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THE WAL-MART DECISION: THE SUPREME COURT OF CANADA CONFIRMS THAT THE COLLECTIVE DISMISSAL OF THE EMPLOYEES OF THE JONQUIÈRE ESTABLISHMENT CONSTITUTED AN ILLEGAL CHANGE IN THEIR CONDITIONS OF EMPLOYMENT UNDER SECTION 59 OF THE *LABOUR CODE*[1]

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THE FACTS

Wal-Mart Canada Corporation (hereinafter **"Wal-Mart"**) opened its Jonquière establishment in 2001. After the United Food and Commercial Workers, local 503 (hereinafter the **"Union"**), was certified to represent the employees in 2004, negotiations were initiated in view of concluding a first collective agreement. As these negotiations proved to be unsuccessful, the Union opted to call upon the Minister of Labour to appoint an arbitrator to establish the terms of their first collective agreement. Shortly thereafter, Wal-Mart announced that it would be permanently closing its Jonquière establishment, which it did on April 29, 2005.

Several proceedings were instituted by the employees and the Union to contest this closure, including a grievance under section 59 of the *Labour Code*[2] (hereinafter the "***Code***"). In particular, this section provides that no employer may change the conditions of employment of its employees during the period spanning from the moment a petition for certification is filed to the moment a collective agreement is concluded, or until the right to strike or lock out is exercised. Essentially, the purpose of this section is to protect the bargaining period by imposing a relative freeze on the employees' conditions of employment. It also obliges the employer to adhere to the "business as usual" rule.

At first, the arbitrator appointed to hear the grievance ruled that he did not have jurisdiction to hear the dispute on the grounds that the grievance essentially dealt with alleged breaches of sections 12 to 14 of the *Code*, over which only the *Commission des relations du travail* had sufficient jurisdiction.[3] However, this preliminary decision was quashed on judicial review.[4] The Superior Court found that the arbitrator ought not to have relied so closely on the exact wording of the grievance in concluding that he lacked jurisdictional authority. Instead, he ought to have identified the true issue, which clearly centered on section 59 of the *Code*. The Superior Court therefore remitted the matter back to the arbitrator.

The arbitrator, then seized of the merits of the dispute, held that the issue he had to consider was whether the employees' dismissal — and not the permanent closure of the establishment — had illegally changed the employees' conditions of employment.[5] Having concluded that this was indeed the case, the arbitrator subsequently had to inquire as to whether these changes were made in the ordinary course of Wal-Mart's business. The arbitrator found section 59 of the *Code* to be inapplicable, due to the fact that an employer may "[TRANSLATION] decide to close up shop for whatever reason."[6]

1 *United Food and Commercial Workers, Local 503* v. *Wal-Mart Canada Corp.*, 2014 SCC 45.

2 RLRQ c C-27.

3 *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503* v. *Compagnie Wal-Mart du Canada*, [2006] R.J.D.T. 1665 (T.A.).

4 *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503* v. *Ménard*, 2007 QCCS 5704 (S.C.).

5 [2009] R.J.D.T. 1439 (T.A.).

6 *I.A.T.S.E., Stage Local 56* v. *Société de la Place des Arts de Montréal*, 2004 SCC 2 at para. 31.

In the arbitrator's view, Wal-Mart did not justify the closure of its establishment other than by providing a statement that it was a business decision. The arbitrator deemed Wal-Mart's explanation to be insufficient, holding that the reasons that led to its decision ought to have been further explained so as to ascertain whether they fell within the ordinary course of its business. He allowed the grievance and his decision was upheld by the Superior Court on judicial review.[7]

However, the Court of Appeal did not subsequently agree and ruled that the Union's grievance ought to have been dismissed.[8] In the majority's assessment, the closure of the establishment did not constitute a change in the employment conditions as such, but rather a termination of employment, even falling outside the broadened meaning of the concept of conditions of employment. In addition, since the establishment had shut down, it was not possible to return the employees to their situation before the alleged change in their employment conditions. Concurring, Justice Léger stated however that it was incoherent and contradictory to recognize an employer's power to close its business for its own specific reasons while also accepting that the continuation of the employment relationship is a condition of employment. Such reasoning would grant the employees an advantage which they did not have prior to the filing of the petition for certification, an outcome that cannot result from the application of section 59 of the *Code*. Otherwise, an employer could shut down its business without justification before and after the period for which the provision applies, but could not do so over the course of said period.

THE SUPREME COURT OF CANADA'S DECISION

Essentially, the majority of Supreme Court —Justice Lebel being the principal drafter of the opinion — adopted the position articulated by the arbitrator, stating that his decision and reasoning were not unreasonable, and that in the circumstances, the Court of Appeal ought not to have intervened.

Justice Lebel opined that the sole purpose of section 59 of the *Code* is not to restore the balance between the parties for the period of its application, but also to enable employees to exercise their right of association and to uphold good faith in the negotiation of the collective agreement. The principal means for exercising influence over employees — its management authority — is thus limited by the provision.

Secondly, Justice Lebel stated that the maintenance of the employment relationship constitutes a condition of employment, and that this condition is implicitly incorporated into the contract of employment. Therefore, unless there is a legitimate cause of extinction of obligations, the proper role of a contract is to require the parties to carry out their obligations. In addition, given that employees are generally dependent on their jobs, the Court's interpretation is that such employees have a reasonable expectation that their employer will not terminate their employment, except to the extent and in the circumstances provided for by law. Applying section 59 of the *Code*, this premise means that, during the period prescribed by this provision, the employer must demonstrate that it would have made the same decision — i.e. to close its establishment — in the absence of a petition for certification. To come to this conclusion, the employer's decision must meet one of the following criteria: (1) be consistent with its past management practices, or (2) be consistent with the decision that a reasonable employer would have made in the same circumstances. These requirements therefore required Wal-Mart to justify the closure of its establishment, given that the right to close up shop for any reason whatsoever is not sufficient. Consequently, in the absence of appropriate justification, it was reasonable for the arbitrator to conclude that the collective dismissal of the employees at the Jonquière establishment was illegal under section 59 of the *Code*.

As for the possible remedies, unlike other provisions of the *Code*, section 59 does not explicitly limit the scope of the arbitrator's remedial power to the sole reinstatement of the wronged employee — which would not be possible in the circumstances — the arbitrator has the power to award damages to compensate for the illegal changes made to the employees' employment conditions.

[7] *Compagnie Wal-Mart du Canada* v. *Ménard*, 2010 QCCS 4743 (S.C.).

[8] *Compagnie Wal-Mart du Canada* v. *Travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 503*, 2012 QCCA 903 (C.A.).

AN INTERESTING DISSENTING OPINION

The dissenting judges fully disagree with the majority's reasoning, regarding the applicability of section 59 in situations of permanent closure of a business, and with respect to the available remedies.

For these judges, section 59 of the *Code* simply does not apply in the case of a business closure. Firstly, this provision would oblige the employer to justify its decision to close up shop, which is otherwise inconsistent with the employer's right to close its business for any reason. The only requirement in such a case is that the closure be genuine and definitive. Secondly, a business closure cannot, by definition, be consistent with a company's past management practices: you only shut down once. Thirdly, applying section 59 to closure situations would lead to an absurd result: the employer would be required to justify the closure of its business only during the period prescribed by the provision, whereas the restriction would not apply following the conclusion of a collective agreement, for example. Finally, section 59 cannot apply to a business closure situation because it presupposes the existence of an active business. The purpose of this section is to facilitate the conclusion of a collective agreement in the context of an existing employment relationship, and not to maintain the employment relationship itself, just like a collective agreement, strike or lockout can only occur in the context of an active business.

As for the remedies in the event of a breach of section 59, the dissenting judges stated the remedies must have the effect of restoring the *status quo ante*. For this reason, and since an arbitrator could not oblige a closed business to reopen, the awarding of damages is incompatible with the purpose of section 59, i.e. to maintain the balance between the employer and the employees during the collective bargaining period. Moreover, since Wal-Mart had already compensated all the employees from the Jonquière establishment for the loss of their jobs, there was no longer any compensable harm related to the termination of their employment.

CONCLUSION

In this decision, the Supreme Court limits the right of all employers to close their business for any reason whatsoever during the period prescribed by section 59 of the *Code*, i.e. between the filing of the petition for certification and the conclusion of a collective agreement, or the exercise of the right to strike or to lock out. An employer who would like to close its business during this period must henceforth justify its decision and demonstrate that the decision is made in the ordinary course of business or that it is reasonable.

The question of whether or not damages will be awarded to Wal-Mart's former employees at the Jonquière establishment still remains to be resolved. We will keep you informed of any further developments.

This decision may become a landmark case and change Québec's labour law: although it does not recognize the right to work as a fundamental right – which it has always refused to do – the Supreme Court nevertheless recognizes an implicit right to employment, at least where a motion for certification is granted.

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