CASE IN POINT: IMMIGRATION

Work permit dispute a non-union matter

Foreign worker complained of employer's lack of support for 3rd certification attempt; employer terminated him after 2nd failure

BACKGROUND

Discretionary duty of representation

WHEN foreign workers apply for a work permit in Canada, it is usually to work in a specific job for a specific employer, who may help the worker in getting the permit. The work permit usually only permits the worker to work for that employer. As a result, the job is often already in place and the details have been worked out before the permit is approved.

If the foreign worker is unionized, to what extent does the union have to protect the worker's status? This question was raised when an Alberta foreign worker complained his union didn't meet its duty of fair representation by helping him convince his employer to let him take a trade exam — for a third time — that he needed to maintain his eligibility under his work permit, as well as address a change in his schedule in his original employment offer. Immigration lawyer Sergio Karas discusses the case and what employers with foreign workers should take from it.

| BY SERGIO KARAS |

IN A short but interesting decision, a panel of the Alberta Relations Board dismissed a grievance by a foreign worker alleging that the union representing him breached its duty of fair representation. The worker claimed that the union refused to enforce his work schedule as previously agreed with the employer, and by failing to assist him to force the employer to request a further opportunity to qualify for trade certification in his profession.

In *De Bruyn v. U.M.W.A., Local 2009*, a foreign worker from South Africa came to Canada after the employer assisted him to obtain a work permit as an industrial electrician, presumably obtaining a Labour Market Opinion (LMO). As is customary, the conditions set out in the work permit were that the employee was only authorized to work for his specific employer, in the occupation described and at the location specified. Prior to commencing work, the foreign worker accepted an offer of employment that provided details of his shift rotation and hours of work. Employment was conditional upon his obtaining provincial trade certification.

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New collective agreement changed shift schedule

Shortly after the hiring, the union entered into a first collective agreement with the employer and a new work schedule was adopted. The foreign worker took issue with the new schedule, arguing that he would have made more money under his agreement with the employer. He wanted the union to take action, but it refused to do so, advising him that his work schedule as originally agreed upon with the employer was a non-union matter.

At the same time, the foreign worker twice failed his provincial trade examination, and his application for trade certification with Alberta Apprenticeship and Industry Training was cancelled. The employer terminated his employment, noting that he was no longer eligible to work as he had failed to obtain the requisite trade certification. The foreign worker asked the union to grieve his termination and force the employer to request the regulatory body to allow him to write his trade examination for a third time. The union declined to grieve and took the position, after seeking legal advice, that a grievance aimed at forcing the employer to support another exam for the foreign worker or to continue employing him with a work permit when he had twice failed to establish his qualification was not viable. Instead, the union contacted Apprenticeship and Industry Training in support of the foreign worker's request to write his trade examination a third time, without involving the employer.

The board held that the duty of fair representation included requiring unions to act in good faith without acting arbitrarily or discriminatorily. It summarized the features of that duty as set out in the jurisprudence. The board agreed that unions enjoy a considerable amount of discretion when

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Employee wanted to file grievance allowing third trade exam

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they deal with grievances, and that they may settle or drop them, even if the affected employee disagrees.

Schedule under work permit a non-union matter: Board

After examining the legal requirements of the duty of fair representation, the board concluded that the union's refusal to grieve the work schedule promised to the foreign worker prior to the existence of the collective agreement fell within the discretionary scope of the duty of fair representation, and dismissed that part of the complaint on the basis that it had no jurisdiction to address it as it was a non-union matter.

With regards to the union's handling of the foreign worker's termination of employment, the board noted that the employee twice failed his trade examination and that his score on the second exam was lower than on the first. The foreign worker wanted the union to file a grievance that would force the employer to provide support for him to be tested a third time. The union took the position that a grievance was not viable in the circumstances. The board concluded that the duty of fair representation does not require a union to bring a grievance merely because an individual asks it to do so. The union is entitled to assess the merits of a grievance and its chances of success at arbitration. The complaint filed by the foreign worker did not suggest the kind of conduct necessary to prove a breach of the duty of fair representation, and there was no evidence to indicate that the decision not to grieve his termination was arbitrary, discriminatory, seriously negligent, or made in bad faith, said the board.

Interestingly, under the terms of an LMO, employers are obligated to provide wages and working conditions agreed upon with the foreign worker at the time of extending the offer of employment. In fact, Service Canada has auditing policies in place based on its encompassing regulatory power to monitor whether employers are abiding by the terms of LMOs. This policy has been in force since April 2011 to ensure that employers do not take undue advantage of foreign workers.

Under an LMO, employers are obligated to provide wages and working conditions agreed upon at the offer of employment. However, the worker was unable to perform his duties, so he couldn't argue that the employer failed to do so.

It is noteworthy that in *De Bruyn*, there was no mention of this policy, which appears to collide directly with the collective agreement. In any event, the employee was no longer able to perform his duties as an industrial electrician given his failure to obtain trade certification, so he could not argue that the employer failed to provide the wages and working conditions agreed upon. In other circumstances, however, that discussion may lead to a different result.

Employers should be aware that employing foreign workers entails a number of obligations that include providing specific wages and working conditions agreed upon and reflected in either an LMO or work permit. They must abide by all conditions set out in the LMO to avoid potential penalties. Employers should always seek legal advice before terminating a foreign worker, or changing wages, duties, location of employment, or other working conditions.

For more information see:

■*De Bruyn v. U.M.W.A., Local 2009* (February 9, 2012), Doc. GE-06224 (Alta. L.R.B.).

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