



Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

**Editors**

Elizabeth Mitchell

Ursula Boylan

Ron Lebi

Telephone:

416-977-8353

TeleFax:

416-977-3316

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### **Replacement workers cannot get rid of union**

In an important decision, the Ontario Labour Relations Board has held that ballots cast by "replacement workers" should not count in determining an application to terminate a union's bargaining rights.

In *ResCare Premier*, employees represented by IWA Canada struck their employer in order to obtain a first collective agreement. A termination application supported by replacement workers was filed some months later. The Board held a "quick vote" and segregated the ballots cast by strikers and their replacements. The Board counted the ballots separately and found that an overwhelming majority of the strikers supported the union while a similar percentage of the replacements wanted the union out. In a "bottom line" decision (with reasons to follow), the Board ruled that the replacement workers were not eligible under the Act to participate in the termination application. As a result, the termination application was dismissed. And in a separate related proceeding, with the agreement of the union and employer, the Board then imposed a first collective agreement under section 43 of the Act (and, with it, an end to the strike).

### **Board issues "single employer" declaration despite 12-year hiatus**

Amendments to the *Labour Relations Act* made by Bill 69 in 2000 established criteria that the Ontario Labour Relations Board must (and must not) consider when dealing with "key person" type applications under the related employer and sale of a business provisions of the Act. Thus, under s. 126(3) of the Act the Board may not consider family relationships between individuals involved with the entities in question when deciding a related employer application in the construction industry. On the other hand, the Board *must* consider the length of hiatus when an individual was a key person with one entity and then becomes a key person with a second company.

In *AML Interiors Inc.*, the Board considered s. 126(3) for the very first time and concluded that its introduction did not represent a substantive change in the statute. More important, the Board

determined that the 12-year hiatus in this case should not cause the Board to deny relief under s.1(4) of the Act. The Board agreed that the hiatus period was long, but noted that it did not meaningfully affect the analysis of the facts. Indeed, the Board found that the case illustrated precisely the mischief that s.1(4) was designed to overcome.

On the other hand, the Board considered it appropriate to consider the hiatus period in fashioning a remedy. It determined that its "single employer" declaration should be made effective only with respect to work for which a bid was submitted on or after the date of the Board's decision.

### **Court clarifies unions' legal status**

The Ontario Court of Appeal has ruled that modern labour relations legislation implicitly gives trade unions the legal status to sue in the courts in their own names for the purpose of performing their role in the field of labour relations. But the situation may well be different for unions that are governed by Ontario's *Labour Relations Act* ("LRA"). The Court opined that section 3(2) of the *Rights of Labour Act* may create an anomalous result for unions governed by the LRA. And the Court suggested that the 50-year old *Rights of Labour Act* "be revisited for possible revision".

In the *PSAC* case, the Court held that several trade unions certified under the federal *Public Service Staff Relations Act* could, in their own names, challenge federal legislation which authorizes the federal government to deal as it wishes with surpluses in the pension plans covering federal government employees. It rejected the argument that s. 3(2) of the *Rights of Labour Act* prevents the federally certified unions from suing in their own names and it disagreed with a 25-year-old court decision that seemed to establish that very proposition. In reaching this result, the Court of Appeal relied heavily on the analysis contained in *Berry v. Pulley* - a Supreme Court of Canada decision described in the June 2002 issue of TALKING UNION. That decision recognized that the world of labour relations is governed by sophisticated statutory machinery that requires that unions have sufficient "legal personality" to play their role in that world.

Finally, the Court of Appeal ruled that, apart from the *Rights of Labour Act*, the trade unions had sufficient "private or special interest" to challenge the federal pension legislation. Even though the *Public Service Staff Relations Act* excludes the pension plan from the scope of subjects about which the unions are entitled to bargain, the Court found that challenging the legality of the pension changes in court came within the "core function" expected of unions in representing their members and their interests.

### **OLRB quashed again**

The Divisional Court has, once again, quashed a decision of the Ontario Labour Relations Board on the basis that it was

"unreasonable". In *Tenneco Canada Inc.*, a case decided under the *Employment Standards Act*, the Board was called upon to determine whether an employee who had resigned his employment had, in the circumstances, actually been constructively dismissed. If so, he was entitled to termination pay in the amount \$10,000.

It is an implied term in a contract of employment that an employer will not make a substantial change in the duties and status of an employee so as to constitute a fundamental breach of contract. Where that happens, however, an employee is entitled to quit, with the resignation being treated in law as if it were a wrongful dismissal by the employer. This is known as "constructive dismissal".

In the decision of the Board under review, an employee with 16 years' seniority was demoted to a lower paid, more physically demanding position. After 6 days, he found that the work on the new job aggravated a previous back injury and he quit. An employment standards officer found that he had been constructively dismissed and was, therefore, entitled to benefits under the *Employment Standards Act*. On appeal, the Labour Relations Board found that the employee had quit and that the Board did not, therefore, have to consider whether he had been constructively dismissed.

The Divisional Court found that the Board "misconstrued" the "real issue" in the case: whether the employee had been constructively dismissed or not. The Court went on to find that "the evidence in this case could lead only to one reasonable conclusion, namely that he was constructively dismissed." Having found the Board's conclusion to be unreasonable, the Court quashed the Board's decision and ordered that the employee be paid his entitlements under the *Employment Standards Act*.

### **Legislative update**

A number of statutory amendments described in the last issue of *TALKING UNION* have now been enacted by legislature. The so-called *Government Efficiency Act, 2002* (Bill 179) amended the Labour Relations Act by re-introducing a "limited strike" regime in the residential sector of the construction industry in the Greater Toronto Area for the 2004 round of collective bargaining. The Bill also made minor changes to the *Labour Relations Act* concerning salary disclosure rules for trade union officers and staff, and more substantial changes to the *Employment Standards Act* dealing with vacation pay, public holiday pay, and termination and severance pay. Bill 179 received Royal Assent and came into force on November 26, 2002.

The *Agricultural Employees Protection Act, 2002* (Bill 187), which gives farm workers the right to join an employee association - not a trade union - and which grants employee associations the right to make oral or written representations to - not bargain with - an employer, received Royal Assent on November 19, 2002.

### **Government retreats from pension amendments**

In the last issue of *TALKING UNION*, we reported on proposed amendments hidden in a Government omnibus bill (Bill 198) that would have re-written Ontario's pension surplus legislation at the expense of pensioners and employees. Following a timely decision from the Court of Appeal in the Monsanto case (in which the Court confirmed that employees are entitled to share in pension surpluses) and as a result of an intensive and effective public campaign that exposed the unfairness of these proposals, the Government was finally forced to withdraw its pension amendments in December.

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