What is Happening with the New Labour Reality in Alberta?

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The Alberta government passed significant amendments to the Alberta *Labour Relations Code*, which came into effect on September 1, 2017. Since then, the Alberta Labour Relations Board ("ALRB") has issued a number of decisions based on the newly passed laws. These decisions have had a significant impact on labour relations and union representation in Alberta. In this article, we summarize two of the more interesting decisions – one concerning a remedial certification order and the second concerning an auto-certification – which could help us assess the new labour landscape in Alberta.

UFCW Local 401 and Widewaters Calgary Hotel Management Company, ULC(April 20, 2018) and (February 7, 2018) (currently unreported)

This is the first case in which a remedial certification order was granted by the ALRB pursuant to the *Labour Relations Code*(the "Code") amendments that came into force on September 1, 2017. In this case, the employer was found to have committed an unfair labour practice as a result of terminating the employment of Mr. Doncaster, a volunteer employee organizer. This is also a reverse onus case in which the ALRB had to assess the procedural implications of the now-formalized reverse onus provisions applicable to the employer's case where the termination was alleged to constitute an unfair labour practice. With the institution of changes to the Code, the employer was required to lead evidence to establish that the reasons given for the discharge were not tainted by anti-union motives. In the result, while the ALRB found no direct evidence that the Employer terminated Mr. Doncaster's employment because of his union activity, it inferred that the decision was tainted based on its assessment of four factors:

1. Whether the employer established a reasonable or credible explanation for the termination;
2. Whether the employer had knowledge of the organizing campaign and the employee's role in it;
3. Any pattern of anti-union activity by the employer; and
4. The credibility of the witnesses.

With respect to a reasonable or credible explanation for the termination, the employer presented evidence that Mr. Doncaster's habitual tardiness was the reason for his ultimate termination. The Employer argued that Mr. Doncaster was a short service

employee with six "lates" in the month of September alone. The ALRB did not accept the employer's evidence and held there were a number of irregularities, including: inconsistent proof with respect to the dates Mr. Doncaster was alleged to have been late (as well as the dates he was disciplined for); the employer failing to follow its policy of progressive discipline; a finding that there was no cogent evidence in support of the "lates" on two of the six dates; and the fact that the termination letter had significant errors in it. In this regard, the ALRB preferred the evidence of Mr. Doncaster concerning his lateness, the dates he was late and the discipline he was given in response.

The more concerning issue with this decision, however, is the limited evidence presented to support the "chilling effect" that Mr. Doncaster's termination was said to have had on the union organizing campaign. Very limited evidence seems to have been presented on the union's organizing efforts and meetings and, in this regard, the ALRB found that important evidence on this issue was not credible. Notwithstanding this finding, the deduction that Mr. Doncaster's termination "had a profound impact on the union's campaign" is concerning because the decision references other evidence suggesting that the campaign was in decline, or perhaps simply experiencing a natural down cycle – The union had not achieved the minimum 40 per cent support needed to file an application for certification, and even though one of the union representatives had been provided with contact information for employees (he had originally lead evidence that he had contacted the employees and set up meetings with them), the evidence ultimately established that he had not done so.

Implications

In the end, the Widewaters case should be an eye-opener for employers as well as employees. The decision is based on limited direct evidence arising out of a reverse onus, with inference being sufficient to ground the result where critical evidence on the "chilling effect" was found not to be credible. Combine that with the prospect of a remedial certification order where a reasonable level of demonstrated employee choice had not been established, and you have an unsettling picture. This case should give employers and employees pause to consider whether the current legislative regime is being enforced with a view that certification should be a reflection of employee choice. Based on the facts in this case, it is difficult to conclude that the employees wanted to be represented by the union.

International Association of Heat and Frost Insulators and Allied Workers, Local 110 and Arcane Industries(ALRB May 17, 2018) (currently unreported)

This case concerns employee objections to the union's application for certification based on the new Alberta auto-certification provisions, which provide that the ALRB may certify a trade union where the application for certification is based on evidence of membership support of more than 65% of the employees in the proposed bargaining unit. In this case, there were two employees in the general construction unit: Joe Visser and his daughter, Rose Visser. The union's application was filed on April 4, 2018. On April 16, 2018, the ALRB received two documents purporting to be evidence from Joe and Rose Visser that they were cancelling their union memberships.

This decision concerns the timing and impact of an employee's expressions of non-support for the union. On the date of the application, the only two employees in the bargaining unit were Rose and Joe Visser. The unit, being in general construction, is

subject to provincial registration collective bargaining (meaning, bargaining takes place at specific times in accordance with the legislation and a single collective agreement applies to all certified employers in the construction industry). The company was owned by Ms. Visser's fiancé, Charles Passey. Joe Visser was himself a long-standing member of the union (for 45 years), having also been a longtime member of the union's executive board.

The employees knew nothing of the union's application for certification. The union filed its application, as it was permitted to do, based on the current membership status of Rose and Joe Visser. As a result of their status, the board officer's report found that the application was supported by more than 65 per cent of the employees in the unit and the officer recommended certification without a vote.

At the hearing, the employees testified that even though they were members in good standing at the time of the application, they did not wish for the union to represent them with this employer and they weren't even made aware that the application for certification had been filed by the union. The employees argued that the new auto-certification provisions under s. 34(8) of the Code did not require the ALRB to certify the union, nor did the provisions prohibit a representation vote from being ordered. Given that they both sought to cancel their union memberships on April 16, 2018 (12 days after the application for certification was filed), and both led evidence in their direct testimony that they no longer supported the union, the employees asked the ALRB to find their lack of support as an appropriate basis for ordering a representation vote. As the alternative, the employees asked the ALRB to exercise its discretion under s. 39 of the Code and consider their lack of support as "any other relevant matter," and on that basis, exercise its discretion to order a representation vote.

In this case, the ALRB rejected the employees' arguments, finding that "Unions need not conduct informal polls to determine if their members are agreeable to the union application for certification before filing an application." It held that the legislation is clear: evidence of membership in good standing on the date of the application is sufficient. The ALRB held that it need not consider actions taken after the date of the application that purport to affect the members' status. As a result, the ALRB granted the certification application based on evidence of support on the date of the application.

Implications

With regard to this decision, it is important for employees to know and understand that if they are currently a member of a union, their membership status may be used at any time in support of an application for certification. Unions are not required to, and will not, poll their members before bringing an application for certification in Alberta. Unions are also not required to inform their members that they are bringing an application for certification. The employee's ongoing membership in the union is evidence of support for any application for the certification of any employer the employee is currently working for. Therefore, the takeaway from this case is if an employee no longer supports their union, the employee must withdraw their support (*i.e.*, cancel their union membership) before the union uses their status to support a certification application, as the ALRB will not necessarily use any of its discretionary powers to otherwise evaluate ongoing support for the union.

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