



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

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WSIB CHANGES REPORTING POLICY

The Workplace Safety and Insurance Board (WSIB) has introduced new rules for the reporting of workplace accidents. This new policy limits employers' reporting obligations and may also adversely affect workplace safety and certain compensation claims.

The new policy, "Employers' Initial Accident-reporting Obligations" (OPM 15-01-02) applies to all accidents occurring on or after March 1, 2000.

Under the new rules, an employer is only required to report an accident where "health care" is administered by a health-care practitioner and/or there is an absence from regular work, reduction of pay for regular work, modified work at reduced pay or modified work at regular pay for more than seven calendar days. Employers need not report where the accident merely requires "first aid", or where the treatment is by a co-worker or manager.

Second, where exposure to infectious disease occurs or is suspected, the employer need not report the incident if a health-care practitioner only tests and monitors the worker or where the results of testing are negative, until some type of treatment is provided.

Third, the employer is only required to report an accident which requires modified work for more than seven days or results in decreased pay.

The new policy is problematic for workers. Many accidents initially appear minor but contribute to serious consequences in future. Since employers need not report accidents where health care is not required, or where modified work is only provided for a few days, many claims may go unreported and uncompensated. Further, the new rules may provide employers with an incentive to give only first aid and to discourage medical treatment, since their obligation to report only arises when "health care" is provided. Also, since employers who monitor are required to report all positive tests, some employers may choose not to monitor at all, in order to minimize claims.

As a result, workers should not rely on their employers to report accidents. If involved in an accident, workers may wish to seek immediate outside medical attention and ensure that the incident is reported by the doctor by way of a Form 8, or by completing his or her own Form 6.

SCC UPHOLDS THE OLRB IN TOWN OF AJAX v. CAW

The Supreme Court of Canada has issued its decision in Ajax (Town) v. National Automobile, Aerospace and Agricultural Workers (CAW-Canada), Local 222, upholding the decision initially made by the Ontario Labour Relations Board that a sale of business had occurred when the Town began operating its bus service with the same employees who had formerly operated it through a service contractor. (See [2000] S.C.J. No. 23)

The SCC noted that the facts were not in dispute. The bus service, although owned by the Town of Ajax, was operated by Charterways Transportation. In 1992, the Town decided to operate the service directly and cancelled its contract with Charterways. The drivers employed by Charterways, and represented by the CAW, were laid off. Subsequently, the Town hired a significant number of them back as drivers, although the service then ran without regard to the Union's bargaining rights.

The Union successfully argued before the OLRB that there had been a sale of a business from Charterways to the Town; the Town acquired an essential element of the business when it hired the drivers, who made up the substantial part of its workforce. (See [1994] OLRB Rep. Oct. 1296.) The Town then successfully applied to the Divisional Court for a review of the Board's decision ((1995), 84 O.A.C. 281 and 95 C.L.L.C. para 210-040.). On the Union's application to the Ontario Court of Appeal, the OCA found that the Board's conclusions were not "patently unreasonable" reversed the Divisional Court's decision and restored the Board's order ((1998), 41 O.R. (3d) 426).

The judges of the SCC were not unanimous in agreeing with the OCA and the Board. Three of the nine judges supported a dissenting opinion which emphasized that there was no nexus between the operations of the Town and those of Charterways; the dissenting judges would have held that it was "patently unreasonable" for the Board to find that the hiring of Charterways' former employees was an "essential element" of the business so that the sale of the business provision could apply. Fortunately, however, the majority of the Court held in favour of the Board's view. The majority issued only brief reasons, relying for the facts and arguments on the decision of Goudge, J.A. in the Court of Appeal's decision. The majority reiterated that the test on judicial review is whether the decision at issue was "patently unreasonable", as opposed to "correct", and determined that it was not patently unreasonable for the Board to decide as it had.

DUNMORE TO GO TO SCC:

The Supreme Court of Canada has granted leave to appeal in

Dunmore v. Ontario (Attorney General), [1999] S.C.C.A. No. 196 (S.C.C.). The case began in 1995 when the provisions giving agricultural workers the right to unionize was removed from Labour Relations Act. The applicant employees were bargaining for a first collective agreement when their right to bargain collectively was repealed. They challenged that repeal in court, claiming violations of their Charter rights to freedom of association (ss.2(d)) and freedom from discrimination (s. 15).

The application was dismissed at the Ontario Court, General Division ((1998), 155 D.L.R. (4th) 193). Justice Sharpe held that the Charter did not require positive government action to facilitate either the formation of associations or collective bargaining. He found that the repeal did not deny agricultural workers the right to form associations and that the disadvantage they may be suffering resulted from their employer's exercise of a private power, which was not reviewable under the Charter. Finally, the Court held that agricultural workers are not a historically disadvantaged group deserving of s.15 protection. The Ontario Court of Appeal agreed with the lower court (1999), 182 D.L.R. (4th) 471 (Ont. C.A.).

The SCC does not grant leave to appeal easily. The issues in Dunmore are similar to those raised in Delisle v. Canada (Deputy Attorney General, [1999] 2 S.C.R. 989. In Delisle, the majority of the SCC held that the Charter's guarantee of freedom of association does not guarantee a right to establish a particular type of association. Accordingly, the majority determined that although under the Public Service Staff Relations Act and the Canada Labour Code the RCMP are prohibited from joining or forming trade unions, that legislation does not offend the Charter; rather, their right was protected since the PSSRA expressly permitted the RCMP to form employee associations. In considering Dunmore, one obvious question will be whether the repeal of the agricultural workers' right to unionize under the LRA, 1995 is balanced by any alternative rights in other legislation respecting their freedom to associate. The fact that the SCC granted leave to Dunmore at all clearly indicates that Court has more to say on the meaning of freedom of association vis a vis trade union representation.

WHAT'S NEW

At the SCC:

Expanded definition of "Handicapped": The SCC has released a decision broadly defining "handicapped" under the Quebec human rights code to include no discrimination because of an individual's above average risk of future illness or disability. To be reviewed in the next issue of TALKING UNION.

At the Ontario Legislature:

Bill 69: The government has proposed amendments to the construction provisions of the Labour Relations Act, 1995, in Labour Relations Amendment Act (Construction Industry) 2000. Bill 69 is summarized in "TALKING UNION - SPECIAL EDITION", enclosed.

At the OLRB:

New Vice Chair: Stephen C. Raymond, formerly a lawyer practising at Hicks, Morley, Hamilton, Stewart, Storie, has been appointed as a Vice-Chair.

At Koskie Minsky:

New Pension Lawyer: Koskie Minsky is pleased to welcome Wayland C.W. Chau, a new lawyer in the Pension Department. Mr. Chau comes to us with extensive experience in the area of pensions, retirement compensation, and tax, gained from his work with Price Waterhouse, the CIBC, and elsewhere.

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