LABOUR & EMPLOYMENT

NEWSLETTER
March 26, 2010

SHOULD FOREIGN WORKERS BE ALLOWED TO BARGAIN THEIR OWN COLLECTIVE AGREEMENT?

As practitioners in the human resources field dealing with what the law and best practices are now, it is important that we take our eyes off the rear-view mirror and look at the road ahead of us.

The B.C. Labour Relations Board ("LRB") reminded us of this in a recent decision involving an application by a group of foreign workers to create their own bargaining unit. In any application for certification, one issue is the appropriateness of the bargaining unit the union is seeking to represent. Bargaining units can be quite varied and there are only limited grounds upon which an employer can object to the proposed bargaining unit. Unions represent employees in bargaining units consisting of one location, one department, and even a single job classification.

> *In a recent decision, the UFCW, Local 1518 applied to represent foreign employees working for a nursery under the Seasonal Agricultural Workers Program*

One long standing LRB rule was that the same employees doing the same job at the same location must all be in one bargaining unit. That is, a bargaining unit should not cut across a job classification so that a union is representing some but not all of the employees who do the same job at that location. This is an important rule for the viability of collective bargaining and the stability of labour relations.

In a recent decision, the UFCW, Local 1518 applied to represent foreign employees working for a nursery under the Seasonal Agricultural Workers Program ("SAWP"). The SAWP employees performed the same jobs as domestic workers at the same location and there was little difference in the duties. Applying the long standing rule, the LRB Vice-Chair dismissed the UFCW application and ruled that the bargaining unit was inappropriate as it cut across classification lines at a single location. This decision was overturned on reconsideration and returned to the original Vice-Chair.

In the re-consideration decision, the Vice-Chair held that despite the common duties, the terms and conditions under which the SAWP employees were employed were "markedly different" from those of the domestic employees and that a "distinct community of interest" existed amongst the SAWP workers rooted in their employment status and the unique aspects of their terms and conditions of employment. He allowed the UFCW's application to certify the group of foreign workers.

The differences in employment that created this different community of interest included the fact that (1) SAWP employees were limited to an 8 month maximum employment term, (2) laid off SAWP employees had no ongoing employment relationship with the employer, (3) SAWP workers were in Canada temporarily without their families creating unique housing, transportation, and other issues, and (4) SAWP employees could not transfer employment without the consent of the transferring employer in most circumstances. SAWP employees could not get second jobs to supplement their income. They could not quit and move to work in other industries. The Vice-Chair found that SAWP employees were much more motivated to get as many hours as possible during their limited employment term. The employer offered housing to all employees and in practical terms the SAWP employees were compelled to use that accommodation. SAWP employees also had special issues related to medical insurance and access to medical services given their circumstances.

Interestingly, the fact these employees were employed in what may be a traditionally difficult sector to organize, was not a factor in deciding to approve the bargaining unit. The LRB allowed the application but limited the scope of the bargaining unit. The UFCW was not permitted to negotiate work jurisdiction issues with the employer. This

was the LRB's way of addressing the potential industrial stability where union and non-union employees would be competing for the same work.

The LRB also made it clear that although this bargaining unit effectively cut across classification lines, the principle that bargaining units should not cut across classification lines was still an important one and that exceptions would be rare and unusual.

As lawyers, we are often advising you on the current state of the law. The current state of the law is based on legislation and existing Court and tribunal decisions. It is our responsibility to ensure that we are advising you on where the law might be going so that you can act accordingly. Although this LRB decision is of limited application to most employers, it illustrates the importance of continuing to look out the front window of the car so we can see where we are going.

The content of this Newsletter is intended to provide information on Bull, Housser & Tupper LLP, our lawyers and recent developments in the law. The information contained herein is summary in nature, and does not constitute legal advice. For additional details or advice concerning specific situations please contact any member of our Labour & Employment Group.

If you have any questions, please contact any member of our Labour & Employment Group.

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