AN ANALYSIS OF THE "RESTRAINT" LEGISLATION AFFECTING EMPLOYEES

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BILL 3 - PUBLIC SECTOR RESTRAINT ACT

Who the Act Applies to:

The Public Sector Restraint Act applies to 25% of the labour force of British Columbia. It applies to all Government employees as well as employees of public corporations such as I.C.B.C., Metro Transit, municipal and library employees, university and college employees, health, hospital and community care workers and teachers.

Retreat or Public Relations Ploy

The history of the legislation is well-known. The initial version of the Act gave a public sector employer the right to fire, without cause, any employee upon the expiration of their current collective agreement. Subsequently the Bill was amended to read that a public sector employer could terminate an employee in accordance with the Regulations in a broad number of circumstances. Until the Regulations were published on October 12, 1983, it was impossible to form an opinion as to whether the amendment deleting the no just cause provision was a real retreat by the Government or simply a cosmetic change for public relations purposes.

It is now clear that the August amendment was designed only to dissipate opposition to the initial Bill which had aroused wide-spread opposition. The legislation as now proclaimed provides no security of employment for public sector employees and it accomplishes what the Government set out to do in the initial Bill.

The Government has authorized the termination of public sector employees without just cause and without regard to standard collective agreement protections such as seniority, the right to protection from lay-offs on the basis of seniority, the right to bump into positions held by less senior employees and the right to recall.

When can an Employer Terminate Employees

The public sector employer is permitted to terminate any employee if any one of five circumstances occur :

1. If there is, in the employer's opinion, insufficient work.

2. If there is, in the employer's opinion, insufficient current operating funds in the budget.

3. If there is a change in the organizational structure of the employer.

4. If there is a discontinuance of a programme, or

5. There is a reduction in activity or service.

No real limitation is put upon management's power to terminate under this section. If the employer wishes to cut back on its component of employees it is only necessary to re-allocate funds from the current operating account to the reserve fund account or to re-organize the structure.

The re-organization need not require the termination of positions, nor need it result in any cost savings or efficiency.

Who Will be Terminated

Under all collective agreements negotiated by public sector

employees, lay-offs are on the basis of seniority.

Under the Public Sector Restraint Act the employer has the power to determine which employee they are going to terminate on the basis of their own requirements, their opinion as to which employee will best meet these requirements, the efficiency of the respective employees and the employer's assessment of the comparative knowledge, skill and abilities of the employees. These are all very subjective criteria and give to the employer a wide discretion as to which employees shall be terminated.

Collective agreements frequently allow the employer to assess the knowledge, skill and ability of employees in a lay-off situation but it is an employee's knowledge, skill and ability to fill a different position into which the employee wishes to bump not continue in the position which they were initially hired to fill.

There is no right for a senior employee to bump into a position held by a junior employee under the legislation. The employer's right to assess the knowledge, skill and ability of an employee allows the employer to by-pass seniority and to select which employee will be laid off.

So-called Seniority

The Regulations say that one consideration in determining lay-offs is seniority. This might deceive the reader into believing that basic trade union rights have been retained by public sector employees but, in fact, in looking further seniority as applied in the legislation has no relationship to seniority in a collective agreement.

Seniority under the Act is defined as an employee's length of service with the employer, the standard definition, but it is a relevant concept only within a unit which the employer is authorized to arbitrarily designate. The employer is free to define the units in a manner that can defeat any seniority protections.

An example of this may be where an employer has decided to terminate half the secretaries in a Department of Medicine at a University. There may be four secretaries with varying seniority. Depending upon who the employer prefers to terminate, the employer could group them into one unit, into two units depending upon who they reported to or worked for, or two different units on geographic considerations. The seniority of the senior secretary is only relevant in comparison with the other person in the unit, not in comparison with seniority in other artificially created units or employer-wide seniority. There is no right to bump either within the unit or into another unit so if two units were established, one with three employees with 20, 5 and 2 years seniority respectively and one with 30 years seniority, the 30 year employee could be terminated and would have no right to displace any employee in the other unit.

Even so-called seniority is only relevant where the considerations as to the requirements of the employer and the efficiency, knowledge, skill and ability of employees is equal.

Review

There are two grounds upon which a decision to terminate can be reviewed and the ground of review determines which is the appropriate forum.

If the decision is to be appealed on the basis that the employer did not have one of the five reasons for termination the employee must, within 15 days, appeal to the review panel. If the employee is unsuccessful there is a further appeal to the court. If the employee can establish that the employer erred then the review panel or the court can order reinstatement.

If the appeal is on the basis that the employer did not properly apply the four criteria of their requirements, the efficiency of the employee, the knowledge, skill and ability of the employee and seniority, the employee must elect to go to the B.C. Supreme Court on a judicial review or to go before an arbitrator appointed under the collective agreement. The Act itself does not provide for an appeal procedure. If the employee went to court then he could not obtain reinstatement. It is unclear whether an arbitrator would have the authority to hear the issue and to reinstate if the arbitrator concluded there had been a breach of the Act.

The Act specifically states that the employer, in evaluating the four criteria, need not act reasonably or correctly, only without discrimination and in good faith.

The Right to Bargain

The Act is deceptive in many respects. On a cursory reading it

appears to extend to public sector employees the right to continue to negotiate and to protect job security but with any careful reading the guarantee is a sham. One section in the revised legislation permits Ed Peck, as Compensation Stabilization Commissioner, to review a collective agreement and determine whether the lay-off, bumping and recall provisions will apply regardless of the Regulations. This section says that Peck may determine that a lay-off provision in the collective agreement is valid if it is "consistent with efficient management". There are three features which make it extremely unlikely that trade unions will apply for this exception. The first is that the scheme must be consistent with efficient management as defined by Mr. Peck. The second is that a pre-requisite for approval is that severance pay must be paid in the event of a lay-off, thus changing lay-offs to terminations. The third is that there is no guarantee that a collective agreement clause will continue to be applicable and by declaration, Mr. Peck can rescind or vary any decision he has made.

What Happens after Termination

Under the Regulations, employees must take one of three options. They can :

1. Take the compensation set out under the Act;

2. Go to court to claim compensation;

3. Go on the recall list.

An employee has 60 days in which to elect to go to Court. The employee has 30 days in which to elect to go on the recall list.

7/...

Compensation

The compensation package is not a generous one in comparison to either non-union or union employees. The compensation is not enough to pay for the loss of a guarantee of continued employment that many employees had before the legislation was introduced. The compensation is not as much as recoverable by most non-union employees upon dismissal without cause. Also if the employee is not terminated within the 12 month period following expiration of the current collective agreement then the severance pay goes down dramatically.

If the employee goes to court to have the compensation set, the court cannot order reinstatement of the employee. For many employees particularly those in secretarial and clerical positions, any severance pay recovered in court will, in no way, compensate them for their loss of employment or their loss of recall rights. In addition, the employee must experience the costs and delays of going to court.

Recall

Recall under the Act is different from the concept as agreed to under collective agreements. For one thing if an employee goes on the recall list the employee must abandon all claims to severance pay. Employees must sell their right to severance pay in order to gamble for a job. No employee in British Columbia, either union or non-union or under the Federal Government's jurisdiction is deprived of their minimum statutory benefit of severance pay. There is, of course, absolutely no guarantee of a recall to work particularly in circumstances where lay-offs are continuing.

8/...

The right to remain on the recall list is for only 1 month for every year of service up to a maximum of 1 year.

An employee under the Regulations is only entitled to be recalled if no employee has better qualifications regardless of seniority. The Regulations say that the recall provisions of a collective agreement may apply regardless of the Regulations except that no employee can stay on a recall list over 12 months and any issue on the application of the collective agreement goes to a review panel and not to the arbitrator.

Other Features of the Act

Another aspect of the Act which has serious repercussions for all employees and particularly those mentioned is Section 6 which permits the Cabinet to control, limit or reduce the wage rate of any person defined as senior management or who is a principal, vice-principal or any teacher who holds a supervisory position. This section permits the Cabinet to re-classify, abolish, and/or roll-back the wages of these senior management positions. Because employees' wages are frequently tied to the wages of managers this affects all public sector employees.

The Public Sector Restraint Act says that public sector unions have no right to negotiate contract language that contradicts the legislation and it provides for a $2,000.00 fine if an employer contravenes the direction in the Act.

* The Act authorizes the Cabinet to pass Regulations that permit the employer to re-assign, re-locate or re-classify any employee as defined in the Public Service Act.

BILL 11 - COMPENSATION STABILIZATION AMENDMENT ACT

The original legislation provided for the imposition of compensation guidelines which were to apply for a maximum of 24 months. The major amendment to the Act is that the Act now applies for an indefinite period.

An important feature of the amendment is that it places ability to pay as the paramount consideration over such factors as comparability with employees in the private sector, labour market demands, past compensation experience and historical inequities.

This amendment is particularly relevant for women workers as they have historically been underpaid for the work they perform. Under the new legislation the correction of historical inequities is subject to the over-riding consideration of the employer's ability to pay.

The Act requires independent arbitration boards to make initial awards within the guidelines and Regulations and requires them to reconsider awards which are rejected by the Compensation Stabilization Office.

The Act now allows for reductions in salary and the compensation stabilization commissioner can order that all public sector employees take a wage reduction. The Government has indicated that the new guidelines will be between 5% and negative 5%. These guidelines can be changed at any point by the Government.

The effect of the Compensation Stabilization Amendment Act and the Public Sector Restraint Act is to deprive public sector employees

of the right to bargain for the wage which their members receive, and the right to bargain and protect their members' jobs. The two most important areas for trade union bargaining, wages and job security are done away with by the new legislation.

There is absolutely no basis for the argument that the effect of the legislation is to put the public sector unions in the same position as the private sector unions. Private sector unions have the ability to bargain freely for their wage rates that the employees are paid and can protect their members from arbitrary terminations.

BILL 2 - THE PUBLIC SERVICE LABOUR RELATIONS AMENDMENT ACT

The Public Service Labour Relations Act applies to public service employees, that is persons who are directly employed by the Government. They are represented by the B.C.G.E.U., the Professional Employees' Association and the B.C. Nurses' Union. The amendments to this Act strike out provisions of the current collective agreements negotiated by these unions and significantly limit the subject areas where they can negotiate.

The effect of these amendments and Bills 3 and 11 is to prevent public service unions from bargaining virtually every aspect of their members employment contract.

The greatest impact for public service employees is that the power of their unions to negotiate on all matters affecting wages and salaries, hours of work and other working conditions has been deleted from the Public Service Labour Relations Act. This deletion

has significantly enlarged those areas where no bargaining is permitted. Under the new legislation a collective agreement cannot "affect the organization, establishment and administration of a Ministry or branch of the Government". This makes the area where a collective agreement cannot impinge incredibly broad.

Management's right to administer a Ministry or branch may be affected by such things as an employee's right to refuse to perform overtime work, an employee's right to refuse to take a transfer, an employee's right to have notice of a shift change, an employee's right to work no more than 8 hours per day, an employee's right to have input into the scheduling of their vacations and many provisions that are in existing collective agreements will be rendered "void" as a result of the amendment.

The old legislation permitted collective agreements to specifically deal with "the effect of reductions in the establishment of employees". This permitted unions to negotiate on the subject of bumping, lay-offs and recall rights. The amended legislation does not give the unions the right to bargain on that issue.

The new legislation expressly prohibits collective agreement language that restricts the Government's power to :

(a) assign duties to positions;

(b) establish work schedules; and

(c) determine the method and delivery of programmes and services.

The collective agreement negotiated by the B.C.G.E.U. has sections restricting management's right to assign higher classification and additional duties to positions without paying higher remuneration.

The Government can now avoid the agreed-to wage structure by changing job duties.

Under the new legislation provisions restricting a work day to 7 hours a day, flex-time provisions and clauses limiting shift work and night work will be struck down.

Persons who are outside the union protection have been required to work 1 hour extra per day since July. This indicates that the Government does intend to unilaterally impose a longer work day on employees who have bargained for a 35 hour week.

The ability of the Government to establish new work schedules that violate the collective agreement will doubtlessly affect female employees most severely, not only because it is in the area of computer work, key punching and word processing where longer shifts are desired by the employer, but also because changes in work scheduling will adversely affect female employees' ability to deal with child care and other household responsibilities.

The Government summary of the Public Service Labour Relations Amendment Act says that the purpose of the Act is to "clarify" what matters may not be included in a collective agreement. The amendments that have been introduced are not clarifications. Bill 3 and Bill 11 take away the public service employees' right to bargain for wages and to provide for job security. Bill 2 guts the collective agreements of many remaining provisions that regulate the employment relationship.

13/...

BILL 26 - EMPLOYMENT STANDARDS AMENDMENT ACT

The major impact of the new legislation is that is states that where a collective agreement deals with a subject which is also dealt with in the Employment Standards Act, the minimum standards under the Act do not apply to that aspect of the employment relationship. Only if the collective agreement is completely silent on the subject matter do the minimum standards of the Act apply. The subjects affected include :

- 24 hour notice of shift change;
- maximum 8 hours a day or 40 hours a week;
- overtime pay;
- eating periods and rest periods;
- minimum breaks between shifts;
- minimum call-in pay;
- 32 hours free from work per week;
- cleaning and repair of special apparel that an employee is required to wear;
- 2 weeks holiday per year and 1 additional week after 5 years;
- vacation period after the first full year's employment;
- 4% holiday pay;
- 2 weeks severance pay per minimum after 6 months of employment;
- the right to a leave of absence for maternity leave;
- the right to at least 6 weeks maternity leave after birth;
- the obligation on employer to pay their share of pension, medical and other benefit plans during absence on maternity leave;
- the right to reinstatement to the same position or comparable position with all increments in wages and benefits that the employee would have been entitled to if she had not taken the leave;

14/...

- where there is a termination of a pregnant employee the onus is on the employer to prove that the termination is not because of pregnancy.

The problem facing many trade unions is that archaic sections have been retained in the collective agreement that provide for less protection than those provided under the Employment Standards Act. Many trade unions have been lax in removing sections which provide for less than the minimum benefits on the basis that for the past 10 years they have been completely irrelelvant.

This amendment is unfair in that it deprives trade unions of the right to negotiate in those areas where they should have required the employer to provide minimum protections. A much fairer approach would have been for the Government to say that during the terms of the existing collective agreement the minimum standards of the Employment Standards Act will apply and at least give them that option at the termination of their agreement to attempt to bargain for at least the minimum or better.

Some trade unions are now locked into long term contracts of 2 or 3 years and during the term of that collective agreement they will not be receiving the minimum benefits under the Act and will not be given an opportunity to bargain for a better deal.

This amendment will have the greatest impact in the area of maternity leave where, in accordance with statistics provided by the B.C. Government, collective agreements that deal with maternity leave provide less maternity benefits than are provided in the Employment Standards Act.

The new legislation also enables collective agreements to undermine minimum labour standards and permits employers to now attempt to bargain contracts that provide for less than the minimum benefits. The group that will be most hard hit again will be women in trade unions. The employer will be in a position to pressure unions to sign agreements that diminish the employees' rights under the Employment Standards Act and many unions may be prepared to abandon those benefits that apply only to pregnant employees in exchange for some wage protection or other benefits for all employees.

Another feature of the legislation is that it does away with the Employment Standards Board and transfers all responsibilities to the Director. The Director now sits as an appeal from decisions of officers directly under his or her control. In the past there was a further appeal from a director to the Employment Standards Board and on occasions decisions had been altered at that level.

Another change in the legislation is that the Director can now nullify a collective agreement after its expiry date upon application by any interested person despite the existence of a continuation clause.

The branch is given a discretion as to whether they will proceed to collect wages.

Directors and officers no longer are liable personally for wages when a company goes bankrupt.

BILL 27 - THE HUMAN RIGHTS ACT

Amendment to the Human Rights Act will have an impact on any collective agreements which have incorporated into the collective agreement by reference, the provisions of the Human Rights Act. This allows employees to grieve under the collective agreement violations of the Human Rights legislation that relate to employment contracts.

Under the new legislation only the named grounds of discrimination are prohibited. There is no longer any protection against discrimination on grounds such as the language one speaks, sexual orientation, age or pregnancy. The new legislation means that it will be necessary to prove an intent to discriminate. A violation does not exist if a policy has a discriminatory affect on a protected group.

In conclusion, these pieces of legislation have a serious wide-ranging impact not only on public sector employees but on all employees in the Province.

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