



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

Telephone:  
416-977-8353

Ursula Boylan

TeleFax:  
416-977-3316

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## BOARD REMEDIES DEATH THREATS DURING ORGANIZING

The Board has released a decision following a multi-day hearing into serious unfair labour practices occurring during an organizing campaign, the first such decision since the law changed to prohibit automatic certification for truly egregious employer misconduct. Earlier Board decisions have granted remedies in such complaints but only where the employers have not attended the hearings. In *United Steelworkers v. Baron Metals* (not yet reported, released May 4, 2001), the Union had filed a S. 96 complaint and had applied for another representation vote under s. 11(1). Its decision is an important illustration of the scope of the Board's remedial jurisdiction.

In *Baron Metals*, the Board found that two days before the union applied for certification, the employer hired two "employees" well known within the Sri Lankan community as Tamil gang members with violent, criminal backgrounds. Both were found to have a direct link to management and to have little work responsibility. They threatened employees of Sri Lankan descent with physical harm, even death, for supporting the union. The employees who were threatened, believed the threats and were quite frightened. The Board found that, although only 12 of the 90 plant employees had been threatened, the intimidation and coercion of the Sri Lankan employees was sufficiently pervasive to have meaningfully affected the results of the vote.

The facts found by the Board were certainly of the kind which would have led to automatic certification prior to the 1998 removal of that remedy from the *LRA, 1995*. The Board recognized it must provide its strongest remedies to cure such egregious conduct. Accordingly, the Board ordered the following remedies:

- Employer to cease and desist from interfering with union activities.
- Employer to reimburse Union's organizing costs.
- Fresh representation vote to be held within 6 months of decision, date to be determined by the Union.

- Notices to employees to be posted, translated into Tamil and other relevant languages, and left posted until the next vote, and copies to be enclosed with paycheques.
- Union to hold meetings at the workplace on company time and with paid mandatory attendance by the employees, initially for one hour, and monthly for 30 minutes until the next vote.
- Employer to provide Union with a furnished office on company premises.
- Employer to provide Union with names, addresses and home phone numbers of all eligible employees within 5 days of the decision.
- Union permitted to hold 15 minute, one-on-one meetings with each new hire on paid time
- Union permitted to designate 3 representatives to act on its behalf on company premises and all employees entitled to meet with them on their own time, or with permission, on work time.
- Union may distribute leaflets throughout the workplace

immediately before the fresh representation vote.

- Union may require meetings with the Employer regarding any suspension or discharges until the fresh representation vote.
- Board recognized that damages for the breaches of the employees' statutory protections may be appropriate but required further submissions.

Although the Employer's interference here was appalling, the *Act* no longer permits the most effective cure for that conduct, automatic certification. However, the remedies that the Board did create may both permit the employees of *Baron* to vote freely in a fresh vote and send a message that the Board will impose intrusive measures if employers engage in misconduct during organizing campaigns. The most important remedy may yet be coming: should the Board award significant damages for breaches of individual statutory rights it will be providing an economic incentive to obey the law.

Needless to say, the Employer in *Baron Metals* is apparently appealing the decision.

## **UNIONS AND DISCRIMINATION: AN UPDATE**

The law of disability has recently undergone significant changes, led by the Supreme Court of Canada in decisions such as *Meorin*. To bring its policies in line with the changes, the Ontario Human Rights

Commission has released a new "Policy and Guidelines on Disability and the Duty to Accommodate" (available from the OHRC or online at <http://www.ohrc.on.ca>). The Policy indicates that the Commission will be taking a proactive approach to discrimination and accommodation in workplace matters and is essential reading for Unions.

As the SCC decision *Renaud*, [1992] 2 S.C.R. 970, made clear, discrimination in the workplace is an issue that Unions must be aware of and strive to prevent. While some forms of discrimination are relatively easy to identify (e.g., discipline based on gender or race), discrimination on the basis of disability and the obligations under the duty to accommodate are often harder to recognize and deal with properly. Unions may be liable for discrimination against bargaining unit members, even if acting in good faith but in a way which lacks sensitivity.

To highlight the importance of a thorough awareness of these issues, below we review two decisions of interest regarding the responsibilities of trade unions when dealing with disabled and vulnerable members.

In *Ferris v. OTEU, Loc. 15* [1999] B.C.H.R.T.D. No. 15, the B.C. Human Rights Tribunal found that the Union had discriminated against a bargaining unit member who was as a pre-operative transgendered woman on the basis of her sex and disability. A co-worker complained that "a man" was using a women's washroom and, eventually, the employee complained to the BC Human Rights Tribunal about how the Union handled that complaint. The Tribunal found that the Union mismanaged the

whole issue; it failed to advise the Complainant of the complaint, failed to inform her of a meeting, and generally failed to treat the issue with seriousness and respect. The Tribunal ultimately concluded that because the Union did not represent the Complainant in the manner that it would have any other employee, simply because she was transgendered, it had discriminated against her. The Tribunal ordered the Union to pay the Complainant damages for lost wages and a further \$5000 for injury to dignity, feelings and self-respect. This case illustrates that transgendered workers are particularly vulnerable to discrimination and harassment in the workplace and that Unions have a legal obligation to protect them, and to do so sensitively.

In *K.H v. CEP, Loc. 1-S* (1997) 98 CLLC 220-020, the Saskatchewan Labour Relations Board found that the Union failed to meet its duty of fair representation when it handled a grievance regarding a mentally ill member. The grievor was disciplined for a number of incidents including his use of loud and abusive language to co-workers, use of threatening behaviour, and unauthorized absences, all conduct related to his illness. The Board found that, although the grievance was processed by experienced and conscientious union representatives, and handled in exactly the same manner as other grievances were, the Union failed in its DFR as it did not take sufficient account of the grievor's disability by adopting a different

approach to the handling of his grievances. The Board concluded that this failure resulted in the Union discriminating against the grievor. Importantly, the Board noted that the Union should have questioned whether the normal progressive discipline was even applicable to an individual with a mental disability, and commented negatively upon the Union's acceptance of the employer's demand for a third party medical examination without considering the concerns of the grievor and his doctor. Clearly the duty to accommodate does not only arise in assessing appropriate discipline. Rather, awareness of the disability must inform and shape how a Union interacts with and represents its members.

### **Government Efficiencies Act, 2001**

Bill 57, the *Government Efficiencies Act, 2001* received first reading on May 17, 2001. This is the Harris Government's most recent omnibus Bill which, if passed, will make substantial revisions to many current pieces of legislation.

While it is interesting to note that Bill 57 proposes extensive changes to the *Employment Standards Act, 2000*, that Act is not yet in force (with the exception of the parental leave sections) and the new provisions will be reviewed in a future TALKING UNION when, and if, the *ESA 2000* is proclaimed in force.

The Bill does propose significant changes to the *Occupational Health and Safety Act* and the *Workplace Safety and Insurance Act, 1997* which may have significant impact upon Union members. Although not a complete list, the following changes are worthy of note:

#### **OHSA**

- Creates a new Part III.1 in the Act, allowing Ministerial approval of Codes of Practice created by employers or employer associations. In a prosecution for failure to comply with a regulatory requirement it will be a defence to show that whatever was done afforded protection equal to that in a Code of Practice – but the creation and approval of the Codes of Practice will not be subject to the same legal requirements as implementing Regulations. Additionally, failure to comply with a Code of Practice is not, in itself, a breach of the regulatory requirement.
- Allows the Minister of Labour to permit worker members on joint committees to designate workers who are not on the committee to conduct inspections and represent workers during work refusals.
- Repeals the current protection of requiring employers to notify the Director of Health and Safety when introducing new chemical or biological agents and give information about the ingredients of the new chemical. It also repeals the power of the Director to order an assessment of the agent where the Director is of the opinion that workers may be endangered by

the use of the new chemical agent.

- Repeals the requirement that employers maintain a publicly accessible inventory of hazardous substances in the workplace.
- Amends the Act to allow work refusal investigations to be made "in consultation with" rather than "in the presence of" the worker and the employer (i.e. on the phone).
- Amends the requirement that a copy of an investigator's report be posted in the workplace and given to the OHS Committee and the complaining worker. Now a worker must request the report.

#### WSIA, 1997

- Removes the two year limitation period for prosecutions of Claimants in respect of s. 149 offences, including allegations of false or misleading statements.
- Creates a two year limitation period for all prosecutions of Employers under the Act, except for offences under s. 149 including making false or misleading statements.
- Makes it an offence for an employer to fail to keep records of wages paid to employees.

#### What's New

- Mega-Tribunal Still on Hold

The Mega-Tribunal proposal "Looking Forward: A New Tribunal for Ontario's Workplaces" was released on February 27, 2001 (See Talking Union Special Edition, March 2001). If you have concerns (which you should) about the disbanding of the Ontario Labour Relations Board (OLRB), the Pay Equity Hearings Tribunal (PEHT), the Workplace Safety and Insurance Appeals Tribunal (WSIAT), the Education Relations Commission (ERC), the College Relations Commission (CRC), and the Board of Inquiry (BOI) under the *Human Rights Code*, and the creation of a new Unified Work Tribunal **you should make your views known now!** Submissions should be sent to:

The Honourable Chris Stockwell  
Minister of Labour  
Attention: Workplace-Related Agency Reform Project  
400 University Avenue, 14<sup>th</sup> Floor  
Toronto, Ontario M7A 1T7  
[arp@mol.gov.on.ca](mailto:arp@mol.gov.on.ca)

- **Victory at Federal Court of Appeal**

Our Larry Steinberg was successful in an appeal to the FCA in the *CTEA, CEP and Femmes Action v. Bell Canada* pay equity case currently before the Canadian Human Rights Tribunal. In April 1999, the Tribunal rejected Bell's argument that the Tribunal was institutionally biased and lacked independence, and denied that the continuation at the proceedings breached the principles of natural justice. Bell was successful on judicial review and all further proceedings in the matter were prohibited until the problems identified by the motions judge were corrected. The CTEA and CEP successfully appealed and the Court's decision was overturned. The Tribunal hearing will now resume and the seven complaints filed against Bell between 1990 and 1994 will continue the long road to justice.

- **At the OLRB**

**Mary Anne McKellar**, has been appointed a Vice-Chair at the Board. **Brian McLean** and **Harry Freedman** have been re-appointed for further three year terms as full time Vice-Chairs.

**Marilyn Nairn** and **Russell Goodfellow**, who have been Vice-Chairs for 12 years and 8 years, respectively, have not had their appointments renewed. Both Ms. Nairn and Mr. Goodfellow had considerable experience in labour relations adjudication, and their professionalism and expertise will be sorely missed.

Do you want your issues of *TALKING UNION* by e-mail? Do you have an issue you would like discussed in *TALKING UNION*? Do you have additions or corrections to our mailing list? If so, please contact the Editors.