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Labour and Employment Communiqué

Do Bargaining Unit Work Clauses Restrict the Re-assignment of "Shared Functions"?

Bargaining unit work is a fundamental concept in a collective bargaining relationship. Unless specifically defined by a collective agreement, "bargaining unit work" refers to the tasks that are performed by members of a bargaining unit. In order to protect the employment of their members, unions frequently seek to restrict the performance of bargaining unit work by non-union employees or by employees who are represented by another union.

Although arbitrators have implied some general restrictions on the reassignment of bargaining unit work, unions usually try to negotiate specific contractual restrictions. These contractual restrictions usually take one of two forms. First, non-bargaining unit employees may be forbidden to do bargaining unit work if it has an adverse effect on bargaining unit employees (e.g. a lay-off or reduction in hours of work). Alternatively, non-bargaining unit employees may be prohibited from doing any bargaining unit work with, perhaps, some narrowly defined exceptions.

What is the effect of these clauses when the same work is performed by bargaining unit and non-bargaining unit employees? Unfortunately, the answer is not completely clear. Two lines of jurisprudence have developed. One theory indicates that "shared functions" (i.e. tasks performed by both bargaining unit and non-bargaining unit employees) cannot be claimed exclusively by a union pursuant to either type of bargaining unit work clause. The other school of thought is to the effect that any work performed by

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bargaining unit employees is protected by a bargaining unit work clause even if it is a shared function.

In *Re Ontario Nurses' Association ("ONA") and I.O.O.F. Senior Citizen Homes Inc. ("I.O.O.F.") and Christian Labour Association of Canada ("CLAC")* (Unreported, February 5, 2003), Arbitrator Brian Keller decided that neither theory is necessarily correct. Arbitrator Keller decided that such issues must be determined based on the facts and the historical context relating to the disputed work. In this particular case, the work in question had been performed by employees in the CLAC bargaining unit, transferred to the ONA bargaining unit for a few months and then reassigned to the CLAC unit.

Arbitrator Keller decided that the bargaining unit work clause in the ONA collective agreement was not violated by what he referred to as the "retransfer" of the work. Further, when the relevant collective agreement was signed, nurses represented by ONA were not doing the work. Therefore, the arbitrator concluded that parties could not be taken to have intended to restrict the performance of the work in question to nurses represented by ONA. The grievance was dismissed.

In dealing with this issue, we recommend the following:

(1) Avoid contractual restrictions on the assignment of bargaining unit work if possible.

(2) If a restriction on the assignment of such work must be accepted, try to limit the restriction to work performed exclusively by bargaining unit employees.

(3) If you are restructuring a unionized portion of your operation in the face of a restriction on the assignment of bargaining unit work, proceed cautiously if duties have been shared by bargaining and non-bargaining unit employees. Consider how the work has traditionally been distributed and, in particular, its distribution when the current collective agreement was signed.

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Please contact us if you would like a copy of the I.O.O.F. award.

About the author:

Hugh Dyer is a partner in our Labour and Employment Group. His practice concentrates on advising and representing employers in all matters relating to labour relations in both the provincial and federal sectors.

Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com.

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