Reduction of work hours a "constructive layoff": The Supreme Court rules

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Disputes about whether a reduction in work hours constitutes a layoff are common in the unionized workplace and may end up at arbitration. Typically, the conflict arises when an employer, seeking to control costs, resorts to cutting staff hours, and one or more of the affected employees files a grievance.

At arbitration, the issue is usually not whether the employer may reduce hours. It is generally held that, in the absence of a collective agreement provision to the contrary, employers have this right. Rather, the issue is whether the employer has violated the seniority provisions of the agreement in relation to the employees whose hours have been cut. Specifically, the question is whether the employer's actions amount to a layoff, thereby entitling the affected employees to exercise their bumping rights.

The general consensus among arbitrators has been that, when some employees' hours are cut while more junior employees' schedules remain unchanged, a layoff has in fact occurred. As one arbitrator has stated:

"[N]ot all temporary severances of the employment relationship constitute lay-offs. A major consideration is the generality of the action taken by the employer. If all employees in a seniority unit are treated alike it is a situation unlikely to attract the characterization of lay-off. If, however, hours of work are reduced for some but not for others in a seniority unit it is likely a lay-off."

Now, in a pair of decisions, the Supreme Court of Canada has endorsed this arbitral approach by recognizing the concept of a "constructive layoff".

CANADA SAFEWAY: NO LAYOFF WHERE GRIEVOR'S ACTUAL HOURS REMAIN CONSTANT

In *Retail, Wholesale and Department Store Union, Local 454 v. Canada Safeway* (June 4, 1998), the employee had been scheduled to work some 37 hours in the deli and meat departments at the Safeway store, with some additional call-in work. In 1989, after being told that she could not continue to work in both areas, she chose to stay in the meat department. After the change, her scheduled hours dropped, eventually reaching one four-hour shift a week. However, because of "call-in" work, her actual work hours remained more or less the same.

The employee grieved, alleging that the reduction in her scheduled hours amounted to a "constructive layoff". A majority of the arbitration board agreed, holding that the employer had breached the scheduling provisions of the agreement by substantially reducing the grievor's scheduled hours while junior staff were assigned hours in positions for which the grievor was qualified. This, the board held, constituted a constructive layoff.

The board's ruling was eventually quashed by the Saskatchewan Court of Appeal, and the union appealed to the Supreme Court of Canada. There, a 6-1 majority of the Court held that the board of arbitration's conclusion that the grievor had been constructively laid off even though her actual number of working hours remained unchanged was patently unreasonable. The Court stated:

"In our view, the term ‘layoff’ as used in labour law refers to the denial of work to the employee. As a matter of law, a layoff cannot be found where the employee continued to work the usual number of hours, as here."

The Court went on to consider the meaning of "layoff" where it is not defined in a collective agreement. It noted that, despite the popular view that layoff is synonymous with termination, it in fact describes a situation in which the employer-employee relationship is suspended, not terminated, and the suspension is due to a lack of available work.

It follows, the Court stated, that for there to be a layoff, there must be a cessation of work. One of the errors committed by the board of arbitration was that it applied an overly broad definition of the term that ignored this fundamental aspect of a layoff:

"The Board defined layoff generally as a disruption of the employer-employee relationship. ... Many things may constitute a disruption of the employer-employee relationship. A layoff is merely one of them. It cannot be inferred from the fact that there was a disruption in the employer-employee relationship that there was a layoff. A layoff ... is the specific type of disruption that occurs as a result of a cessation of work."

However, the Court was careful to note that a significant reduction of work short of a total cessation could, in appropriate circumstances, constitute a layoff.

***BATTLEFORDS AND DISTRICT CO-OPERATIVES*: "SINGLED OUT" EMPLOYEE CONSTRUCTIVELY LAID OFF**

In a companion decision, *Retail, Wholesale and Department Store Union, Local 544 v. Battlefords and District Co-operatives* (June 4, 1998), the Court unanimously affirmed the finding of a board of arbitration that the grievor had been constructively laid off. In this case, the affected employee had seen her hours reduced, as a result of a workplace reorganization, from between 30 and 35 hours to some 13 hours a week. As is often the case, there was no definition of "layoff" in the collective agreement.

The board of arbitration recognized that management had to be able to reorganize the workplace in order to respond to economic conditions, and noted that the collective agreement did not provide a guarantee that employees would have a specific number of work hours. However, it stated that, when a workplace reorganization affected an employee's work, the question was whether any employee rights were affected and if so, what remedies were provided under the collective agreement.

The board rejected the employer's assertion that a layoff occurred only when an employee's hours were reduced to zero and held that the phrase "reducing staff" in the agreement could mean either a reduction in the work hours of one person or a total elimination of that person's work. It followed the arbitral case law in finding a layoff where the grievor's seniority rights had been affected by the employer's actions. As in the *Canada Safeway* case, the board's ruling was set aside by the Saskatchewan Court of Appeal.

The Supreme Court of Canada held that the board's decision that the grievor had been laid off was an "eminently reasonable" one in the context of the collective agreement:

"Here only two employees had their hours of work substantially reduced while more junior employees replaced them. ... The collective agreement did not specifically define layoff. It was therefore open to the Board to give the term a meaning in the context of the entire agreement."

The Court pointed to the line of arbitration decisions which held that a significant reduction in hours in circumstances where a particular employee is singled out may amount to a constructive layoff, and echoed the view of the board regarding the relationship between management's legitimate efforts to reorganize the workplace and the effect of such reorganization on employees' rights under the collective agreement:

"Employers must have the ability to reorganize their departments and staff. Yet, in the absence of a clearly expressed intention to the contrary, the provisions in a collective agreement should not generally be interpreted in a way that undermines acquired seniority rights of employees and fundamentally alters the nature of the employment."

Accordingly, the Court set aside the ruling of the Court of Appeal and restored that of the arbitration board.

IN OUR VIEW

Managers considering workplace restructuring would do well to closely examine the provisions of the collective agreement in light of the arbitral approach to what the Supreme Court has termed "constructive layoffs". Where restructuring reduces employees’ hours and has an unequal impact on employees, the seniority provisions of the agreement should be reviewed to ensure that no employee rights are being contravened.

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