



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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Supreme Court embraces broad interpretation of Human Rights Code

The Supreme Court of Canada has endorsed a broad meaning for "marital" and "family" status in human rights legislation.

In *B. v. Ontario Human Rights Commission, Mr. A.* was dismissed from his job after his wife and daughter accused his employer of having sexually molested the daughter when she was a young child. Mr. A. claimed that his termination constituted unlawful employment discrimination on the basis of marital and family status. In separate judgments, the Supreme Court of Canada unanimously agreed.

The majority held that the enumerated grounds of marital and family status set out in s.5(1) of the Ontario *Human Rights Code* are broad enough to encompass circumstances where the discrimination results from the particular identity of the complainant's spouse or family member. In its view, "the proper inquiry is not whether the [complainant] belongs to an identifiable group, but whether he was arbitrarily disadvantaged on the basis of his marital or family status." So even if Mr. A.'s dismissal was based on personal animosity, that animosity resulted solely because of his marital and family affiliations. The majority wrote that the employer's automatic attribution of the wife and daughter's behaviour to Mr. A. reflected stereotypical assumptions about Mr. A. that had nothing to do with his individual merit or capabilities. This, they wrote, was precisely the type of conduct that the Code aims to prevent.

In a two-sentence judgment, the minority agreed with the result reached by the majority, but reserved for another day the more general question of the precise meaning of discrimination on the basis of family status.

Labour Board quashed in Court ...twice

Decisions of the Ontario Labour Relations Board are protected by two strong privative clauses. They are not subject to appeal and may only be reviewed in court when they are found to be "patently unreasonable". This happens rarely - on average, once every two or three years. But in separate proceedings this fall, the Divisional Court

concluded that two recent decisions of the Board were indeed "patently unreasonable" and it quashed them both.

In *OPSEU v. City of Owen Sound*, OPSEU sought successor rights after the City of Owen Sound secured a contract to provide ambulance services and had hired most of the paramedics employed by former ambulance operators. The City resisted OPSEU's application and said that it planned to integrate paramedics and firefighters to form a broader "firemedic" service. The Board "deemed" paramedics to be firefighters to allow the City to implement its integration plan and it adjourned the application for 18 months. The Divisional Court found the Board's decision to be "internally inconsistent" and, as noted, patently unreasonable. It directed that the case be reheard in its entirety by a different panel of the Board.

In *CUPE Local 5167 v. City of Hamilton*, OPSEU applied to represent a bargaining unit of paramedics following downloading and restructuring of ambulance services in Hamilton. The Board found that the collective agreement between CUPE and the City of Hamilton did not cover paramedical employees. It ruled that OPSEU's application to represent those employees was therefore timely. On review, the Divisional Court held that the Board's approach to interpreting the collective agreement was patently unreasonable and that its interpretation of the collective agreement's scope clause was "clearly irrational". Perhaps surprisingly, the Court observed that the Board was improperly influenced by what it called the "general issue to be resolved by the certification application, namely 'whether workers who wish to be represented by a trade union of their choice may properly do so'." CUPE's judicial review application was allowed and the Board's decision was set aside.

Labour Board enforces inter-union "peace treaty"

The Ontario Labour Relations Board has, for the first time, given effect to an inter-union "peace treaty" by dismissing certification and termination applications brought by the CAW in violation of such a "treaty".

In the *National Grocers* case, the CAW sought to displace UFCW Local 1000A as bargaining agent for a 600 person bargaining unit. In response, Local 1000A filed a complaint under s. 96(7) of the Act. It relied on a settlement involving Local 1000A and a predecessor to CAW that resolved several earlier Board proceedings. Under that settlement, each union agreed to "respect the bargaining rights" of the other "whether acquired by certification or by voluntary recognition".

The Board determined that CAW was bound to the settlement, that CAW had breached that settlement by bringing the certification and termination applications and, finally, that the Board should enforce the settlement by dismissing both CAW applications. The Board noted the competing policy considerations at play in the case and concluded that the balance weighed in favour of enforcing the parties' settlement.

Pension surplus grab hurts employees and pensioners

Hidden in an omnibus budget bill (Bill 198), the Provincial Government has proposed a dramatic rewriting of Ontario's pension surplus legislation at the expense of pensioners and employees.

The current pensions legislation encourages the sharing of surpluses in pension plans between employees and employers so that no employer can have access to surplus without entering into an appropriate sharing agreement with its employees. Bill 198 would wipe out existing protections so that:

- employers can automatically apply for their share of surplus on a total or partial plan termination based on criteria to be set in regulations of the Minister that are secret and have yet to be published
- any trust document, statute or "rule of law" that conflicts with the secret "prescribed" rules that the Minister has yet to make public will have no value
- previous rights of appeal to the Courts by employees and pensioners have been repealed.

There are no protections in Bill 198 to deal with losses of the value of pensions due to inflation, protections for employees of insolvent employers or provisions which encourage resolution of pension disputes. Indeed, there are thousands of employees and hundreds of pension plans in Ontario that will be negatively affected if Bill 198 is enacted. Nevertheless, the Government has announced that it intends to pass Bill 198 before the end of the year.

Province re-introduces "limited strike" regime for residential construction in GTA

In 2000, the Provincial Government amended the *Labour Relations Act* to limit strikes and lock-outs in the residential sector of the construction industry in the GTA for the 2001 round of collective bargaining. Under those amendments - which were automatically repealed last spring - no strike or lock-out could continue beyond June 15, 2001. Thereafter, disputes would be resolved by arbitration. In September of this year, the government tabled Bill 179 which reintroduced the limited strike regime for the 2004 round of bargaining only. Once again, these special rules will apply only to the residential sector of the construction industry and only in the Greater Toronto Area. It is anticipated that Bill 179 will be enacted before the end of the year.

Agricultural workers' bill disappoints

The provincial Government has introduced the *Agricultural Employees Protection Act, 2002* (Bill 187) in response to last year's Supreme Court of Canada decision in *Dunmore v. Ontario*.

Those who expected that the *Dunmore* judgment might usher in a

new era of significant rights for farm workers will be profoundly disappointed. The *Agricultural Employees Protection Act* would protect the rights of agricultural employees to form and join an employee association - not a trade union. And it would also guarantee employee associations a "reasonable opportunity" to make "representations", rather than any right to engage in collective bargaining. Under the Act, farm employers would be obliged only to "listen to the representations if made orally, or read them if made in writing". Furthermore, complaints under the Act would be heard, not by the Labour Relations Board, but by the Agricultural, Food and Rural Affairs Tribunal (formerly known as the Farm Products Appeal Tribunal). The Tribunal's mandate currently includes hearing cases under the *Crop Insurance Act*, *the Drainage Act* and other statutes.

WHAT'S NEW

AT KOSKIE MINSKY:

New Lawyer: Our former articling student, Robyn Matlin, has joined KM. She can be reached at (416) 595-2081.

AT THE OLRB:

Jurisdictional Disputes: The OLRB has issued new forms, notices and rules, as well as a new Information Bulletin No. 25 regarding Jurisdictional Disputes in the Construction Industry. These are available from the Board and its website:
www.gov.on.ca/lab/olrb/home.htm.

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: tel: 416 595 2148; e-mail: rlebi@koskieminsky.com.