*Enbridge*"), he alluded to the "belt and braces" approach to safety:

> if the "belt" does not work to safeguard a worker, the backup system of the "braces" might, or vice versa. If all workplace parties are required to exercise due diligence, the failure of one party to exercise the requisite due diligence might be compensated for by the diligence of one of the other workplace parties (*Enbridge* at para 24).

The dissenting opinion diverged from the majority with respect to the City's role as employer of Interpaving's employees. Concern for the financial liability of small businesses was one of the reasons the dissenting Justices refrained from finding project owners to be "employers" under *OHSA*. Relatedly, the minority opinion cast doubt on the ability of small businesses (including landlords) to shoulder the costs of proving a due diligence offence, resulting in businesses paying fines regardless of whether they can meet the defence.

The Court did not decide the issue of the City's defence. As such, the matter has been remitted to the Superior Court of Justice to determine if the City acted with due diligence.

Less than two weeks after *Greater Sudbury* was released, Newton-Smith J applied *Greater Sudbury* in *Ministry of Labour v Limen Group Construction (2019) Ltd., Octavio Tome and Emanuel Tavares*, 2023 ONCJ 535. In that decision, the Court did not address the liability of the project owner, but only the liability of the contractor and its supervisors.

The decision also involved a horrific fatality. In *Limen Group*, a worker was crushed to death by a waste concrete block hoisted overhead by crane. The swamper (assistant operator) had rigged the crane hooks directly onto the rebar embedded in the concrete block. That practice, despite being contrary to section 27(2)(c) of *OHSA*, had been the practice on the site. Following the tragedy, Limen Group, the contractor, was charged under sections 25(1)(c) of *OHSA*, whereas the individual defendants were charged under section 27(2)(c) of *OHSA*. The owner-client, Concord Construction, was not charged.

The Court reiterated the public welfare purpose of health and safety legislation, namely that *OHSA* "should be interpreted in a manner consistent with its broad purpose," which is "to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace" (para 118).

In light of the evidence of Concord and Limen employees about the training and practice of rigging waste concrete blocks, Newton-Smith J applied *Greater Sudbury* to find the *contractor* and two supervisors employed by the contractor for the inadequate training and safety measures on site. The Court rejected the corporate defendant's argument that it was merely "an" employer, not the "direct" employer of the formwork crew. Applying *Greater Sudbury*, the Court found at para 140 that "a person can be an employer under the Act even where they lack control over the worker or the workplace."

Importantly, the owner-client Concord Construction was not charged with any violation of the *Act*. The timing of *Greater Sudbury* in relation to the charges in *Limen Group* may explain the absence of any discussion of the owner's liability. As such, it remains to be seen whether applications of *Greater Sudbury* would find the owner responsible.

What does this decision mean for construction unions?

The significance of the decision for employers is clear: they cannot escape liability for project health and safety by downloading that responsibility to the contractor or subcontractor.

Unions should be advised that health and safety concerns are now not only within the purview of the contractor (or sub-contractor) but also the project owner. Owners may likely be taking a more active role in assuring compliance with *OHSA*, given the considerable liability they may face in the event of accidents or fatalities on project sites. With respect to Unions' obligations and responsibilities, Unions should ensure to liaise and cooperate with all responsible parties with respect to the health and safety on construction sites.

E. UPCOMING CHANGES TO ONTARIO EMPLOYMENT LEGISLATION

Samir Silvestri

On November 14, 2023, the Ontario government tabled the fourth iteration of its *Working for Workers* legislation. If passed as drafted, the legislation would substantially change certain parts of the *Employment Standards Act* ("*ESA*") and the *Workplace Safety and Insurance Act* ("*WSIA*"). The changes will have a positive impact on both unionized and non-unionized employees, particularly in the food retail sector, as well as injured workers receiving WSIB benefits.

ESA Amendments

1. Job Postings and Pay Transparency Requirements

The latest iteration of the *Working for Workers* legislation will add a new part to the *ESA* governing job postings. Under this new part, employers who post "publicly advertised job postings" would be required to:

- Include information about the expected compensation or range of expected compensation for the position;
- Remove any requirements related to Canadian work experience;
- Disclose whether Artificial Intelligence is used as a part of the application process; and
- Retain copies of all publicly advertised job postings and application forms for 3 years after the post is made.

These additions will add necessary transparency for prospective employees, allowing them to know what compensation they can expect before entering the application process. It will also expand the range of available experience prospective employees can rely on in applying for employment. Although these changes are unlikely to have a substantial affect in unionized workplaces, the addition of an Artificial Intelligence disclosure requirement will allow prospective employees (unionized and not) to have a better understanding of how their data may be used by employers.

2. Trial Periods

Working for Workers would also add a new section specifying that an individual performing work during a trial shift would be considered an "employee" for the purposes of the *ESA*. This means, most importantly, that persons performing trial shifts must be paid for their work – regardless of whether they are ultimately hired permanently.

3. Tip Pay-Outs and Prohibited Deductions

Working for Workers will also add a provision to the *ESA* prohibiting deductions from an employee's wages when a customer at a restaurant, gas station, or other establishment leaves without paying for goods or services.

There are also planned amendments to the *ESA* to regulate employee tip pay-out processes, including regulating the methods for paying out employee tips and other gratuities. Notably, employers will no longer be able to use fee-collecting tip payment apps and must now pay tips in cash, cheque, or direct deposit. If paid in cash or cheque, the payment must be received at the workplace or another agreeable location. Direct deposit can only be used if the account is chosen by the employee, is in their name, and is accessible only by the employee or an authorized person.

Finally, the *ESA* would be amended to require employers to post their tip-sharing policy (if they have one) in at least one conspicuous place in the workplace. If the policy is retracted, employers must keep a record of it for at least 3 years thereafter.

If passed as drafted, the new legislation would prevent the use of tip payment systems which deduct fees from employee tip-outs (which has been an issue in both unionized and non-unionized workplaces) which lower employees hard earned tip income for the benefit of employer convenience.

4. Vacation Pay

Finally, *Working for Workers* would amend the *ESA* to require that any alternative vacation pay-out arrangements must be "set out in an agreement" between employer and employee.

WSIA **Amendments**

Two key changes are also afoot to the workplace insurance regime, which would help increase the potential amount of WSIB benefits available to injured workers, and lower barriers to access to benefits for firefighters and fire investigators diagnosed with Esophageal Cancer.

1. "Super Indexing" of Benefits

If passed, *Working for Workers* would allow for increases to WSIB benefits beyond the annual rate of inflation. The purpose of WSIB annual benefit indexing is to help protect injured workers' benefits against the effects of inflation over time through gradual increases in those benefits. Annual indexing presently applies to loss of earning, non-economic loss, survivors' payments, temporary disability, future loss of earnings, and permanent disability benefits. Allowing for a "super indexing" model could see increases

in those benefits beyond the rate of inflation, hopefully providing injured workers with greater income security.

2. Firefighters with Esophageal Cancer

Working for Workers will also make it easier for firefighters and fire investigators to have access to coverage when they are diagnosed with Esophageal Cancer by lowering the duration of employment needed to receive presumed (automatic) compensation prior to diagnoses from 25 to 15 years.

If you have any questions with respect to the changes being introduced in the latest iteration of *Working for Workers*, please contact one of our lawyers for answers to specific questions.

F. PUROLATOR EMPLOYEES AWARDED COMPENSATION FOR PROTRACTED VACCINE MANDATE

Erin Carr

On December 14, 2023, B.C. Arbitrator Nicholas Glass issued a decision awarding compensation to Purolator employees who were kept from the workplace beyond July 1, 2022, due to their vaccination status. Arbitrator Glass ruled that while there was justification for the original mandate, by late June of 2022, medical opinions had evolved to indicate that two-dose vaccination provided negligible protection against Omicron after 25 weeks. Non-compliant employees were compensated for lost wages and benefits from July 1, 2022, until their return to work in May 2023.

Background

On September 15, 2021, Purolator introduced its vaccination policy (the "Policy") requiring all employees to get vaccinated by December 25, 2021. As a federally regulated employer, Purolator was subject to the federal government's vaccine mandate, which came into effect in October 2021.

In January of 2022, unvaccinated employees were placed on an unpaid leave of absence.

In June of 2022, the federal government lifted its vaccine mandate.

In November of 2022, employees who had still not complied with the Policy were administratively terminated.

On April 30, 2023, Purolator suspended its policy and employees were returned to work.

Ruling

Arbitrator Glass found there was justification for the original mandates based on the advice from health experts at the time. According to Arbitrator Glass, the medical evidence supported the following justifications for the Policy when it was introduced, as advanced by Purolator:

- Allowing unvaccinated workers into the workplace endangered other workers because they were more likely to be infected and pass it on to others.
- There were requirements from customers for Purolator employees, particularly couriers who came on-site, to be vaccinated.
- Vaccination provided protection against serious illness, so unvaccinated workers carried an increased risk of serious illness for themselves.

- Unvaccinated workers were more infectious once infected than vaccinated workers.

However, by the spring of 2022, the landscape was shifting – new evidence suggested there was reduced efficacy of vaccines against the Omicron variant. The Union's medical expert testified that "the COVID-19 vaccines in use provided no reliable protection from infection" 60 days after the second dose.

Arbitrator Glass scrutinized the medical evidence concerning health risks in the workplace. He concluded that unvaccinated employees did not substantially heighten the risk of severe illness from infection for themselves or for vaccinated colleagues. He found the Union's expert evidence was "overwhelming and persuasive," and preferred it over Purolator's expert evidence.

Further, Arbitrator Glass noted that by March 2022, the medical community and health authorities had stopped asserting "that a two-dose vaccination after 25 weeks was of any value in protecting against infection." All vaccinated employees at Purolator who had received two doses had exceeded this timeframe by June 2022, meaning it was difficult to make the case that vaccinated workers had any more protection than unvaccinated ones. At that same time, the federal government suspended its mandate and other mandates and restrictions were also being eased.

According to Arbitrator Glass, the pivotal moment was a management meeting that occurred in June 2022, where the decision to continue the mandate was made, despite the federal government lifting its workplace vaccine mandate and providing sound reasons for doing so. Purolator failed to investigate or substantiate the continued existence of the requirements at that time, as it should have.

None of the justifications for the Policy advanced by Purolator, as noted above, made sense once the federal government lifted the mandate:

> I do not find any of these reasons to be a reasonable explanation for why Purolator declined to follow the lead of the Federal government in lifting their workplace vaccine mandate. The lack of convincing reasons tends to support the conclusion that the decision to maintain the mandate was not a reasonable decision. By saying that I do not wish to imply that in taking a different view than the Federal government or other employers and health care facilities, the employer's decision to continue the mandate is automatically established as unreasonable. A number of arbitrators have made this point, and I agree with them. However, it should be recalled that the employer regarded the imposition of the Federal workplace mandate as a highly significant factor in its decision to impose a mandate in the first place.

> Taken together, they demonstrate a somewhat directionless management response to the evolution of the virus, vaccine science, and a high level of vaccination in the workforce, it said.

Ultimately, Arbitrator Glass concluded: "banning unvaccinated workers from the workplace after June 2022 did nothing for their safety and contributed nothing to the safety of the others working there…It was not a reasonable and proportionate workplace safety measure."

Comment

This decision is consistent with other emerging decisions which state that the efficacy of vaccine mandates after a certain point in time – be it the Spring of 2022 or the fall of 2022 or some later point – was negligible. Therefore, policies that required adherence to a two-dose vaccine regime after that point were no longer reasonable.

As with all mandatory vaccine cases, consideration must be given to the type of workplace and workers at issue. Here, the company was a package delivery business, and the vast majority of employees were employed as couriers. They spent most of their time outside and alone, apart from other workers of the company.

It is still an open question whether the reasoning of this decision would be applied to a health care setting or a workplace where employees have close contact with each other and clients/residents.

For more information, see *Teamsters Local Union No. 31 v Purolator Canada Inc.*, 2023 CanLII 120937 (CA LA).

F. ONTARIO COURT OF APPEAL RULES BILL 124 UNCONSTITUTIONAL

Erin Carr

On February 12, 2024, the Ontario Court of Appeal upheld the Ontario Superior Court's decision striking down the Ontario government's Bill 124. The Ontario Court of Appeal agreed that Bill 12 was unconstitutional, as it infringed collective bargaining rights.

Background

In June of 2019, the Ford government introduced the *Protecting a Sustainable Public Sector for Future Generations Act* (Bill 124), ostensibly for the purpose of reducing provincial debt. In reality, Bill 124 imposed a cap on total compensation increases at 1% over the course of three years, primarily for individuals working in the health care sector. The Ford government maintained the 1% cap even after the pandemic hit in March of 2020, when these same individuals were asked to work on the front lines.

On November 29, 2022, almost 3 years after Bill 124 received Royal Assent, Justice Koehnen of the Ontario Superior Court declared Bill 124 to be void and of no effect. In brief, the Ontario Superior Court held that a 1% cap on wage increases "exacerbates inequality by allowing the state to prevent employees from having a meaningful discussion about the [wage] issue. While the *Charter* may not protect outcomes, it should also not allow the state to predetermine outcomes." (2022 ONSC 6658, para 63)

The Ford government announced that it would be appealing the Ontario Superior Court's ruling the same day the decision was released.

Ford Government's Appeal Largely Dismissed

The Ontario Court of Appeal upheld Superior Court's decision. In a 2-1 ruling, the Ontario Court of Appeal found Bill 124 infringed the *Charter*-protected right of freedom of association for unionized public sector workers by interfering with their "right to participate in good faith negotiation and consultation over their working conditions." (para 5)

Writing for the majority, Justice Favreau stated Bill 124 was different than other wage restraint legislation that had survived constitutional challenges in the past, because of how broadly Bill 124 applied, and the lack of negotiations with unions prior to its passage:

> [T]here was no meaningful bargaining or consultation before the Act was passed, the Act significantly restricts the scope and areas left open for negotiation in the collective bargaining process, there is no meaningful mechanism for collective agreements to be exempted from the Act, and

> public sector collective agreements to which the Act does not apply generally provide for higher annual wage increases than 1%.

Justice Favreau also found that the limits imposed by Bill 124 could not be saved by section 1 of the *Charter*, which is the section that allows certain rights to be limited if those limits are proven to be reasonable in a free and democratic society. Bill 124 was not saved by section 1 because "[Bill 124] does not minimally impair the respondents' right to freedom of association, and because the Act's deleterious effects outweigh its benefits." (para 5)

The Ontario Court of Appeal's decision reinforces the fact that health care professionals are entitled to the same *Charter* rights as all other Canadians.

Following the release of the Court of Appeal's decision, the Ford government announced it would be taking steps to rescind the legislation.

The full decision is available for review: *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101.

Note: *The information contained in this Newsletter is not intended to constitute legal advice. If you have any questions concerning any particular fact situation, we invite you to contact one of our lawyers.*

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