

# MANAGEMENT COUNSEL

Employment and Labour Law Update



## Education and Preparedness Are Keys To Avoiding Remedial Certification

As labour lawyers representing the interests of management we are often asked what managers and supervisors can say and do in response to union activity in the workplace. Some management teams - motivated by insufficient knowledge and fear of making a mistake - retreat in the face of union activity, giving up critical opportunities to lead their workforce. Other management teams, caught off guard by the union presence, take the opposite approach and react rashly, sometimes contrary to the Ontario *Labour Relations Act* (the "Act") resulting in an allegation of an unfair labour practice.

In our view, every manager and supervisor should have the knowledge, skill and tools to immediately and appropriately lead the workforce in response to union organizing activity. Failure to have this knowledge and skill, and the resulting confidence to make the right decisions, can create a situation in which the Ontario Labour Relations Board ("Board") finds that the automatic certification of a trade union, without regard to the wishes of employees, is the only appropriate remedy.

### REMEDIAL CERTIFICATION

Remedial certification is a hot button issue for labour activist and management interests alike. On the one hand, remedial certification deprives employees of their democratic right to determine whether or not they will be represented by a union. On the other, the Ontario legislature has determined that it may be necessary, in some circumstances, to give voice to employees whose democratic rights have been impaired by employer misconduct.

Throughout the past two decades we have seen governments abolish and reintroduce this legislative remedy, largely in accordance with the political climate of the day. Most recently, in 2005, the Ontario legislature reintroduced remedial certification as a remedy available to the Board where it determines that an employer has committed serious violations of the Act.

Under the current Act, remedial certification may only be awarded where the Board finds that there is no other remedy that would sufficiently counter the effects of the employer's actions. For example, the Board has long held that a threat to job security and/or actual discharge linked to support for a union has such a strong and deep rooted impact that even a representation vote in which ballots are cast confidentially would not reflect the true wishes of employees.

### THE BOARD ISSUES ITS FIRST DECISIONS

On June 15, 2007, the Board issued its first decision under the most recent incarnation of the remedial certification sections of the Act, providing some insight into how the Board will exercise its remedial powers.

In *Swing Stage Equipment Rentals*, a small construction business was targeted for organization by the Carpenters. A professional

*continued inside...*



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*Remedial Certification continued from p.1*

organizer paid by the Carpenters, referred to as a 'salt', applied for a position with Swing Stage on September 18, 2006. On September 20, 2006, the union organizer started work for Swing Stage and immediately began talking to other employees about union membership. Twelve days later, all of the Swing Stage employees, except the union salt, came to Swing Stage's owner, and advised him that they had been approached by a union.

At the hearing before the Board, a company employee gave evidence that the employees had told the employer that they were not interested in union representation. There was also evidence, accepted by the Board, that the following day the union organizer was told not to come to work due to weather, when all of the other employees were at work as usual. In fact, the union organizer was ultimately told not to return to the workplace at all, with the explanation that work was being done more efficiently without him. The Carpenters filed an Unfair Labour Practice complaint alleging that the organizer's termination was a violation of the Act and seeking remedial certification as a remedy.

**THE ONUS SHIFTS TO THE EMPLOYER**

When a union alleges that an individual has been (among other things) terminated in breach of the Act, the onus shifts to the employer to demonstrate that it did not commit a violation of the Act. This is referred to as a "reverse onus" and it differs from the traditional case in which the party that makes the allegation - in this case the union - has the obligation to prove it. A reverse onus can therefore create a difficult challenge for an employer.

In *Swing Stage*, there was no direct evidence that the employer was aware of the employee's union affiliation or organizing activities. Despite this, the Board found that the employer could *not* meet its burden to prove that it had not acted in violation of the Act. This is because the Board found that the employer had been advised by its other employees that someone was attempting to organize a union and had concluded that the someone was likely the new employee. As a result, the employee was terminated. The Board concluded that the employer's actions were motivated, in whole or in part, by anti-union sentiment in breach of the Act.

**NO OTHER REMEDY APPROPRIATE**

In *Swing Stage*, the Board found that the union organizer's termination was "*a clear message to the employees: if you are involved with the union, you will lose your job*" and effectively destroyed the union's organizing campaign. The Board went on to say that Swing Stage's action "*violated the most fundamental right of an employee under the Act to freely choose whether or not to become a member of a trade union.*" Remedial certification was therefore ordered.

More recently, in *East Elgin Concrete Forming* (issued July 18, 2007) the Board ordered remedial certification where it found that the employer had threatened employees' job security in connection with union organizing, and issued physical threats against union organizers.

**IMPLICATIONS FOR EMPLOYERS**

In these first two remedial certification decisions the Board has confirmed its historic approach: in response to an Unfair Labour Practice allegation, where an employer makes threats of physical harm, or fails to establish that it did not threaten employees' job security, directly or indirectly, in connection with union organizing, remedial certification will likely result.

This does not mean that an employer's hands are tied. It does mean that, like so many aspects of running a successful business, preparation and training are the keys to a positive result.

Successful workplaces spend significant time and energy focused on the creation and maintenance of trust among their employees and management. A key component of this trust is management providing clear and timely communication and consistently following through on commitments to employees. In a workplace where managers are trusted and respected, employees are motivated to work as a team and are much less likely to be interested in the promises made by a union.

Should a union come knocking at your workplace, it is important that managers and front line supervisors know what they can say and do in response. At a time when your workplace may feel under siege from a union, it is critical that your leaders have the knowledge, skills and tools to lead; failure to have this will undercut the trust and respect you have worked so hard to cultivate. This includes being comfortable and confident talking to employees about what it means to have a union, in a way that is not only legally appropriate, but also effective. The Act was not designed to, and does not, prevent employers from discussing their views about unionization. To the contrary, the Act specifically states that it does not "*deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence*".

At Sherrard Kuzz LLP a hallmark of our practice is assisting our clients to educate and train managers and supervisors so that they have the knowledge, skills and tools they need to immediately and appropriately lead their employees in the face of union activity.

For more information, please contact a member of the Sherrard Kuzz LLP team.

**DID  
YOU  
KNOW?**

The Ontario Human Rights Commission recently released guidelines which address an employer's duties and responsibilities as they relate to discrimination on the basis of Family Status. To learn more, please contact a member of the Sherrard Kuzz team.

## Class Action Against CIBC Warning Bell To Employers

A recent claim launched by a Canadian Imperial Bank of Commerce employee has rung a warning bell for employers that a breach of employment standards legislation may result in much more than a monetary payout to a single employee. Employers may increasingly see themselves at the receiving end of a class action lawsuit aimed at recovering employment standards entitlements on behalf of large groups of employees.

### THE CLAIM AGAINST CIBC

On Tuesday, June 5, 2007, CIBC bank teller Dara Fresco took the day off work. She dropped her toddler off at daycare and then proceeded to file a Statement of Claim in the Ontario Superior Court of Justice alleging that her employer had failed to comply with its statutory and contractual obligations to pay its employees for overtime hours worked.

The Statement of Claim alleges that CIBC employees are assigned heavier workloads than can be completed within their standard working hours; are required or permitted to work overtime to meet the demands of their jobs; and CIBC fails to pay for the overtime work, or accurately record all hours worked, in direct contravention of the *Canada Labour Code*. The claim also alleges that employees are actively discouraged from accurately recording their hours of work or claiming overtime pay.

What makes Ms. Fresco's claim significant is that she is not seeking damages on her behalf alone. Rather, the claim has been filed as a class proceeding, to allow other CIBC employees to participate. The "class" which Ms. Fresco is seeking to represent includes all tellers and other front-line customer service employees. Approximately 10,000 current and former non-management, non-unionized employees across Canada are expected to be covered in the lawsuit. The claim, as filed, is seeking \$600 million in damages which is the equivalent of nearly 25% of CIBC's 2006 annual profits. Ms. Fresco specifically claims that she is owed approximately \$50,000 for overtime hours worked during her ten-year career.

Shortly after the lawsuit commenced, CIBC issued a statement saying that it has a clearly defined overtime policy that exceeds legislative requirements. On June 28, 2007, CIBC filed a Notice of Intent to Defend, signalling its intention to defend against the action. As of July 13, 2007, no Statement of Defence had yet been filed.

### IMPLICATIONS FOR EMPLOYERS

The Superior Court has not yet decided whether Ms. Fresno's claim against CIBC will be certified as a class proceeding to allow other CIBC employees to participate in the action. Regardless of the result, the negative publicity surrounding the allegations against CIBC - or any employer for that matter - may threaten its reputation, good will and economic viability.

The CIBC lawsuit may also signal the start of a dangerous trend.

Statistics Canada reports that 1.6 million Canadians worked unpaid overtime hours in the month of April alone. Recently in the United States, Morgan Stanley announced a \$54 million settlement with the Equal Employment Opportunity Commission of a class action that included claims of gender discrimination in pay. Shortly thereafter, The Boeing Co. agreed to pay up to \$72.5 million to settle a class action gender discrimination suit brought by approximately 29,000 salaried and hourly female employees alleging discrimination in pay, promotions, overtime, assignments, bonuses and other conditions of employment. In the well-publicized Wal-Mart employment discrimination class action, the U.S. district court certified a class action involving pay discrimination claims covering more than one million women in both hourly and salaried jobs in Wal-Mart's 3,400 stores across the United States.

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### SIX STEPS TO REDUCE THE RISK OF A CLASS ACTION LAWSUIT

As an employer, there are steps you may consider now to minimize your exposure to a successful class action:

1. **Understand employment standards obligations.** Regularly review with human resources personnel and employment counsel your organization's employment standards obligations.
2. **Review wage and hour policies.** Ensure that your organization's written policies fully comply with applicable law.
3. **Audit wage and hour practices.** If your organization already has policies in place, ensure that they are audited regularly. Include in the audit, consultation with employees at various levels of the organization. Look for disparities between the organization's policy and practice.
4. **Issue new or revised written policies as necessary.** If written policies or practices do not comply with applicable employment standards laws, remedy deficiencies immediately. Implement new written policies affirming the company's ongoing commitment to compliance.

*Class Action continued from p.3*

5. **Train supervisors and managers.** When new or corrected policies or procedures are issued, ensure that supervisory employees are well trained on proper implementation.
6. **Maintain required records.** Maintain adequate and accurate employment-related records.

If you have questions about class action lawsuits or or employment standards compliance, please contact a member of the Sherrard Kuzz team.

## Next in our series of employment and labour law updates:

**TOPIC:** *Employer Strategies to Improve Employee Attendance and Manage Medical Information.\**

1. Employer Rights.
2. Culpable v. Innocent Absenteeism: The significance of the distinction and appropriate approaches.
3. Medical Information: When, what and how?
4. Balancing the Employer's Need For Information Against the Employee's Expectation of Privacy.
5. Severance Strategies.
6. Top Ten Tips To Manage Employee Absenteeism.

**HReview**  
Seminar Series

**DATE:** Wednesday, September 19, 2007, 7:30 – 9:00 a.m. Program to start at 8:00 a.m.; breakfast provided.

**VENUE:** Holiday Inn Hotel & Suites, 7095 Woodbine Avenue (Hwy. 404 & Steeles Avenue), Markham 905.474.0444

**RSVP:** By Monday, September 10, 2007 to 416.603.0700 (Tel.) or [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com)

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