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BULLETIN

LABOUR BOARD CLARIFIES TEMPORARY LAYOFF NOTICE OBLIGATIONS

Does an employer breach s. 54 of the Labour Code when it temporarily lays off bargaining unit employees? Under s. 54, an employer must provide 60 days' notice to the union before it introduces a "measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees". The union and employer must then meet and try to negotiate an adjustment plan, including alternative measures, severance pay, and employee counselling.

In a recent reconsideration decision, the Board reversed its initial finding that Tolko Industries breached s. 54 by temporarily laying off a large number of employees without providing the 60 days' notice required under s. 54.

In 2018, Tolko Industries decided that shutting down certain facilities would cost significantly less than continued operation. There had been wildfires, a pipeline explosion, changing supply prices and falling lumber prices. The Union was given notice that the entire bargaining unit would be laid off on the same day that the day and afternoon shifts were verbally advised of layoff effective at the end of their shifts. The union filed a complaint at the Labour Board that the layoffs were subject to the requirements of s. 54, and the employees should be made whole (compensated for the 60 days).

In *Tolko Industries and United Steel Local 1-424,* BCLRB No B33/2019, the Board considered whether the layoffs fell within the meaning of s. 54. The employer presented evidence of several temporary layoffs in the past where no notice had been provided. The employer said such layoffs were a normal practice in the industry. However, the Board said that the reason for the 2018 layoffs did not fit within an established history or practice. The Board found that s. 54 is triggered when the reason for the layoff lies outside the expectations of the parties. For example, expected seasonal layoffs would not trigger s. 54. Because the shut down was in response to uncertain market conditions arising from a variety of factors, the layoffs constituted the introduction of a new practice, policy or change. However, since one of the factors – a pipeline explosion – was unique and unforeseeable, no remedy was ordered and Tolko was not required to compensate the laid off employees.

Both parties appealed this decision, and in 2020 BCLRB 57, the Board found that s. 54 did not apply to the layoffs. The question was whether the layoffs were a predictable feature of the employment relationship. The Employer had established a history of temporary layoffs for a variety of reasons related to market volatility. A requirement that the reasons for the layoffs be

predictable set the bar too high for employers. The Board found that temporary layoffs were part of an established practice, and therefore were not a "change".

The union argued that because there was no recall date, the layoffs were indefinite, not temporary. The Board found that the existence of a recall date is not determinative of whether layoffs are subject to s. 54. Because there was a practice of temporary layoffs, and the employer's intention at the time of layoff was that it would be short term and temporary, s. 54 did not apply. However, the Board noted that s. 54 is an ongoing obligation, and that the nature of a layoff may change after it is implemented. The Board made it clear that the decision applied only to the decision at the time the layoffs were implemented.

Unfortunately, it is still not clear whether the Board would find that temporary lay-offs resulting from the COVID-19 pandemic fall within the scope of s. 54 of the Code and that local governments were required to give 60 days' notice to the Union. However, the Board was clear that s. 54 is an ongoing obligation which local governments will need to be mindful of if the temporary lay-offs already implemented become indefinite.

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