Mathews Dinsdale

Employer's Advisor

A Newsletter From Mathews, Dinsdale & Clark LLP

October 2010

Bill 16 and "Restraint"

In March, Ontario's Minister of Finance introduced his 2010 Budget designed to eliminate Ontario's deficit by 2017-18. On July 20, he expressed concerns about public sector compensation which he identified as a key component in his government's plan to manage expenditures while sustaining public services. An accompanying document disclosed that between 2009-10 and 2012-13 interest on provincial debt is projected to increase by $3.6 billion, and each $1 billion of which adds another 50 million dollars in annual interest. Money which goes to pay off debt does not go to teachers or social workers or nurses or the programmes and services they deliver; rather, it takes away from public services.

At the rate of $1 per second, it would take 114 years to count the $3.6 billion, without time off to eat or sleep. To arrive at this $3.6 billion total the government estimated that the increase in costs in the education sector over this period would average 3.7 per cent. This amount must include the annual 3% wage increase for elementary and secondary school teachers and for support staff that was agreed to by this government until August 2012. It also must include increases for employees moving through the salary grid plus increases in the costs of employee benefits and increases in utility and supplies costs. Perhaps the outlook is even worse than described.

In response to this economic problem, in its 2010 Budget the government announced that there would be no increases in revenue to fund incremental increases for collective agreements in the broader public sector. It followed this up on March 25, 2010 with the introduction of Bill 16, legislation which it claimed was designed to restrain public sector compensation. However, the government excluded from those whose compensation is to be restrained all those employees in the public sector who were represented by trade unions. This legislation not only widely misses the mark, but it also badly distorts the market: it freezes the wages of all management but allows the wages of those managed to increase, narrowing the difference between the two and in some cases allowing the wages of those managed to surpass the wages of the managers. The legislation has planted a time bomb for future increases to right this distortion. As nonsensical as that may be, that is the least of its evils.

It is a basic and fundamental underpinning of labour relations in this country, that employees are free to join a union. It is an unlawful practice for an employer to interfere in an employee's choice in this regard. Of course, the freedom to join a union means there is a correlative equal right for an employee not to join a union. There should be no intimidation or coercion, one way

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or the other. So what do we make of this legislation on that score? Here is how this works: if you are a nurse and you chose to be represented by a union, as for example the nurses at the Toronto General Hospital, then you are entitled to compensation increases during this period of restraint; however, if you are a nurse at a hospital and chose not to be represented by a union, as for example the nurses at the Hospital for Sick Children which is across the road from the Toronto General, then you are to be punished for that decision by having your compensation frozen. This discrimination about who gets what arises in other hospitals as well as at long term care centres. In each case if the employees chose not to be represented by a union they get substandard treatment compared to those who chose to join a union.

It is obvious then, and it would have been obvious from the outset, that this legislation designed to restrain compensation will encourage employees to join trade unions to obtain compensation increases. Rather than fix that obvious imbalance, the government embarked on discussions across the broader public sector to see what else it could throw into the hopper for the unions to agree to a compensation freeze. You could throw the universe into that hopper before that would happen. This is particularly the case in the health sector, a sector which consumes a significant portion of the provincial budget. Increases in compensation in that sector are largely resolved by a third party arbitrator. That process, known as interest arbitration, is widely considered to be both chilling and narcotic: it interferes with meaningful bargaining and, once resorted to, it becomes the rule rather than the exception, as arbitrators set compensation increases with only passing regard to employers' ability to pay. In the Minister's press release of July 20 he stated: "And I also hope you will agree that interest arbitrations will be put on hold... to allow this consultation to bear fruit." Sure enough, on September 15, an arbitrator awarded increases in compensation to a large number of nursing homes across Ontario. In the world of collective bargaining, this increase will serve as the basis for whipsawing and leapfrogging for other unions in other nursing homes and homes for the aged and in other sectors.

What is happening here? The Supreme Court of Canada, in a case emanating out of British Columbia, said it is a violation of the freedom of association for a government to change a collective agreement during the period of its operation in such a way that employers could effectively walk away from the collective agreement in its entirety by contracting out its services to non union employers. One may question how this is a matter of freedom of association; others will say that the B.C. government overreached and invited this result. There is room to argue that there is no similarity between disemboweling an existing collective agreement on the one hand and prospectively imposing a wage freeze on all of the public sector, both union and non-union, during a time of dire economic conditions. If the public does not like that even handed fiat, it can express that disdain at the ballot box. It is difficult to believe that any level of government would rely on the B.C. case as an explanation for enacting such an imbalanced piece of legislation as Bill 16. One might speculate about other explanations for Bill 16: the government is afraid of unions; the government wants to remain in their favour; the government wants labour peace?

This government recognizes the severity of the economic conditions before it. It has enacted legislation which in name calls for restraint but ignores the key source for the need for restraint and which serves as a gift for union organizers. It now faces yet another arbitral award which may serve as the stepping stone for more increases. How Bill 16 furthers the goal of wage restraint is far from clear.

Court Issues Ruling on Fiduciary Duties

In the recent decision of *Aquafor Beech v Whyte*, the Ontario Superior Court issued a decision relating to the fiduciary duties of departing members of an engineering firm.

The Defendants were two senior engineers who had worked at the Plaintiff, Aquafor Beech ("Aquafor"), a niche market engineering firm, for almost fifteen years. The Defendants left Aquafor and started their own firm. There were no non-competition agreements in place with respect to the Defendants. Aquafor sued, claiming that the Defendants had breached their fiduciary duties by secretly planning to leave and setting up a competing firm, by failing to give reasonable notice of their departure, by soliciting clients and employees, by appropriating business opportunities and by using confidential information to secure work for their new firm.

The Court found that the Defendants did, in fact, owe a fiduciary duty to Aquafor because of the significant role they played at that firm. The Defendants were both senior partners of Aquafor, accounted for a significant portion of Aquafor's revenue, and had almost complete autonomy with respect to their work and client relations. In fact, from their clients' perspectives, the Defendants were "the face of" Aquafor. Further, the Defendants were involved in making many of Aquafor's important decisions, including those with respect to hiring, profit-sharing and employees' salaries. Further, the Defendants were involved in marketing the firm to the community and potential clients.

Interestingly, while the Court found that the Defendants had fiduciary obligations, it also found that they had not actually breached any of their fiduciary duties.

The Court concluded that the Defendants were entitled to plan the formation of their new company and take preliminary steps towards its formation while still employed with the Plaintiff, as long as they didn't actually compete with Aquafor before leaving, stating it would be unrealistic to expect them to wait until after their departure before taking such steps.

The Court confirmed that fiduciary employees, although they are allowed to compete with their old company after their departure, cannot solicit the old employer's clients for a reasonable time after their departure. However, the Court found that the defendants had not solicited clients in this case. Due to the Defendants' reputation in the field, some old clients followed them of their own accord, but the Defendants had not attempted to persuade them to come to their new company or to leave Aquafor. The Defendants had also sent out a "Letter of Introduction" to a large number of mining companies in the region, some of which were Aquafor's clients, but again the Court found that this was not "solicitation" of clients. Further, simply informing some of their old clients at Aquafor that they were leaving did not constitute solicitation on the part of the Defendant, as they would be expected to so inform these clients given their close working relationship.

The Court also ruled that the Defendants did not try to convince any of Aquafor's employees to leave and join them at their new company, even though one employee had quit Aquafor and joined them of his own accord, and another had applied for a position at the Defendant's new company via a job posting she found on the internet.

The Plaintiffs argued that even absent solicitation, the Defendants had a duty to decline work from Aquafor's clients. The Court rejected this argument, stating that, with respect to both previously existing projects and new projects, there was no reason for the Defendants to be precluded from doing work that had been offered to them by their old clients (absent solicitation or misuse of confidential information).

Finally, the Court found that the ex-employees had given reasonable notice of their departure (approximately one month in advance of their departure date), and had not misused any of the Plaintiff's confidential information.

This case comes on the heels of two other recent decisions, *RBC Dominion Securities v Merrill Lynch* and *GasTOPS v Forsyth*, which also dealt with the fiduciary duties of ex-employees. In both RBC Dominion Securities and GasTOPS, the ex-employees were found to have breached their implied duties and were liable for damages. However, as stated by the judge in *Aquafor Beech*, "each case depends on its own circumstances," and thus employers must be aware that departing senior employees are not necessarily precluded from developing and founding competing businesses immediately prior to their departure.

Indeed, the judge in *Aquafor Beech* stated that if the principal of Aquafor wanted to restrict the defendants from competing with Aquafor or accepting work from its clients, "he could have negotiated a non-competition agreement with them. He did not." Thus, this case illustrates the importance of developing explicit non-competition or non-solicitation agreements, as companies will not be able to protect their interests simply by relying on employees' implied fiduciary duties.

Seminars and Presentations:

June

On June 23rd, *Walter Thornton* spoke to the Barrie Construction Association on "Certification Applications in The Construction Industry, Subcontracting Under a Collective Agreement and Construction Management."

August

On August 25th, *Bill Phelps* and *David Francis* gave a presentation to a major airline about Managing Employees and Labour Relations Board procedure.

On August 25th, *Steve Wilson* spoke to Principals, Vice-Principals and Senior Management of a school board about "Collective Bargaining and Managing in An Environment Subject to Grievances and Arbitration."

October

On October 23, *Joe Liberman* will participate in a panel at the Schulich School of Law at Dalhousie University as part of the Innis Christie Symposium on Labour Law.

Steve Bernardo will be a guest speaker at the opening of the Ottawa office of the Merit OpenShop Contractors Association in October. The Association represents over 200 open shop or non-aligned construction contractors across Ontario.

December

On December 9th, *Elizabeth Keenan* will be speaking at the Lancaster House Labour Arbitration Conference as part of a panel providing an update on "Major Case Law and Legislative Review."

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