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ROPER GREYELL

EMPLOYMENT + LABOUR LAWYERS

TO: CLIENTS AND OTHER INTERESTED PARTIES

RE: ROPER GREYELL NEWSLETTER – JULY/AUGUST 2006

WORKPLACE ACCOMMODATION OF RELIGIOUS BELIEFS

Introduction

This newsletter focuses on the issue of accommodating religious beliefs in the workplace.

That issue was recently considered by Arbitrator Donald R. Munroe, Q.C in *British Columbia Maritime Employers Assn. v. International Longshore and Warehouse Union, Loc. 500 (Dhillon and Sandhu Grievances)*, [2006] C.L.A.D. No. 262 (Munroe).

***British Columbia Maritime Employers Assn. v. International Longshore and Warehouse Union, Loc. 500 (Dhillon and Sandhu Grievances)*, [2006] C.L.A.D. No. 262 (Munroe).**

Background Facts

Arbitrator Munroe was constituted as an industry arbitrator under a collective agreement (the “Collective Agreement”) between the British Columbia Maritime Employers Association (the “BCMEA”) and the International Longshore and Warehouse Union – Canada (the “ILWU”).

The employer parties to the arbitration were the BCMEA, Neptune Bulk Terminals (Canada) Ltd. (“Neptune”) and Pacific Coast Terminals Co. Ltd. (“PCT”). The BCMEA is an employer organization that is responsible for the administration of the Collective Agreement, and for the ultimate resolution of labour relations issues arising at its members’ work locations. Neptune and PCT – which are members of the BCMEA – are bulk terminals located in the Port of Vancouver.

The union party to the arbitration was a constituent local of the ILWU, the International Longshore and Warehouse Union, Local 500 (“Local 500”).

The BCMEA owns and operates the Despatch Hall through which members of Local 500, and casual employees aspiring to union membership, acquire work at the various sites within the jurisdiction of Local 500. Those sites include Neptune and PCT. The despatch system that is in place at the Despatch Hall is complex, and consists of general principles found in the Collective Agreement, additional agreements, union rules and historical practices.

In response to an increasing concern about head injuries and at the suggestion of Human Resources and Social Development Canada, risk assessment reports were produced that revealed a risk of head injuries in a number of areas at both the Neptune and PCT sites. The existing hard hat policies at those sites were not adequately addressing the risk. Neptune and PCT – after consulting with their respective joint safety committees and the BCMEA – decided to promulgate new hard hat policies.

The new policies, as initially developed, were “gate-to-gate” policies with certain exceptions. In other words, the “new policies initially developed by Neptune and PCT would have required the wearing of a hard hat everywhere on the respective work sites except only in areas or buildings identified in the policies as being exempt”.

The new hard hat policies of Neptune and PCT ultimately came to be in the nature of area-by-area policies with specified exceptions. As a consequence, “both the Neptune hard hat policy and the PCT hard hat policy exempt certain categories of longshore workers from the requirement at any point in their shifts to wear a hard hat”.

At or around the time of implementation of the new policies of Neptune and PCT, the BCMEA issued instructions to the despatch staff at the Despatch Hall “about how to accommodate longshore workers who [are] unable to wear a hard hat for religious reasons”. At the same time, the BCMEA posted notices at the Despatch Hall stating, among other things:

“If you are despatched to [Neptune or PCT], please ensure that you are prepared to wear your hardhat ...

If for legitimate religious or medical reasons you cannot wear a hard hat, please identify yourself to the Despatch a.s.a.p. to enable us, if possible, to accommodate you for other work.”

In passing, we note that the “hard hat issue” has had – as Arbitrator Munroe described it – “a rocky and sometimes turbulent history on the Vancouver waterfront”. The general body of Local 500 membership has felt for many years that rules about the wearing of a hard hat should be resisted and opposed.

Dhillon and Sandhu Grievances

Local 500 filed grievances on behalf of Avtar Dhillon and Amarjit Sandhu, who – as Arbitrator Munroe put it – “are practising Sikhs whose adherence to their faith requires the wearing of a turban, and precludes the wearing of any other or additional head coverings”.

On April 14, 2005, Neptune denied Mr. Dhillon work to which he would normally have been entitled to be despatched because he was:

- required in accordance with Neptune’s hard hat policy to wear a hard hat; and
- unable to comply with that requirement on account of his religious beliefs.

A few days earlier, Mr. Sandhu had been denied work at PCT for the same reasons and on the same grounds.

The Dhillon and Sandhu grievances, as originally filed, raised identical issues. The first set of issues – on which we will not elaborate in this newsletter – was described as “ordinary pay claim issues under the [C]ollective [A]greement”. The second set of issues – on which we will focus in this newsletter – involved an allegation that “the refusals to permit [the grievors] to do the work in question ... comprised violations of the *Canadian Human Rights Act*”.

Parenthetically, we note that, during the arbitration hearing, Local 500 modified the Dhillon and Sandhu grievances so that there was “no longer an allegation of a violation of the *Canadian Human Rights Act*” in relation to Neptune’s hard hat policy. Much of Arbitrator Munroe’s award thus concentrated on PCT’s hard hat policy.

Key Evidence

There was no evidence that Mr. Dhillon and Mr. Sandhu had to the date of the arbitration hearing been disadvantaged “in terms of work opportunities by the implementation of the new hard hat policies at Neptune and PCT”. Quite to the contrary, Arbitrator Munroe found that “[b]ecause of the daily despatch system, and because in recent years there has been sufficient work in the Port of Vancouver ... both the Local 500 membership and the casual employees registered at the Despatch Hall have had as much work available to them as they have wished”.

Arbitrator Munroe underscored Mr. Sandhu’s evidence that he was “getting as much work as [he] want[ed]”. That said, the arbitrator also noted Mr. Dhillon’s evidence that while “the introduction of the new hard hat policies had not resulted in a loss to him of work opportunities”, he was “losing out on ... the ‘choice’ of work opportunities”.

The arbitrator took note of the BCMEA’s evidence to the effect that “if any Sikh union members [who are] not able to wear a hard hat wish to be trained in a category not requiring a hard hat, they would face ‘no impediment’ to acquiring such training”. The arbitrator further observed that the same generally applied in respect of Sikh casual employees.

There was also evidence adduced by the BCMEA that it “remains willing to work with Local 500, and with any affected Sikh longshore workers, to pursue and facilitate training opportunities which presently exist in abundance, so as to minimize or negate the potential for any future effects on those workers of the new hard hat policies”.

Analysis and Decision

There was no dispute in the Dhillon and Sandhu grievances that the hard hat policies at Neptune and PCT are *prima facie* discriminatory on the prohibited ground of religious discrimination. The only dispute involved the question of “whether the policies comprise a *bona fide* occupational requirement”.

Under section 15(1)(a) of the *Canadian Human Rights Act*, prohibited discrimination is not considered to have occurred if the “refusal, exclusion, suspension, limitation, specification or preference in relation to ... employment is established by [the] employer to be based on a *bona fide* occupational requirement”. The *bona fide* occupational requirement (“BFOR”) defence to an allegation of discrimination is also available in other jurisdictions across Canada.

Arbitrator Munroe began by setting out the law on the question of whether the BFOR defence has been successfully established. As stated by the arbitrator, the following three-step assessment is required:

- The first step is “to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job”.
- The second step involves “the employer ... demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose ... and without discriminatory animus”.
- The third step raises the question of whether the particular standard “is reasonably necessary for the employer to accomplish its purpose”. The employer must establish that “it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship”. This – as noted by Arbitrator Munroe – has come to be known as the duty to accommodate to the point of undue hardship.

With respect to the first step, Local 500 had no issue with the industrial safety purpose of the hard hat policies. Regarding the second step of the above assessment, Local 500 conceded that there was no evidence of bad faith or discriminatory animus.

In the Dhillon and Sandhu grievances, it was at the third step of the above assessment that the dispute arose. Arbitrator Munroe framed the question before him as follows: “Is PCT’s hard hat policy¹ reasonably necessary to the accomplishment of the legitimate purpose of workplace safety (more particularly, minimizing the risk of head injury); and if so, has the duty to accommodate persons whose religious beliefs preclude the wearing of a hard hat been satisfied as required by law?”

Arbitrator Munroe stated unreservedly that “there can be no doubt that PCT’s hard hat requirements are justifiable on safety grounds”. The arbitrator declared that he was “unable to discern a consistent or defensible principle to Local 500’s adamant opposition ... to a hard hat policy at PCT”. He inferred that “Local 500’s generalized opposition to a hard hat policy at PCT [was] driven more by internal union divisions than by objective analysis and consideration of the safety issues”.

Note was made by Arbitrator Munroe of the statutory and regulatory regime in which PCT operates. The arbitrator made reference to the various legislative provisions that bind PCT and are aimed at promoting and furthering industrial safety. He described industrial safety as “a matter of important public policy”. Arbitrator Munroe stated that there was “force to the employer’s submission that where a workplace risk of head injury cannot be engineered out, the legislative/regulatory framework obligates the employer to ensure that an approved hard hat be used”.

¹ Arbitrator Munroe focused specifically on PCT’s hard hat policy. As stated earlier in this newsletter, the Dhillon and Sandhu grievances were modified by Local 500 during the course of the arbitration hearing. With regard to Neptune’s hard hat policy, there was “no longer an allegation of a violation of the *Canadian Human Rights Act*”.

Arbitrator Munroe stated that the “real question” was whether “in the implementation of the new hard hat requirements, the duty to accommodate [had] been satisfied”.

The arbitrator ultimately concluded that the BFOR defence was established, and the duty to accommodate had been satisfied. In the process of doing so, the arbitrator – rather than narrowly focusing on the “hard hat requirements themselves” – took into account “the despatch policies designed to accommodate persons with religious objections” and “the BCMEA’s offer (which remains open today) to facilitate training ... for person[s] whose religious beliefs preclude the wearing of a hard hat”.

The arbitrator went on to describe as “flawed” Local 500’s argument that “the standard itself [did not] provide for individual accommodations, if reasonably possible”. The arbitrator pointed out:

- “the BCMEA, as an employer’s organization representing its membership as a whole, says that it is both willing and able to reasonably accommodate [longshore workers whose religious beliefs preclude the wearing of a hard hat]”;
- there was “no evidence to suggest that the Despatch Hall accommodations [had] been insufficient, in any degree, in terms of as much work being made available to religious objectors as would have been the case absent the hard hat policies”;
- “[w]hen the Neptune and PCT hard hat policies were implemented in 2004/05, the BCMEA, as part of such implementation, issued instructions to the Despatch Hall to the effect that the despatch practices or sequences should be adjusted for the benefit of religious objectors”; and
- “the offer by the BCMEA to facilitate training of affected Sikh longshore workers to mitigate what otherwise might potentially be the consequences for some of them of waterfront hard hat policies”.

Arbitrator Munroe highlighted that “the evidence [was] unequivocally to the effect that ... the two grievors ... [had] suffered no loss of work as the result of the existing hard hat policies ... implemented”.

The arbitrator addressed the complaint of Mr. Dhillon (who, as you will recall, was denied work at Neptune) that “the introduction of the new hard hat policies” caused him to “los[e] out on ... the ‘choice’ of work opportunities”. The arbitrator stated:

“[T]he person complaining of the discrimination must participate in the process of accommodation, including by reasonably adjusting his or her own work preferences or otherwise as may be appropriate ... As the matter was put in *Anderson v. Alberta*, [2004] A.J. No. 1216 (Queen’s Bench), ‘... a person is not entitled to a job of their choice as long as the proffered job is one that is sufficiently inclusive to accommodate the complainant’. To a similar effect is the observation by Arbitrator Dorsey in [*Cloverdale Paint Inc.*, [2006] B.C.C.A.A. No. 29] that while the employer has the primary responsibility to initiate the search for an appropriate accommodation, ‘... [t]he employee must participate, accept and facilitate implementation of an employer’s reasonable accommodation offer even if the employee wants or prefers another arrangement’.

Simply put, the complainant is not entitled to the perfect accommodative solution from his or her own perspective.”

Arbitrator Munroe dismissed Local 500’s concern to the effect that “Despatch Hall accommodations implemented by the BCMEA to mitigate the effects on religious objectors of the PCT hard hat policy [would] adversely affect the despatch rights of other employees”. The arbitrator made the following statement:

“[I]t is well established in the jurisprudence that existing workplace practices, including those mandated by a collective agreement, cannot stand as a *per se* bar to a reasonable accommodation as required by human rights legislation.² As the matter was recently put by Arbitrator Dorsey in *Cloverdale Paint* ... ‘... sometimes a collective agreement provision has to be waived if it unreasonably blocks a workable accommodation’. As a related proposition, it is equally well settled that the duty to accommodate is a multi-party duty, albeit with the burden typically falling on the employer to originate a solution to the *prima facie* discriminatory situation created by it. That is to say, if a reasonable accommodation proposed by the employer can only be implemented with a union’s concurrence, and the union declines to agree, it can become a party to the discrimination and thereby incur a legal duty not to contribute to the ongoing discrimination And lastly, the other employees in the work group of which the complainant is a member have an obligation to participate, to an extent reasonable in the circumstances, in the necessary accommodative measures ... [T]he employees in the affected work group are expected to participate in the process of accommodation, like everyone else

Where it is appropriate for such to occur ... a duty of cooperation and participation falls on Local 500 ... and on the general body of workers.³”

Arbitrator Munroe provided a response to Local 500’s position that “the duty to accommodate [fell] to the direct employers [including PCT], individually at their respective work sites, subsequent to the daily despatch, and not to the longshore employers collectively (through the BCMEA) by means of the Despatch Hall”.

² At this juncture, we recall the following statement of the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970:

“The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were *ad idem* with their employer.”

³ We note that Arbitrator Munroe was clear that “where avenues of accommodation (short of undue hardship) are available that do not interfere with the established rights of others, those other avenues should be the first explored”, and that “[i]ntrusions into the established rights of others ... while undoubtedly necessary in some cases, should be limited to those truly required for the achievement of a reasonable accommodation”. Incidentally, the arbitrator ruled that the “Despatch Hall accommodations that were initiated by the BCMEA on PCT’s behalf to accommodate the religious objectors were minimally intrusive into the rights of others, and indeed, there was no evidence of adverse consequences being experienced by others as a result”.

More specifically, the arbitrator expressed the view that on-site accommodations at the PCT site – subsequent to the daily despatch – would result in undue hardship to PCT.⁴ The arbitrator noted the following:

- “[I]f an accommodation were to occur at the PCT site, it would necessarily include one or more workers who were supernumerary to actual requirements.”
- “[T]here are effectively a good many more accommodations potentially available at the point of hiring (despatch) by the BCMEA on behalf of its member employers, that is to say, at the point when the available jobs can be viewed as a composite whole prior to the work day beginning, than would be the case if the despatch sequences simply ran their course, with any necessary accommodations being found (or not) at the individual work sites after despatch has occurred.”
- “[T]he longshore workers at the Port of Vancouver do not have the same attachment to individual employers as in other industrial settings.”

Please do not hesitate to contact any member of our firm if you have questions in respect of Arbitrator Munroe’s award or the issue of accommodating religious beliefs in the workplace, or if you wish to have information on any other employment or labour law issue.

⁴ Arbitrator Munroe was careful to add the following: “I do not wish to be taken as saying, in general, that the BCMEA’s member companies need not individually concern themselves with religious accommodations (or for that matter, medical or other accommodations); that is, that the Despatch Hall is the sole location where the duty to accommodate ... need be considered.”

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In 1992, Tom was appointed by the British Columbia Minister of Labour to a Committee of Special Advisors to recommend an overall labour relations strategy for British Columbia. He was one of three special advisors responsible for drafting the *Labour Relations Code*.

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* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *