Store Closing is not "Business as Usual"

By: Jeremy Schwartz

Employers often remark, with varying degrees of intention, that they would rather close up shop than manage a unionized business. In yet another chapter of this ongoing saga, the Supreme Court of Canada has ruled that it was not "business as usual" for Wal-Mart to close its recently unionized store in Jonquière, Québec. Wal-Mart will now likely be ordered to pay damages to almost 200 employees for violating the "statutory freeze".

Background

Just three years after Wal-Mart opened its store in Jonquière in 2001, the United Food and Commercial Workers, Local 503 ("UFCW") was certified to represent the store's employees in collective bargaining. When bargaining proved unsuccessful, the UFCW obtained an order that the first collective agreement be settled by arbitration (labour statutes in B.C., Saskatchewan, Manitoba, Ontario, Newfoundland and P.E.I. also provide for the possibility of first contract arbitration).

Approximately one week later, Wal-Mart notified its employees, the UFCW and the relevant ministries that Jonquière would close in two months.
The UFCW launched a wave of ultimately unsuccessful legal skirmishes, fronted by various bargaining unit employees:

- One employee sought an injunction to prevent the closure pending the conclusion of related litigation. That application was dismissed.

- Another employee sought to certify a class action lawsuit against Wal-Mart, but this was dismissed for lack of jurisdiction.

- Finally, several employees argued Wal-Mart was subject to a reverse-onus provision under Québec's Labour Code, which imposes a rebuttable presumption that Wal-Mart was punishing employees for exercising their legal rights when it closed Jonquière. This position was also dismissed.

Each of these cases, though interesting, were decided on fairly technical grounds related to the unique structure of Québec's Labour Code and related jurisprudence, so there were few lessons to draw for employers in other jurisdictions.

UFCW v Wal-Mart

Unfortunately the one decision which arguably has application outside of Québec favoured the UFCW. The Supreme Court recently held that, **despite** the lack of proof of anti-union animus, Wal-Mart violated the statutory freeze when it closed the Jonquière store.

Québec's Labour Code provides that an employer may not unilaterally (i.e. without the union's consent) alter employees' terms and conditions of employment once a union is certified as their bargaining agent, until certain pre-conditions are met. This is colloquially referred to as the statutory "freeze".

The term "freeze" is somewhat misleading. Courts and labour tribunals across the country have interpreted such provisions to restrict employers' ability to take actions (or refrain from taking actions) that would be contrary to existing terms and conditions, but employers may continue to manage their businesses. For example, an employer may unilaterally change hours of work during the freeze so long as it had the contractual right to do so before the freeze, and provided it does so for *bona fide* business reasons and without any anti-union motive.

Unlike in previous litigation between the parties, in this case the UFCW was not burdened with proving that Wal-Mart's decision to close the Jonquière store was motivated by anti-union sentiment, or a desire to punish employees or prevent them from exercising their statutory rights. In order to demonstrate that the closure constituted a violation of the freeze, it had only to demonstrate that the closure was not "business as usual".

In other words, to escape a finding that it violated the freeze, Wal-Mart had to demonstrate that it would have proceeded to close the Jonquière store even if there had been no petition for certification.

A majority of the Supreme Court upheld the arbitrator's ruling that the closure of Jonquière was not business as usual and so it violated the freeze. Central to the arbitrator's finding was that Jonquière "was performing very well," and its "objectives were being met" to such an extent that bonuses were being promised. On that basis, the arbitrator found that a reasonable employer in those circumstances would not have closed the store.

Given that the closure could not be undone, the Supreme Court held that it was appropriate and within the arbitrator's power to award damages to the (almost) 200 employees who lost their jobs as a result of Wal-Mart's violation of the freeze.

Lessons for Employers

The similarity between the relevant freeze provisions in Québec's Labour Code and legislation in other provinces would likely support a similar result outside Québec.

Even after the Supreme Court's decision, a company that is truly struggling before its employees unionize should still be able to establish that a closure during the freeze would be "business as usual". In other words, it would be lawful provided it can be shown that an employer similarly positioned would be acting reasonably by closing shop, with or without a union.

Under the general duty to bargain in good faith such employers would still be required to advise the union in bargaining of the impending closure and to discuss it in good faith. However, absent anti-union animus it appears the law would still permit closure in those circumstances without a resulting violation of the freeze or a finding the closure constituted an unfair labour practice.

After the Supreme Court's decision, it appears that most closures implemented during the freeze, even absent evidence of anti-union animus, would be unlawful. That said, as noted by the dissent, once the freeze is over (provided there is no anti-union animus or violation of the duty to bargain in good faith) employers can likely implement a closure with impunity.

This is perhaps the most unfortunate aspect of the decision. We expect that labour tribunals and courts will require more than speculative evidence to demonstrate that a closure was "business as usual". This may force some employers that are already struggling to wait longer than they would otherwise have done to close locations, resulting in significant and avoidable financial loss.

For more information, please contact:

Jeremy Schwartz at jschwartz@stringerllp.com or 416-862-7011

UPDATE is an electronic publication of Stringer LLP
110 Yonge Street, Suite 1100, Toronto, Ontario M5C 1T4
T: 416-862-1616 Toll Free: 1-866-821-7306
E: info@stringerllp.com I: www.stringerllp.com