



Highest Court rules on absence due to illness

In a Judgment released on January 26, 2007 (*McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4) the Supreme Court of Canada has clarified the law with respect to the duty to accommodate ill employees.

The employee in that case was provided a three year period of absence due to sickness, as was required by the collective agreement. The employer also granted additional rehabilitation time over and above the three year absence.

When the employee was about to return to work she got in a car accident. It was not clear when she could return. The employer terminated her at that point. An arbitrator approved the termination. The Supreme Court of Canada upheld the arbitration decision. In so doing, the Court expounded on the extent to which employers must accommodate a disabled employee's absence from work.

The majority of the Court held that the employers and unions are entitled to agree on sick leave period. Employers, however, cannot merely apply this provision automatically, but must examine the circumstances in each indi-

vidual case. The duty to accommodate may require more time in the circumstances.

On the facts of the case, the majority ruled that the arbitrator correctly concluded that the employer need not continue to employ someone who had been declared to be disabled for an indeterminate period. According to the majority, it is incumbent on the employee to provide evidence that the accommodation provided for in the collective agreement is insufficient and that the employee would be able to return to work within a reasonable period of time.

This case is significant for two reasons. First, it is now clear that the employer cannot simply rely on the sick leave period negotiated with the union, though certainly compliance with the sick leave provisions of a collective agreement should supply strong evidence of accommodation. Second, employees cannot expect to be accommodated for an indeterminate period of time. Every case is different. The degree of accommodation due to any individual ill employee must be evaluated based on the circumstances and in consultation with legal counsel.

Labour, Employment and Administrative Law Group

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Proposed law would ban replacement workers under Federal jurisdiction

The ability of employers under federal jurisdiction to operate during a strike may be significantly diminished if Bill C-257 is approved by Parliament. The proposed law would apply to unionized employers covered by the *Canada Labour Code*. This includes most federal Crown corporations and federal undertakings or businesses that involve activities such as air transportation; railways; inter-provincial/cross-border road transportation; banks; broadcasting; telephone; grain elevators; uranium mining and processing; and many First Nations activities.

The Bill, sponsored by the Bloc Québécois, would prohibit these employers from hiring replacement employees or contract workers to do the bargaining unit work of striking or locked out employees. Significantly, the Bill would also prohibit employers from redeploying non-bargaining unit employees (potentially including managers) to do bargaining unit work of striking or locked out employees.

“... Bill C-257 would make it significantly difficult for an employer under federal jurisdiction to continue with operations during a strike or lock out...”

In other words, Bill C-257 would make it significantly difficult for an employer under federal jurisdiction to continue with operations during a strike or lock out. While Bill C-257 will not apply directly to employers under provincial jurisdiction, the effect of the proposed law could be felt by all businesses that have a federal jurisdiction employer in their supply chain. Should the Bill become law, a strike in a federally regulated organization will undoubtedly have economic and practical consequences for everyone that does business with the organization.

Bill C-257 passed second reading in the House of Commons in October. It is currently before the Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities, which is holding hearings into the proposed law.

To date a number of prominent business organizations and employers have lined up against the Bill, including Bell Canada, the Canadian Association of Broadcasters, Canada Post, the Canadian Federation of Independent Business, along with representatives of the transportation and manufacturing sectors, as well as bankers.

However, unless there is a significant change in the support for Bill C-257 at third reading, the Bill will become law. Employers under federal jurisdiction would therefore be well-advised to consult with their legal counsel about their rights should a strike or lock out arise.

Certification of pension class proceedings upheld

The British Columbia Court of Appeal has upheld the certification of a class action of former public service employees who claim to have been promised post-retirement benefits from the Government of British Columbia (*Bennett v. British Columbia*, 2007 BCCA 5).

It is noteworthy that some of the public servants involved in the case were not directly employed by the Government. They were, however, contributors to a pension plan controlled by the Government. The Court held that those former public servants who were not direct employees of the Province could pursue a claim for breach of fiduciary duty against the Province.

It is also noteworthy that the B.C. Court of Appeal rejected the Province’s argument that the complaints of former unionized public servants ought to have been addressed through labour arbitration and not the courts. The Court ruled that a class action is the preferable process for both the former union and non-union public servants in that case.

The case follows on the heels of the recent certification of a class action against the Government of Saskatchewan where former public servants are alleging the Government breached contractual or fiduciary duties owing to members of the Public Service Superannuation Plan. These cases indicate that the courts are becoming increasingly comfortable with class action proceedings as an effective means of litigating pension and benefits disputes, even in unionized settings.

Labour Board disapproves of employer's approach to bargaining

The Saskatchewan Labour Relations Board recently issued a scolding decision (*United Food and Commercial Workers, Local 1400 v. Impact Security Group Inc. and Invicta Group Inc.*, LRB File No. 081-06) in which the employer was rebuked by the Board for its manner of bargaining with the union and for its refusal to disclose relevant information to the union.

The employer had attributed the poor state of negotiations to the negotiating tactics of the union's bargaining representative. The Board, however, found that it was the employer who had failed to bargain in good faith. In reaching this finding, the Board commented on the requirements of the duty to negotiate in good faith.

The Board stated that while the duty to negotiate in good faith does not compel the parties to reach an agreement, it does require the employer and the union to make every reasonable effort to engage in full and rational discussion.

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This duty creates an obligation on the employer to disclose information to the union where it is needed for the parties to engage in an informed discussion.

For instance, disclosure of information may be relevant and necessary to help the union understand the existing terms and conditions of employment or any proposals by the employer.

The Board gave a number of examples of bad faith bargaining by the employer. For instance, the Board pointed to the employer's refusal to disclose the names, addresses, and telephone numbers of all current employees in the bargaining units; the occupational classification, wage rate and date of hire of each employee; and any wage progressions currently in place.

The Board ordered this information to be disclosed together with “any other information relevant to the terms and conditions of employment of the employees”. The Board also noted that the employer had threatened in bargaining to close the business, fire the employees and contract out work. The Board further criticized the employer for sending a representative to a bargaining meeting who had no authority to bind the employer.

Lastly, the Board considered it bad faith bargaining for the employer to refuse to bargain with the representative put forth by the union. The Board commented that the employer has no right to dictate who it bargains with from the union.

This case also addressed the issue of an employer's obligation to have new employees sign union cards. The Board clarified that while the large majority of employers provide new employees with the union's application for membership and return completed cards to the union, the employer is not obligated to do so. If, however, the employer opts not to do so, the employer has to provide the union with the names and contact information for new employees.

Northern exemption review

The Report on the Northern Exemption Review was released to the public in February, 2007. The purpose of the Report was to explore whether or not the northern overtime exemption for workplaces north of Township 62 in Saskatchewan should be repealed.

The Report, authored by a Regina Northeast M.L.A., concludes that the exemption should be removed as soon as possible, subject to some exceptions. The recommendations of the Report are currently being considered by the Provincial Cabinet. A copy of the Report can be obtained at:

www.labour.gov.sk.ca/northern-overtime-exemption/Northern-Overtime-Exemption-Report.pdf

End to mandatory retirement

On November 6, 2006, Justice Minister Frank Quennel introduced Bill 9, *The Saskatchewan Human Rights Code Amendment Act, 2006* (“Bill 9”). The purpose of Bill 9 is to end mandatory retirement in the Province of Saskatchewan. The effect of the Bill will be to make it unlawful discrimination to compel employees to retire at a certain age, subject to very rare exceptions.

Bill 9 is not yet law. It has currently only passed first reading. However, as it is a government bill, there is a reasonable prospect that the Bill, or a variant thereof, will be passed into law some point after the current session of the Legislative Assembly resumes in March. Bill 9 provides that the changes will not come into force until one year after the Bill receives Royal Assent.

This is intended as a transition period to allow employers to modify their policies or to negotiate the necessary changes to applicable employment and collective bargaining agreements. The transition period is necessary. For employers that currently have a mandatory retirement policy, there will be a number of implications that must be considered to ensure compliance when this new law comes into force.

For employers that offer pension, disability, and other group benefits, it will be important for them to consult with their insurance providers, actuarial and financial advisors and legal counsel concerning the proposed changes to the law. Both the pension plan and the benefit policy will need to be reviewed to determine whether or not coverage can be extended beyond the former retirement date.

Bill 9 will undoubtedly result in more demands for accommodation in respect to age-related illnesses, disabilities, and other realities of aging. An employer’s responsibility in this regard only ends when the accommodation sought would result in undue hardship.

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Bill 9 will also have very significant implications for employers who have been using mandatory retirement as a substitute for properly evaluating and enforcing performance by employees. If such employers decide to revisit their performance evaluation processes as a result of Bill 9, care must be taken to avoid discriminating against aged employees in gauging performance.

Employers may also wish to consider encouraging retirement by making early retirement packages, phased retirement, or part time opportunities available to employees.

Given the significant impact that Bill 9 will have on workplaces with mandatory retirement, it is recommended that employers meet with their legal advisors once Bill 9 is passed by the Legislative Assembly.



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