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CAN NO SMOKING RULES ON PROPERTY BE SWEEPING?

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UNDER THE *TOBACCO ACT* (R.S.Q., C. T-0.01), EMPLOYERS MUST PROHIBIT THEIR EMPLOYEES FROM SMOKING INSIDE THEIR ESTABLISHMENTS. HOWEVER, THE ACT IS MUTE ON NO SMOKING OUTSIDE, ON THE COMPANY'S LAND.

Can an employer be stricter than the *Tobacco Act* by implementing a no smoking policy intended to entirely ban smoking on its property (establishment and land)?

In March 2009, Jean-Pierre Lussier, grievance arbitrator, responded positively to this question in the *Pratt & Whitney* case[1].

In fact, the arbitrator had to determine the validity of the policy pursuant to which smoking was not allowed **anywhere** on company property (namely, its establishments, entrance ways, parking lots and land).

To illustrate the scope of this policy, the arbitrator noted that the ban targeted, for instance, the employee who, during his break, wanted to smoke in his car parked on company land.

It is clear from the arbitration award that by adopting its no smoking policy, Pratt & Whitney wanted to promote its employees' health thereby increasing their productivity, reducing absenteeism and, as a result, lowering its business costs.

Although, on the one hand, this policy is restrictive and seeks to strongly encourage employees to quit smoking, the arbitrator pointed out, on the other hand, that it is in keeping with trends that are increasingly present in our society, that is, to promote no smoking.

ANALYSIS OF THE DECISION

To determine the validity of the policy, the arbitrator reviewed it according to the following criteria:

1. Was the policy contrary to the collective agreement?
2. Was the policy unreasonable given the broad scope of the ban?
3. Did the policy have a discriminatory effect given some employee's tobacco dependence?

[1] *Pratt & Whitney* and *TCA – Québec, union local 510* (union grievance), D.T.E. 2009T-374, March 23, 2009.

1. WAS THE POLICY CONTRARY TO THE COLLECTIVE AGREEMENT?

As the collective agreement was mute on the issue of tobacco use and as management's rights were stipulated in general terms, the arbitrator was of the view that the employer maintained the exclusive right to adopt a no smoking policy.

2. WAS THE POLICY UNREASONABLE GIVEN THE BROAD SCOPE OF THE BAN?

To ascertain the scope of such a policy, some sensitive issues had to be analyzed. Did the sweeping smoking ban on company property run counter to the employees' free will to smoke? Did the employer thus impose a lifestyle on smoking employees? Where do we draw the line between a company's legitimate economic interests and the employees' rights (for instance, the employee's free choice, on his break, to smoke in his car parked in the company's parking lot)?

The arbitrator listed some examples which reflected the difficulty of setting the boundaries between the employer's legitimate interests and the employees' free will:

[Translation]

> "[87] In my opinion, it is not evident that a policy promoting the health of employees and the economic interests of a company is reasonable. In fact, for that matter, a company could prohibit its employees from travelling to work by motorcycle on the grounds that motorcyclists run a greater risk of having accidents than car drivers and, in the event of accident, their injuries are generally worse. Such a prohibition in effect could be motivated by the desire to ensure better health and safety for employees and lower the costs associated with the potential absenteeism of injured motorcyclists. The same could be said for a policy requiring employees to travel to work using public transportation since the risks of having an accident are significantly lower than if they use their own car.
>
> [88] Examples are always somewhat lame, but what if Pratt were to prohibit its employees from consuming food containing trans fats while at work. Or, what about a policy requiring employees to eat a balanced meal during their lunch break. Or a policy requiring employees to do physical exercise prior to starting their jobs.
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> [89] All these policies could be justified on the basis of a company's economic interest in having employees in better health. Scientifically, it could probably be quite easy to show that trans fats cause obesity as well as respiratory and coronary diseases. It could be shown that employees who exercise on a regular basis are more fit, more productive and less prone to illness than those who do no physical exercise.
>
> [90] I am giving these examples to illustrate the fact that a policy can be justified by the legitimate economic interests of an employer and still be perceived as unreasonable because it directly clashes with the free will of employees. An employee does not lose his freedom to choose his lifestyle. He may decide to come to work by motorcycle even if he knows that he runs a greater risk than if he opted to drive a car. He may travel to work by car rather than by public transportation. He may choose to eat "fast food" every day, even at work, despite the risks associated with this type of food. He may choose not to do physical exercise, etc. [...]"

In the arbitrator's opinion, where the company's legitimate interests are at variance with the employee's personal freedom to choose to smoke, the variance must be resolved by reviewing social values.

Thus, the arbitrator considered the various smoking-related statutes adopted over the years, the purpose of which is to protect non-smokers from harmful secondary smoke. He concluded that Canadian and Quebec legislators have [translation] "introduced restrictive tobacco standards because society is increasingly aware of the harmful effects of tobacco and wants to be protected from it as much as possible"[2]. The arbitrator thus ruled that the policy was reasonable in the following terms:

> [Translation] "[110] In the case under review, even though the policy constitutes a strong inducement for all the employees to stop smoking and therefore constitutes pressure to impact on their freedom to choose, it does not seem unreasonable to me. It could be unreasonable if it had an extra-territorial application, that is, if it obliged employees to become non-smokers regardless of whether they are at work or not. In the case at hand, admittedly, employees are being pressured to stop smoking, but they retain the freedom to continue to do so, even during work periods. In fact, nothing prevents them from going off company property during their lunch break, for example, to smoke one or more cigarettes. This is, moreover, what Ms. Tardif and Mr. Bourget do."

[2] Paragraph 108 of the decision.

As the goals of such a policy are legitimate in the case at hand and are consistent with our social values, the arbitrator concluded that it was reasonable.

3. DID THE POLICY HAVE A DISCRIMINATORY EFFECT GIVEN SOME EMPLOYEES' TOBACCO DEPENDENCE?

The arbitrator only considered discrimination on the basis of a handicap (nicotine dependence) since the union, in this case, did not raise other rights protected under the *Charter of Human Rights and Freedoms*, such as the right to privacy. In the case at hand, since the policy included several accommodation measures [3] which the arbitrator deemed reasonable, he considered that the policy was valid despite the discriminatory effect it might have on nicotine-dependent employees. In fact, according to the arbitrator, [translation] "the accommodation measures contained in the policy should be sufficient for a majority of nicotine-dependent employees to meet the standard" [4].

Nonetheless, the arbitrator added that [translation] "in the event of medical evidence of serious difficulties despite the accommodation measures contained in the policy, other means of accommodation could be considered" [5] for employees who are heavily handicapped by their nicotine dependence and for whom most of the accommodation measures contained in the policy would not be enough.

Thus, although the arbitrator recognized the employer's right to totally ban its employees from smoking on its property, it is important to note that the arbitrator also concluded that nicotine dependence constitutes a handicap giving rise to accommodation measures.

CONCLUSION

In conclusion, the arbitrator recognized the validity of a no smoking policy that is not limited to the prohibitions under the *Tobacco Act* and that [translation] "encourages no smoking and serves to promote the health of employees, increase their productivity and reduce absenteeism (since many diseases are directly or indirectly tied to smoking) and, as a result, lower the company's production costs" [6].

This arbitration award is interesting since, to date, few decision makers in Quebec have had to consider this issue.

We noted that, to date, few decisions dealing with this issue have been rendered in the other Canadian provinces. Despite the fact that case law is not unanimous [7], it stems from some reported decisions that a larger number of decision makers have concluded, as Arbitrator Lussier did, that such policies are reasonable.

In short, Arbitrator Lussier's comments show that business mirrors society and where society evolves, the business adapts and may also evolve in the same direction.

[3] For example, the policy provides for counselling services for employees who smoke, consultations with physicians of the company's medical services for purposes, where necessary, of assessment, advice or medical prescriptions, etc.

[4] Paragraph 143 of the decision.

[5] Paragraph 142 of the decision.

[6] Paragraph 70 of the decision.

[7] Among the decisions ruling on the unreasonable nature of such a policy, we note for instance the *Grand Lake Timber Ltd.* case where the reviewing court upheld the arbitrator's decision. The arbitrator had concluded that (1) the policy infringed on the employee's freedom to choose, (2) there was no proof of absenteeism caused by smoking and (3) there was no proof of a link between the employer's commercial interests and the general ban on smoking. *Grand Lake Timber Ltd.* v. *Syndicat canadien des communications, de l'énergie et du papier, section locale 104* [2001] A.N.-B. No. 22 (Glennie, J.); upheld by the New Brunswick Court of Appeal.

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