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CAN A MANAGER BE A MEMBER OF A CERTIFIED ASSOCIATION?

Posted on March 13, 2017

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In a significant decision rendered on December 7, 2016, Justice Irène Zaikoff of the Administrative Labour Tribunal decided that low-level managers have the right to form part of a certified association.

Facts

In this case, the *Association des cadres de la société des casinos du Québec Inc.* (the "**ACSCQ**") filed a Motion seeking certification to represent certain first-level managers employed by the Montreal casino. This file was joined with a similar file in which the *Association professionnelle des cadres de premier niveau d'Hydro-Québec* ("**APCPNHQ**", collectively with the ACSCQ, the "**Associations**") was also seeking certification to represent certain first-level managers working for Hydro-Québec.

Both employers opposed the certification alleging that managers are excluded from the definition of "employee" under the *Quebec Labour Code*[1]. According to the employers, this exclusion is justified given the need to avoid the conflict of interest which would arise if a representative of the employer, who is supposed to act in the employer's best interest, was able to collectively negotiate his or her own conditions of employment. The Associations, on the other hand, alleged that the exclusion of first-level managers from the definition of "employee" under the Labour Code is a violation of the right to freedom of association protected by the *Canadian Charter of Rights and Freedoms and the Charter of Human Rights and Freedoms* (collectively with the Canadian Charter, the "**Charters**").

Accordingly, the Tribunal had to decide whether the exclusion of managers from the definition of "employee" in the *Labour Code* is i) a violation of the right of association guaranteed by the Charters, and if so, ii) if such a violation is justified under the Charters.

Decision

After a thorough analysis by the Tribunal of managers' rights to form part of a certified association in Canada, the United States, and internationally, the Tribunal concluded that in this situation, first-level managers can be considered employees under the *Labour Code*.

In its analysis, the Tribunal found that while the purpose of this exclusion is to avoid conflicts of interest, the

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main effect of this exclusion is to hinder the Associations' ability to collectively negotiate on behalf of their members. In fact, since these Associations are not certified associations, the recognition of the representative character of these Associations will depend solely on the employer, and there is no way to prevent employer interference. Also, since these Associations are not certified, there is an imbalance of power between the employer and the members of the Associations, since there is no way of ensuring that their employment conditions are negotiated in good faith, and because the members do not have the right to strike.

According to the Tribunal, first-level managers do not benefit from the same protections as senior level managers, since senior managers have an active and strategic role in labour relations and are part of the negotiations of the collective agreement and the establishment of working conditions, whereas lower level managers are not. This is particularly true in organizations of this size and complexity.

It should be noted however that the fact that these organizations are governmental entities was taken into consideration.

Consequently, the Tribunal ruled in favour of the Associations declaring that the exclusion of the managers from the definition of employee under the Labour Code violated the right to freedom of association and is not justified in a free and democratic society. Furthermore, the violation of the Charters was not proportional to the objective sought, since, there was no need to exclude every manager, without distinction as to their duties and hierarchy.

Impact for employers

While it is difficult to determine with certainty whether the outcome of this decision would apply in cases where the employer in question is not a governmental entity, it is still important to be aware of this decision given the possibility that the scope of this decision may be expanded to all employers. As a precaution, employers may want to clearly outline in the collective agreement that all managers are excluded from the bargaining unit, rather than simply including a general statement excluding "employees excluded by law" from the bargaining unit. In addition, it may no longer simply be enough for an employer to give an employee a "manager" title for them to be excluded from the union. Real thought as to their tasks, duties and responsibilities may also have to be given.

by Shari Munk-Manel and Mireille Germain, Student-at-Law

[1] Section 1(l) of the Labour Code defines an employee as: "*a person who works for an employer and for remuneration, but the word does not include: (1) a person who, in the opinion of the Tribunal, is employed as manager, superintendent, foreman or representative of the employer in his relations with his employees* [...]"[ps2id id='1' target=''/]

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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