Recent developments in U.S. labour and employment law

March 08, 2021

In terms of matters of labour and employment, there has been extensive work written about the distinctions between the systems in the U.S. and Canada. The two countries have many notable differences in the area of employment law. For example, the absence of the notion of "at-will" in Canada, as well as the inherent differences between the countries' discrimination laws.

However, two recent U.S. events demonstrate that while differences continue to exist in the area of labour law, the U.S. is moving towards the adoption of certain concepts already present in the Canadian context. This article highlights these concepts for U.S. practitioners to learn from experiences in Canada.

Google’s Alphabet Workers Union

The first event is the recent formation of Google’s Alphabet Workers Union (AWU). While calling itself a union, the AWU is actually not a union under either the National Labor Relations Act (NLRA) or any decision of the National Labor Relations Board (NLRB). The AWU has never organized for collective bargaining rights through the NLRB. In fact, it is a minority union that has partnered with the Communication Workers of America. Currently, the AWU consists of a number of Alphabet employees and third-party contractors who have joined forces to take positions and act in respect of social issues upon which the AWU believes Google has an effect. This is not a model seen in Canada. In fact, certain Canadian jurisdictions provide that a union may be automatically certified in *very specific limited circumstances* or be voluntarily recognized a union. Otherwise, a union can only be certified by a Board decision where a majority of signed union cards supports it at the time of the filing of the application (the card check system) or after garnering the majority of the votes at the time of an election. Otherwise, a purported union has no standing to call itself the representative trade union under the applicable statute of any jurisdiction in Canada.

In Canada, trade unions generally attempt to organize employees through traditional methods. Recently, trade unions in Canada have used public issues to gain and maintain support for themselves. One example of this approach was the support and sponsorship trade unions provided for the arrival of Syrian refugees in Canada. The unions’ role in this cause won them support and respect from diverse parts of the

Canadian public, including industry. However, one may also view these efforts taken by the trade unions as a means to maintain their relevance and promote their views in the news.

The AWU situation is different from the Canadian experience and leads to the question, why would the AWU situation happen in the U.S. and not in Canada? While there may be several reasons for this, one could argue that the lower number of unionized employees in the U.S. (as opposed to in Canada) explains why trade unions in the U.S. need to be more aggressive in promoting themselves. However, even though trade unions on both sides of the border aim to increase membership, the way in which trade unions in the U.S. and Canada behave is different. While their purposes may be the same, their messaging and approach vary in important respects. Could the AWU and its members not work on behalf of the Google employees and third-party contractors without calling themselves a union?

NYC's Mandatory Collective Bargaining Agreements in Fast-Food Shops

The second event that may indicate a shift in the U.S. towards adopting certain elements of labour law, which is currently found in at least one Canadian province, is the recent adoption of two laws mandating extensive labour protections for fast food workers in New York City.

In their piece "NYC's Mandatory Collective Bargaining Agreements in Fast-Food Shops?", Sam Estreicher and Zachary Fashma state the following:

> Although not officially called collective bargaining statutes, there is no mistaking that these laws mandate core provisions found in many if not most collective bargaining agreements. (JUSTIA, January 5, 2021)

These laws provide that:

- Employees beyond their probationary period of thirty days may be discharged only for just cause or a "bona fide economic reason";
- Just cause requires some form of "progressive discipline";
- A written notice of the reason must be submitted to the employee within five days of the dismissal and the reasons may not be changed or increased;
- Where challenged, the employer must prove a number of elements which include that the rules were known to the employee, fairly and consistently applied; and
- A fair and objective investigation took place into the alleged misconduct.

The laws passed in New York City come close to mirroring a "decree", a long-standing legal concept that has existed in both France and the province of Québec for many years. A decree is tantamount to a collective bargaining agreement for non-unionized employees. While decrees in Québec do not include rules governing the firing of employees and the burden imposed on employers to defend such decisions, they do contain minimum standards (wages, overtime rules, holidays, vacations and salaries, etc.) which, when passed in a decree, mandate core provisions commonly found in collective bargaining agreements.

When will a decree be legislated? In Québec, a decree is passed where the Government orders that a collective agreement negotiated between a certified trade union and an employer or group of employers respecting a particular trade, industry, commerce or occupation (the proper field of activity) shall also bind all the employees and professional employers in the province or in a stated region of the province within the proper field of activity as defined in the decree. Once determined that a decree should be proposed, a notice is published for at least 45 days. During this period, employers who are to be covered by the decree are given the right to contest the passing or proposed amendments to the decree. Once this process is completed, the decree sets out the minimum conditions under which employees covered by the decree will be hired and paid.

While there is no decree for fast-food workers in Québec, it is clear that the NYC laws in question are similar. Where would this type of legislation be extended in New York City? Given that a variety of professions in Québec have their own decrees (from as construction workers, to janitors, and hairdressers and barbers, to name a few) it raises question whether similar laws might come to New York.

Knowingly or not, New York City has imported a labour law concept already known in Québec and France. As a result, it would be worthwhile to draw from Québec's experience.

The Québec law known as *An Act Respecting Collective Agreement Decrees, CQLR, c. D-2* (the Act) allows for a decree to be extended when the collective agreement upon which such decree is based has been re-negotiated. The amended collective agreement may be extended if the amendments are expedient and "do not significantly impair the preservation and development of employment in the defined field of activity" (article 6 (2)(c) of the Act) and, furthermore, "do not result, where they provide for a classification of operations or for various classes of employees*, in unduly burdening the management of the enterprises concerned*" (article 6 (2)(d) of the Act). This would seem applicable since the New York City legislation does not cover all fast-food restaurants and/or chains.

Based on the similarities between the Québec decrees and the New York City laws, one must seriously question whether the latter should be re-visited in order to consider the following:

- The length of the probationary period;
- Whether the term "days" should mean full days of at least 7-8 hours of work; or
- Whether these days should be counted only where the day is actually worked by the probationary employee and is not simply a calendar day when the employee on probation is not working.

In practice, a 30-day probationary period is extremely short and does not properly allow an employer to assess an employee. One may ask what does an employer do with an employee who is late and/or absent during the probationary period? ;How should this tardiness or absence reflect on the employee once that employee works beyond the probationary period? One may argue that the failure to answer these questions and deal with these issues does, in fact, "unduly burden the management of the enterprises concerned". Accordingly, our position is that these recently passed New York City laws

require greater scrutiny and further considerations of fairness, including fairness to employers.

One final consideration may be noted. In their New York Law Journal Law.com article, of February 2, 2021 entitled “NYC Bans At-Will Employment for Fast Food Workers”, Jeffrey S. Klein and Nicholas J. Pappas made an interesting point. In their analysis, the authors raised the fact that the New York City legislation will come into effect on July 4, 2021, giving fast-food restaurant operators/employers covered by the legislation six months to bring their policies and practices into compliance. While the period proposed for the rollout seems fair, there will likely be insufficient time to deal with the questions and issues left posed but unanswered as set out above. Those responsible for the New York City legislation can certainly learn from the Québec decree experience. The next six months should be used to deal with the issues and unanswered questions raised by the legislation. If not, the new legislation may have unintended legal and business consequences.

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