

VOLUNTARY PLANT CLOSINGS AND WORKFORCE REDUCTIONS IN CANADA

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I want to start by reviewing just a couple of points made by Dean Adell in Edward Yemin's book.¹ We must understand that Canada is a highly decentralized federal country in which provinces have jurisdiction along with the Federal Government over the matters with which we are concerned here. Depending on the industry in question, federal labor and employment law is not as dominant as it is in the United States; it does, however, tend to be in the vanguard of development.

The second point I want to make at the outset is that I do not agree with the statement by Mr. Yemin that in Canada, as in the United States, contracts of employment are generally deemed to be at will in the absence of a contrary stipulation in the contract or collective agreement.² Where there is no collective agreement, Canadian courts appear quite ready to imply requirements of periods of notice much longer than those required in the United States for ordinary employees.³ That is, of course, in the absence of just cause of termination. By "just cause" I mean personal misconduct, not an economic reason for termination. I recognize that I am now speaking about individual termination rather than the redundancy issues that we are addressing here, but a distinction in this respect between the common law in Canada and in the United States has developed and should be recognized.

Furthermore, still looking at the matter from the point of view of individual termination for a moment, and at laws that concern mainly what we would call blue collar workers here in Belgium, in all but

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¹ Adell, *Canada*, in *WORKFORCE REDUCTIONS IN UNDERTAKINGS* 37 (E. Yemin ed. 1982).

² Yemin, *Comparative Survey*, in *WORKFORCE REDUCTIONS IN UNDERTAKINGS* 4-5 (E. Yemin ed. 1982).

³ I. CHRISTIE, *EMPLOYMENT LAW IN CANADA* 343-50 (1980); ARTHURS, CARTER AND GLASBEEK, *LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA* 122-23 (2d ed. 1984).

two provinces and the federal jurisdiction in Canada, statutes require periods of notice in cases of individual termination.⁴ Those requirements are enforced by administrative procedures. In these ways in the last fifteen or twenty years the Canadian system has moved much closer, or closer at least, to the kind of thing we see in Europe rather than in the United States. In the Canadian federal jurisdiction there is now also a right to moderate severance pay over and above the right to notice or pay in lieu thereof.⁵ Also in the federal jurisdiction, in the very large province of Quebec and in the small province of Nova Scotia, from which I come, employees dismissed for misconduct which the employer fails to substantiate have a statutory right to reinstatement.⁶ That right again is enforced through administrative proceedings.⁷ From the standpoint of countries in the English common law tradition, that is very important because, as most of you are aware, traditionally the employment contract is not enforceable by specific performance; employers cannot be ordered to put employees back to work.⁸ This, then, is a highly significant departure in three jurisdictions in Canada.

The common law tradition is that where there is no collective agreement, employees who are terminated for economic reasons have no rights other than to notice or to compensation in lieu of notice. In the absence of a collective agreement they have no seniority rights or rights based on family circumstances or the like, either upon dismissal or recall. On the other hand, under most collective agreements, which in Canada cover about forty-five percent of all em-

⁴ See CHRISTIE, *supra* note 3, at 338-43; ARTHURS, *supra* note 3, at 123-24.

⁵ Canada Labour Code, CAN. REV. STAT. ch. L-1, §§ #61(1) - 61(2) (1970), amended by CAN. REV. STAT. ch. 17, § 16 (2d Supp. 1970), ch. 89, 1980-82 Can. Stat. § #34, and by ch. 39, 1983-84 Can. Stat. § 8.

⁶ Canada Labour Code, CAN. REV. STAT. ch. L-1, §§ #59-61 (1970), amended by CAN. REV. STAT. ch. 17, § 16 (2d Supp. 1970), ch. 27, 1977-78 Can. Stat. § 21, and ch. 47, 1980-83 Can. Stat. § 27(3); An Act Respecting Labour Standards, ch. 45, 1979 Que. Stat. §§ 124-28, amended by ch. 22, 1983 Que. Stat. § 104; Labour Standards Code, ch. 10, 1972 N.S. Stat. 67A, amended by ch. 50, 1975 N.S. Stat. § 4 and ch. 41, 1976 N.S. Stat. § 15.

⁷ Such administrative arrangements in respect of wrongful dismissal in provincial statutes have recently been held to be unconstitutional on the ground that the "judges" who deal with such cases must be federally appointed under § 95 of the Constitution Act 1982. See *Sobey's Stores, Ltd. v. Yeomans* (1985) N.S.S.C., App. Div. (unreported).

⁸ *Ryan v. Mutual Tontime Westminster Chamber Assoc.*, [1983] 1 Ch. 116 (C.A.); *De Francesco v. Barnum* (1980), 45 CH. D. 430; *William Robinson and Co., Ltd. v. Heuer*, [1892] 2 Ch. 451 (C.A.).

ployees, seniority modified by ability is the governing criterion for termination in the case of reduction of the workforce. Most collective agreements in Canada, as in the United States, only extend to a particular plant, or at most to a particular industry.

In the context of collective agreements, Professor Adell has summarized the situation very well in the Yemin book.⁹ I will not repeat what he has said, beyond mentioning that almost every collective agreement requires that seniority be respected and some, as Professor Adell says, require consultation. Some even contain provisions for re-opener clauses. That is, where there is a significant change in the workforce the parties may commence collective bargaining, with the right to strike, which they would not otherwise have in the middle of a Canadian collective agreement. Significant arrangements, particularly in some of the big collective agreements, such as those covering the railways, often deal with redundancy by giving employees rights to retraining, by providing assistance in transferring from one part of the company to the other, or by making payments to assist early retirement and other similar solutions.

I turn now to legislation and to the legislated arrangements for mass lay-offs arising from redundancies. I will consider first, employees under collective agreements, where the lay-off is the result of technological change. In the Canadian jurisdictions that have legislation addressed to this issue, the definition of technological change is very broad and includes a reorganization of the way the employer does his or her work; as a result, it catches a lot of workforce reductions. Three provinces — British Columbia, which is a major employing province, and Manitoba and Saskatchewan, which are less important—and the federal jurisdiction have statutory provisions for re-opening the collective agreement where technological change has occurred, regardless of what the collective agreement says.¹⁰ In British Columbia's case, arbitration is made available where there is technological change. In the others the result must be negotiated, with the union having the right to strike. The most significant point that I can add to what is in the Yemin book¹¹ is that this legislation was adopted in those provinces, and federally, in the 1970's and has not

⁹ Adell, *supra* note 1, at 38-41.

¹⁰ Labour Code, ch. 212, 1979 B.C. Stat. §§ 74-78, *amended by* ch. 10, 1983 B.C. Stat. § 21, sch. 2; The Labour Relations Act, MAN. REV. STAT. ch. L-10 (1970).

¹¹ Adell, *supra* note 1, at 44.

been adopted by any other provinces since. The legislation was thought to be highly significant and politically controversial, but the steam seems to have gone out of the movement to adopt it unilaterally; that, to me, is the interesting point. The reason is that in industries threatened by technological change, parties have tended to negotiate re-openers to their collective agreement on their own.

Quite apart from technological change, Manitoba, Newfoundland, Nova Scotia, Ontario, Quebec, and the federal jurisdiction — all jurisdictions where statutes require notice of individual termination — impose special requirements in respect of mass lay-offs.¹² The layoff of as few as ten employees within a period of a month or so constitutes a mass lay-off in some provinces. In most the number is about fifty within a period of six weeks or so, but it varies from province to province. At any rate, depending on the number of employees terminated within the stated period, longer periods of notice are required than where there are individual lay-offs. There is also a requirement of notice to public authorities, but as Mr. Yemin indicates, the purpose of this notification is unclear.

In 1982, after publication of the Yemin book, Ontario, Canada's most heavily industrialized province, adopted legislation providing for severance pay where there is a permanent plant closing, but the legislation is not generous.¹³ The statute only applies to employees with five years' seniority and simply gives them, in addition to pay in lieu of notice, up to twenty-six weeks' severance pay depending on how long they have been employed.

Also in 1982, the Federal Government amended the Canada Labour Code, which applies only to employees in certain industries that are under federal jurisdiction, to make what looks at first glance like far-reaching provision for redundancies, whether or not there is a collective agreement. Essentially, the amendment provides that where there is a layoff for over three months or where fifty or more employees are affected, there must be sixteen weeks' notice to employees, to any certified bargaining agent, and to the Ministry of Labor.¹⁴ What is new and interesting is the requirement that the

¹² CHRISTIE, *supra* note 3, at 338-43.

¹³ Employment Standards Act, ONT. REV. STAT. ch. 137, § 40a (1980), amended by ch. 31, 1984 Ont. Stat. § 1.

¹⁴ Canada Labour Code, CAN. REV. STAT., ch. L-1, § 60(11)-(15) (1970), amended by ch. 89, 180-82 Can. Stat. § 32.

employer establish a joint planning committee on which all unions affected and non-unionized employees are represented.¹⁵

The object of this new federal legislation is, of course, to develop an adjustment program to eliminate the necessity of the termination, or to minimize its impact, assisted by a Department of Labor inspector. The key provision in my mind is that employee representatives may, if they are willing to make the request unanimously, require the Minister of Labor to appoint an arbitrator who can decide on an adjustment program addressing matters normally the subject of the collective agreement in relation to the termination of employment. On the face of it, that proposition is quite far reaching; however, it is very much watered down by the modifiers in the legislation, primarily by the fact that the arbitrator may not review management's decision to terminate the employees or even to delay its implementation. Moreover, the Minister of Labor has wide discretion to waive the whole procedure, or any part of it, as being unduly prejudicial to employer or employee interests, or where a collective agreement binding on the employer makes similar sorts of provisions. I should mention too that the parties can bargain themselves out of this legislation in advance if they have addressed the same sort of concerns. In other words, if the collective agreement addresses the redundancy problem, then the parties are free to agree that these sections of the Canada Labor Code have no application to them. The railways, to use that example again, have done that.

In Mr. Yemin's book Professor Adell outlines a number of Federal Government funding initiatives.¹⁶ These are available to industries outside the federal jurisdiction because the Federal Government is not making a law, but is simply making funding available for various processes aimed at softening the impact of redundancies through training, mobility grants, funding of joint redundancy planning programs, and so on. Those programs are still on the statute books but I can report from recent personal experience, having been involved in a small redundancy problem as an *ad hoc* inquiry commission, that the legislation is largely useless because it is underfunded as a matter of conscious governmental policy at the federal level. To count that legislation as softening the effect of redundancy is misleading.

In sum, I think there was real progress in Canada away from the notion of employment at will and toward European standards in the

¹⁵ *Id.* § 60(11).

¹⁶ Adell, *supra* note 1, at 48-50.

context of mass terminations up to about 1982, but since then progress has slowed seriously, although there have been no formal legislative reversals.