Victory Of Ex-Wal-Mart Employees – What's Next?

On June 27, 2014, the Supreme Court of Canada issued a decision that is of much interest to the majority of the workforce and employers and that presents a significant impact on certain well established legal principles.

In 2001, Wal-Mart opened a store in Jonquiere. In 2004, the Labour Board certified the United Food and Commercial Workers, Local 503 ("Union"),as the representative of all of the employees of Wal-Mart's Jonquiere establishment. In the months following the Union's certification, the parties met several times in order to bargain a first collective agreement. In early 2005, after unsuccessful negotiations, Wal-Mart announced that, for business reasons, it was closing the Jonquiere store. Approximately 200 employees were laid off as a result. Claiming that this decision was motivated by anti-union reasons, the employees and the Union filed several claims against Wal-Mart. Most of the decisions stemming from such claims have been in favour of the employer.

The present case deals with a complaint filed by the Union pursuant to section 59 of the Quebec Labour Code. The Union claimed that the termination of employment of the employees of Wal-Mart constitutes a unilateral modification of their working conditions, which is prohibited under section 59 following the certification of a Union. The arbitrator who first heard the complaint found that Wal-Mart did not prove that the decision to lay off its employee was made in the normal course of business. This decision was however overturned by the Quebec Court of Appeal. The Union appealed before the Supreme Court of Canada.

In its decision, the Supreme Court of Canada ruled that section 59 of the Labour Code was created to foster the right of association. The Court also stated that the decision of an employer to modify the working conditions of its employees does not require any anti-union "animus" in order for section 59 to apply. A Union would only have to prove that the employer unilaterally modified the working conditions of its employees after the certification of a union and that the modification was not carried out in the normal course of business. But what constitutes the "normal course of business" of an employer? The Court determined that an arbitrator will have wide discretion to assess this issue depending on the facts of the case. In deciding so, the Supreme Court of Canada confirms that the closing of a business does not justify an employer to lay off his employees.

The Court therefore confirmed the arbitrator's initial decision and returned the case

to an arbitrator to determine the appropriate remedy, which will likely be the granting of damages. The exact nature of these damages is unspecified and one could question how the principles of the infamous 2006 decision of the Supreme Court in the *Isidore Garon* case would apply in the granting of such damages by the arbitrator under for such a violation of section 59 of the Labour Code[1].

Finally, we wish to point out that the Court was careful in stressing that the right of an employer to close its business still exists under section 59 of the Labour Code. Employers should therefore be reassured that this decision does not deprive them of the power to close their business for actual bona fide economic reasons. Hence, employers must justify that the closing if its business was done in the normal course of business and that any reasonable employer would have taken the same decision.

It will be interesting to follow the various reactions to this controversial decision and analyze its consequences in the unionized world in the years to come.

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