Right To Close Business: The Supreme Court Of Canada Rules Store Closure Illegal During Statutory Freeze

An employer's right to close down its business for any reason and at any time has always been well established in Canada. However, a recent judgment by the Supreme Court of Canada has dramatically changed the state of the law on this matter.[1]

After almost a decade of legal proceedings, the highest court in the country held that Wal-Mart violated the *Quebec Labour Code* (the "*Code*") when it closed its store in Jonquière during the "freeze" on conditions of employment following the certification of the union. According to the Supreme Court, the store closure constituted an unlawful change in the working conditions within the meaning of section 59 of the Code, giving rise to the award of damages to about 200 employees. The union and the employees of the Jonquière store regarded the decision to close the establishment's doors as a roundabout way of preventing their unionization.

Although the Wal-Mart case falls under the jurisdiction of the Labour Code of Quebec, it might have an impact on other Canadian provinces which have similar provisions regarding the "freeze" on conditions of employment in a unionized environment.

Facts

In August 2004, the union of the United Food and Commercial Workers (UFCW) was certified to represent the employees of Wal-Mart in Jonquière. The Jonquière establishment became the first Wal-Mart store to be unionized in North America. After the negotiations of the first collective agreement failed, the Minister of Labour appointed an arbitrator to settle the remained dispute between the parties. On the same day, Wal-Mart informed the workers of its decision to shut down the store. The decision to close the establishment on April 29, 2005 gave rise to a series of proceedings based on several sections of the *Code* initiated by the union which believed that the closure of the establishment was motivated by anti-union animus.

The recent judgment of the Supreme Court is based on a grievance filed before the arbitrator by the union of the store employees alleging that the store closure resulting in the dismissal of about 200 employees constituted a change in their conditions of employment that violated s. 59 of the *Code*:

59. From the filing of a petition for certification and until the right to lock out

or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employeeswithout the written consent of each petitioning association and, where such is the case, certified association.

The same rule applies on the expiration of the collective agreement until the right to lock out or to strike is exercised or an arbitration award is handed down.

The employer alleged that the store was permanently closed for business reasons. Furthermore, it argued that a permanent closure of a business may not logically constitute an unlawful change in conditions of employment within the meaning of section 59. Like the Court of Appeal, the employer was of the opinion that a permanent closure of a business could not qualify as a change in conditions of employment, arguing that it was rather an elimination of the employment.

Judgment

The Supreme Court allowed the appeal of the union and upheld the decision previously rendered by the arbitrator which confirmed that the resiliation of all the contracts of employment of Wal-Mart employees in Jonquière constituted a unilateral change in the employees' conditions of employment prohibited by section 59 of the *Code*.

Reminding that the purpose of the "freeze" on conditions of employment codified by section 59 was to facilitate the certification and ensure negotiations in good faith, the Supreme Court held that the employer that closes its business within that "freeze" period must prove that such change occurred in the ordinary course of its business. According to the Court, the employer will be able to convince the arbitrator that such change is consistent with the employer's normal management policy if (1) it is consistent with the employer's past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances.[2]

In Wal-Mart's case, the Supreme Court accepted the evidence that the Jonquière establishment did not experience any financial difficulties. The Court held that Wal-Mart failed to prove the existence of a legitimate reason which may have reasonably justified the closure of the establishment during the "freeze" on conditions of employment. In this regard, the Court stated: "It was in fact reasonable to find that a reasonable employer would not close an establishment that "was performing very well" and whose "objectives were being met" to such an extent that bonuses were being promised".[3]

Thus, the Supreme Court held that a closure without cause constituted an unlawful change in a condition of employment, namely continued employment, a condition implicitly incorporated into the contract of employment.[4] Therefore, the employer that closes its business during the "freeze" period imposed by section 59 of the Code must be able to prove that such decision was reasonable. If this is not the case, the Court concludes that the employer might be liable for damages payable to the employees to compensate for the unlawful change in their conditions of employment. Considering that Wal-Mart was unable to provide such proof, the Court returned the matter to the arbitrator who heard the initial complaint under section 59 so that he determines the appropriate remedy in accordance with the disposition of his award.

It should be noted that the Supreme Court does not suggest in any way that an arbitrator might order the reopening of the business, which was actually never requested by the union. The appropriate remedy in the case of an illegal business closure is an award of damages nature and amount of which shall be determined by the arbitrator.

In a strong dissent, Justices Rothstein and Wagner argue that the “freeze” on conditions of employment does not apply to the complete and final closure of a business. Forcing an employer to justify its decision to close down the business is incompatible with the right of the employer to close down its business for any reason. Furthermore, the dissenting judges argue that the position of the majority leads to absurd conclusions. So, the employer must justify the closure of its business during the s. 59 “freeze” period. However, at the end of that period (with a conclusion of a collective agreement, exercise of the right to lock out or right to strike, or the day an arbitration award was handed down), the employer would no longer be bound by the “freeze” on conditions of employment and therefore would be able to close down its business for any reason.

Key points for employers

The employer that closes down its business during the “freeze” period on conditions of employment imposed by section 59 of the *Code* must be able to justify its decision, either by showing that such decision is consistent with the rules that applied previously and with the employer’s usual business practices, or that this is the decision which would have been made by a reasonable employer in the same circumstances. Obviously, the closing down of a business will unlikely be consistent with past business practices, and the courts should therefore analyze the decision to close down a business from the position of a reasonable employer in the same circumstances.

In this particular case, the Supreme Court essentially held that the Jonquière establishment appeared to be profitable as it concluded that the closure of a business was not a reasonable decision. However, in our opinion, profitability should not be the only criterion to be taken into consideration when deciding on the reasonableness of the decision to close down a business during the “freeze” period. Some businesses may, for example, decide to close down an establishment despite its profitability, due to business strategy reasons such as relocation of activities, or a decision to focus on one market instead of another. In any case, the employer has to be able to justify its decision to close down a business during the “freeze” period on working conditions using objective elements.

Finally, it is important to remember that, by declaring the business closure illegal, the Supreme Court does not order the reopening of the business nor does it suggest that a Court might have such authority. Rather, it states that such closure of business, if declared illegal, may entail financial consequences for the employer who may be obliged to compensate its employees. Pursuant to the judgment of the Supreme Court, an arbitrator shall now determine the damages to be paid to the employees. In this respect, the dissenting judges emphasize that Wal-Mart has already compensated the employees for the loss of their jobs by paying them severance pay in an amount equal to two weeks of work per year of service. What might be the nature and extent of damages to be awarded by the arbitrator then.

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