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Employment Update

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"[T]he Supreme Court of Canada has confirmed the right of employees of the Royal Canadian Mounted Police ('RCMP') to organize."

RCMP EMPLOYEES NOW HAVE RIGHT TO ORGANIZE

Elizabeth J. Forster

In a landmark decision issued in January, the Supreme Court of Canada has confirmed the right of employees of the Royal Canadian Mounted Police ("RCMP") to organize.

The RCMP had previously not been allowed to unionize. Rather, labour relations were dealt with by a Staff Relations Representation Program. The Program provided for consultation between members' representatives and management regarding labour relations issues but management retained the ultimate authority to make all decisions in connection with the workplace.

In its reasons, the Supreme Court held that the legislation imposing the Program on RCMP employees violated the employees' right to freedom of association; a right which is guaranteed under the *Charter of Rights and Freedoms*. In reaching this decision, the Supreme Court has further developed the right to freedom of association guaranteed under the *Charter*.

Historically, collective bargaining was not recognized as a right protected by the *Charter*. That changed in 2007 when for the first time the Supreme Court elaborated on the extent to which collective bargaining is protected under the right to freedom of association.

The Supreme Court pointed out that it was not mandating any particular form of collective bargaining but that any form of collective bargaining must involve a "meaningful process" to pursue workplace goals. To be "meaningful," collective bargaining must provide employees with a degree of choice and independence "sufficient to enable them to determine their collective interests and meaningfully pursue them."

Giving employees "a degree a choice" includes:

(i) giving employees an opportunity to have effective input into the selection of their collective goals;

(ii) the ability to form and join new associations, change representatives, set and change collective workplace goals and dissolve existing associations; and

(iii) accountability to members of the association.

Finally, the Supreme Court held that associations must be independent of management.

Since the Program was imposed by statute and RCMP members neither selected the program

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"... an employment contract (including a verbal contract) contains an implied term that, absent just cause, employees are entitled to reasonable notice of the termination of their employment."

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nor controlled the representatives, the Supreme Court held that the program was not consistent with the guaranteed right of freedom of association.

The declaration of invalidity does not take effect for one year to give the government time to pass new legislation. We suspect that it will not be long thereafter that unions attempt to organize the employees of the RCMP. ■

THE FOUR TOP WAYS FOR EMPLOYERS TO AVOID LIABILITY TO EMPLOYEES FOR DISABILITY BENEFITS

Elizabeth J. Forster

One of the most difficult issues faced by employers when terminating employees is how to deal with benefit coverage during the severance period.

Unless there is a written contract of employment that provides otherwise, an employment contract (including a verbal contract) contains an implied term that, absent just cause, employees are entitled to reasonable notice of the termination of their employment.

Most employers provide an employee with a severance package which provides pay in lieu of reasonable notice rather than allowing an employee to work through the reasonable notice period.

In order for a severance package to comply with the common law requirement for reasonable pay in lieu of notice, all compensation and benefits should be continued during the reasonable notice period. Deductions can be made for any earnings the employee has through alternative employment during this period.

Most severance packages are structured in a way that does not comply precisely with this common law requirement because of restrictions in the employer's group benefit plans.

As benefits are generally provided through group insurance policies, it is important for employers to be aware of the terms of the group policies to ensure that coverage can be provided during the reasonable notice period. There is usually no problem continuing benefit coverage during the statutory notice period in Ontario where employment standards legislation deems employees to be actively employed during the statutory notice period. However, once the statutory notice period expires eligibility for benefit coverage is based solely on the terms of the group insurance policy. However, employers usually encounter difficulty in providing long-term disability coverage to their employees during the reasonable notice period as most long-term disability policies provide that coverage is only available to "active" employees of the company.

This leaves an employer exposed to liability in the event that an employee becomes disabled during the reasonable notice period. As a general rule, the courts have held that an employer is liable for all damages an employee suffers because of an employer's failure to provide the employee with reasonable working notice.

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"The employer may be liable to pay disability benefits to the employee until they reach age 65 or 70 depending on the terms of the group insurance policy and the length of disability."

Thus, the employee's argument is that had they been given reasonable notice, they would have been covered under the firm's group disability policy at the time their disability occurred. If no coverage was available, the employer is often found liable to the employee for all disability benefits the employee would have recovered from the insurance company had the policy been in effect. The cost to the employer can be extremely high especially in cases of young employees who are permanently disabled. The employer may be liable to pay disability benefits to the employee until they reach age 65 or 70 depending on the terms of the group insurance policy and the length of disability.

This exposure to liability has caused considerable problems for employers in structuring severance packages. Employers always hope that they will be able to settle the terms of severance with their employees and in return receive a full and final release which would absolve them from any further liability to the employer. But if this is not the case, employers remain exposed to liability.

In 2000, the Court issued a decision which disagreed with this approach. In the decision of *Pioro v. Calian Technology Services Ltd.*, an employee sued his employer for wrongful dismissal. He also sued for lost disability benefits when he became disabled during the reasonable notice period. The court granted his claim for damages for wrongful dismissal. However, the court denied his claim for long-term disability benefits during the notice period. The court held that the employee handbook indicated that LTD coverage was not available when you cease to be a full-time employee. Normally language like this is interpreted in favour of the employee based on the argument that had they been given reasonable notice they would still be a full-time employee and thus eligible for coverage. However, the court in this case said that the policy was "consistent with industry standards similar to many in the industry." Further, the court found that even if the employer had given the employee reasonable notice he would have been sent home because there was no available work and thus he would not have been actively employed during the notice period.

While to some this may seem like a common sense approach to the issue of disability benefits during termination, the case has never been followed in Ontario. Accordingly, employers must still be concerned with this issue and the potential for liability. The following are suggestions on how to minimize liability:

1. Make it clear in all offers of employment and employee handbooks that disability coverage will not be provided to employees beyond the statutory notice period unless the applicable group insurance policy allows for coverage beyond that time.
2. Provide employees with written employment contracts which clearly set out that upon termination of employment, benefits will only be continued during the statutory notice period unless you have the written permission of the insurance company to continue benefits beyond this period.

"... the Court recognizes that some employees may indeed perform services which are so essential that their ability to stop work must be curtailed."

3. Purchase a group disability policy that has a conversion privilege which allows an employee the opportunity to convert their policy to a private policy upon termination.
4. Offer to pay an employee the premium cost of replacement disability coverage during the notice period. ■

RIGHT TO STRIKE UPHELD BY THE SUPREME COURT OF CANADA

Elizabeth J. Forster

The Supreme Court of Canada has upheld employees' right to strike as a meaningful part of the collective bargaining process guaranteed under the *Canadian Charter of Rights and Freedoms*.

Background

In 2007, the Saskatchewan government passed legislation which limited the right to strike of public sector employees who performed "essential services." The legislation provided for the government and the union representing its employees to enter into a negotiation as to the identity of the "essential service employees." However, in the absence of agreement, the government was given the sole right to make the final determination without appeal.

The Supreme Court had already held that the freedom of association guaranteed under the *Charter* included the right to engage in meaningful collective bargaining. However, the Court has been careful not to mandate the process by which that collective bargaining had to take place.

Analysis

As a result of this decision, we now know that, as a minimum, the right to collective bargaining must include "the ability to engage in the collective withdrawal of services." The Court has held that this is a "necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals."

This decision does not stand for the proposition that essential service employees have an unfettered right to strike. On the contrary, the Court recognizes that some employees may indeed perform services which are so essential that their ability to stop work must be curtailed.

What the Supreme Court found objectionable in this case was that the legislation did not define essential services to mean services that truly were essential; the category of workers deemed essential was subject to the government's unilateral discretion; there was no impartial and effective dispute resolution process by which the unions could challenge the government's designation of an essential service employee and there was no meaningful alternative mechanism for resolving bargaining impasses.

The effect of the decision has been suspended for a period of one year to allow the Saskatchewan government to amend its legislation.

Summary

In 1987, the Supreme Court of Canada held that the right to freedom of association

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guaranteed under the *Charter* did not include the right to collective bargaining. Twenty years later, in 2007, the Court reversed itself and held that the *Charter* did indeed protect the right of employees to "engage in a meaningful process of collective bargaining."

In 2011, the Court held that "a meaningful process of collective bargaining" included a right to join together to pursue workplace goals, to make collective representations to the employer, to have the employer consider those representations in good faith and to have a right of recourse in the event that the employer did not bargain in good faith.

Finally, in its recent decision, the Supreme Court further expanded these requirements by finding that in order to engage in meaningful collective bargaining, employees had to have the right to bargain independent of their employer and the right to determine how to pursue their collective interests. This decision further expands the protection guaranteed to workers under the *Charter*.

We anxiously await the next step. ■

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