The Wal-Mart Saga: One More Chapter

On June 27th, the Supreme Court of Canada released a decision in the Wal-Mart saga that will have a major impact on employment law in Québec.

Context

In August of 2004, the United Food and Commercial Workers Local 503 (the Union) was certified to represent the employees of a Wal-Mart store in Jonquière. This store was in fact the first of the Wal-Mart chain to be certified.

In the months following certification, the parties met on several occasions to negotiate the terms of the first collective agreement, but negotiations were unsuccessful. On February 2, 2005, the Union applied to the Minister of Labour seeking the appointment of an arbitrator.

On April 29, 2005, Wal-Mart permanently closed the Jonquière store. The employees and the Union brought several proceedings against their former employer, alleging that the closing of the Jonquière location was a reprisal to the "unionization" of its employees.

Following the announcement of the store's closing, the Union submitted a grievance alleging that the dismissal of the employees in this context constituted a change in their working conditions, violating s. 59 of the ***Labour Code of Québec***(the Code).

In September of 2009, the arbitrator upheld the grievance and concluded that a dismissal of employees while closing their location of employment constitutes a unilateral modification of the employees' working conditions, violating s. 59 of the Code. Although the arbitrator stated that it is possible for an employer to close its establishment, he specified that an employer must demonstrate that the store's closing is part of a "business as usual" decision in order to avoid violating s. 59 of the Code.

In October of 2010, the Superior Court **rejected** Wal-Mart's request for judicial review and upheld the arbitrator's decision which found that Wal-Mart had failed to demonstrate that the closing of the store had occurred in the ordinary course of its business.

In May of 2012, the Court of Appeal **quashed** the Superior Court's decision and concluded that the arbitrator's decision was unreasonable insofar as it deprived the employer of its right to close its business. Moreover, the Court held that it was

impossible to restore the previous situation because it would force the employer to continue to operate its business. The Union appealed this decision to the Supreme Court.

The decision

In ***United Food and Commercial Workers, Local 503* v. *Wal-Mart Canada Corp***., the Supreme Court, in a split decision, allowed the appeal and restored the arbitrator's decision.

At issue was whether s. 59 of the Code could be alleged to contest the dismissal of the store's employees. If so, the Court had to decide if those terminations constituted a modification of the working conditions, violating s. 59 of the Code.

Justice Lebel, writing for the majority, adopted a broad interpretation of working conditions under s. 59 of the Code, deciding that a termination of employment constituted a modification of working conditions. While being careful not to remove the employer's management rights, the Court held that any modification to working conditions must be done in accordance with the normal practices of the employer. Consequently, the employer " must now continue acting the way it acted, or would have acted, before that date".

When addressing complaints based on s. 59 of the Code, the Court determined that the employer needs to demonstrate that the modification of the working conditions was part of its usual management practices. The modification needs to be coherent with the previous management practices of the employer or, failing that, it needs to comply with the decision of a reasonable employer in the same circumstances.

In the present case, according to the arbitrator's decision upheld by the Supreme Court, we can conclude that a reasonable employer would not have closed an establishment that "was profitable" and where "objectives were being met" to the point that bonuses were promised to employees.

Upholding the arbitrator's decision, the Court needed to consider the appropriate remedy in the circumstances. In fact, the arbitrator does not have the power to reinstate employees once an establishment has closed. In this context, the Court concluded that the arbitrator may order reparation by equivalence, meaning financial compensation for the employees.

In their dissent, Justices Rothstein and Wagner stated that "once an employer exercises its right to close up shop, then s. 59 cannot impose an additional *ex post facto* justification requirement simply because this closure gives rise to a secondary effect – the collective termination of employees".

Regarding the arbitrator's powers in the context of a grievance pursuant to s. 59 of the Code, the dissenting judges concluded that awarding damages would be inconsistent with the purpose of s. 59 of the Code because such a remedy would not restore the balance between the parties or facilitate the conclusion of a collective agreement.

Ultimately, this decision will have a significant impact on employment law in Québec. It expands the scope of s. 59 of the Code and potentially imposes limits on employers that intend to close their businesses "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". In such circumstances an employer would need to demonstrate that the closing of the establishment is part of its regular management practices or that a reasonable employer in the same circumstances would have made the same decision. Furthermore, this decision increases the arbitrator's powers, now

allowing the possibility to award damages in the context of the closing of an establishment.

This saga is far from over as the question of appropriate remedies remains unanswered. In fact, at the time of the store’s closing, Wal-Mart had provided a legal indemnity equivalent to two weeks of pay per year of service to all of its Jonquière employees.

Last Updated: July 21 2014

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