Jacob Giesbrecht

Helpful Legal Information for MAHCP Members

"You Can't Fire Me, I Belong to the Union"

by Jacob Giesbrecht
of Inkster Christie Hughes, LLP

There are myriad benefits to belonging to a union, too many to mention here. As more and more of the workforce joins the ranks of the non-unionized, there are those that may question these benefits. One of the benefits isn't always obvious but is at the heart of the employment relationship. Membership in a union restrains the employer's right to fire without cause. In these days of high stress, unrealistic workload and micromanagement, that is a truly significant benefit.

This right is not without limitation. Article 2401 of the MAHCP's central table Collective Agreements provides: "No employee shall be disciplined or discharged without just cause. In order to establish cause the employer has the onus to prove that a very significant shortfall in the ability or loyalty of the employee.

As stated in the clause, this right to a job is not without limitation. The employer has the obligation to provide the job, so long as the employee performs the duties to the job adequately.

For those not represented by a union under a collective agreement, the employer can terminate your employment without cause at any time, on a whim. They can do this so long as the employer gives the employee working notice or reasonable pay in lieu of notice.

Some may consider this "pay in lieu" of notice an attractive feature of an employment contract. In most cases it is not available to a union member because as mentioned earlier, union members can't be dismissed without cause. What if your job is altered to such a degree that it is effectively not the same job anymore. In this scenario, the employer has essentially "constructively dismissed" the employee from their position and the employee may be able to claim pay in lieu.

In the case of Mathews Conveyer Co. of Canada v. I.A.M.A.W., Local 2291 out of Ontario, the arbitrator was asked to determine whether constructive dismissal had occurred when the company announced that it would close its plant. The arbitrator commented on the issue as followings:

> 37 The Company maintained, however, that constructive dismissal has no application in a unionized workplace. In support of this submission, the Company relied on Re Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild (1990 (Brent) in which it was held that the concept of constructive dismissal is "inappropriate in a collective bargaining situation". Similarly, in Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union. Local 454, [1998] 1 S.C.R. 1079 (S.C.C.), it was suggested that where the relations between the parties are governed by a collective agreement, it is inappropriate to have recourse to common law concepts such as constructive dismissal. For purposes of this case, however, it is unnecessary to decide whether the concept can have application where the parties are bound by a collective agreement as, in the circumstances, I find that a case for constructive dismissal has not been made out.

In another case decided by the Supreme Court of Canada, they had this to say about constructive dismissal:

> 81 The Board's final error lay in failing to apply the collective agreement properly to Ms. Hardy's grievance. The relations between the parties were governed by the collective agreement. If the dispute fell under the terms of that agreement, no recourse to common law concepts like constructive dismissal or its alleged cousin, constructive layoff, was proper. Ms. Hardy alleged a violation of the collective agreement, in particular the "most available hours clause" and Letter of Understanding No. 5. In fact, the "most available hours clause" provided for assignments on the basis of seniority only within the employee's classification and department. It did not provide for cross-classification transfer of part-time employees on the basis of seniority and the Board concluded that it had not been violated. Instead, the Board, through the purported common law doctrine of constructive layoff, converted Ms. Hardy's scheduling complaint into a layoff complaint and gave her a remedy available under the layoff provisions the right to be scheduled to work across classifications (Article 12.03 says that seniority governs in the case of lay-off of part-time employees). It found that the employer had breached Article

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> A-1.01 (2) by ceasing to pre-schedule Ms. Hardy for the hours she worked and relying on the call in procedure. In the Board's view, this breach of the scheduling provisions, which resulted in Ms. Hardy receiving substantially fewer scheduled hours while junior staff in other classifications were being scheduled to work, constituted a constructive lay-off.

In the case Inn On The Park v. H.E.R.E., Local 75, the employer provided working notice of dismissal to two long-term employees. The work provided to the employees during the notice period was nothing like the work they had done before the employer ceased operations. The arbitrator determined that the employer provided the working notice to defeat claims of termination pay under the Employment Standards Code. The arbitrator in that case found a constructive dismissal because the collective agreement no longer determined the issues between the parties.

Another way of establishing a constructive dismissal is to prove that the employment relationship is so poisoned that it is impossible to continue to work for the employer. This theory of the constructive dismissal seems to be gaining ground. It is sometimes being used in argument by employers to justify terminating employees without cause.

Sometimes an employee wishes to have constructive dismissal but not without the ability to obtain severance. Over all, the case to justify a constructive dismissal is very difficult for either the employee or employer to establish a case. The fact of the matter is that where an employee competently performs their work and doesn't provide cause, the employer must retain that employee so long as the work remains…that is, so long as the employee is represented by a union.

Choosing the Attorney

As you know, Inkster Christie Hughes LLP offers a legal assistance program to the members of MAHCP. Under this plan you receive reduced rates on a number of specific legal matters such as the purchase or sale of a home, Wills, Powers of Attorney, Health Care Directives, separation agreements, divorces as well as a reduction on general legal rates.

This paper is intended as an introduction to the topic and not as legal advice. If you require specific advice with respect to your situation, you should contact a lawyer.

This series of articles will continue in future editions of the MAHCP News. If there is a topic that you would be interested in, please contact Wendy at 772-0425.

MAHCP LEGAL ASSISTANCE PLAN

Membership does have its privileges

MAHCP members receive reduced legal fees on house purchases, sales and mortgages as well as Wills, Powers of Attorney and Health Care Directives under the MAHCP Legal Assistance Plan.

Discounts also apply to family law matters and members benefit from a 20% reduction in other legal fees.

For more information, please contact:
Jacob Giesbrecht at
Inkster Christie Hughes LLP
at 947-6801

How Well Do You Know Your Collective Agreement?

Question:
If your employer has told you that someone has complained about your performance or conduct, are you entitled to see the complaint if it is written?

Answer: Yes, Employers are not entitled to use documentation against an employee if the employee has not been able to defend him or herself against it. Any such documents are considered disciplinary.

"The information contained in this question is meant to be a general rule and should not be considered exhaustive in terms of contemplating every contingency in every work environment. Any questions that members may have regarding their particular situation should be directed to their Labour Relations Officer for clarification."