Management and Legal Implications of Union Certification in a Traditionally Union–Free Organization

By Marcel C. Faggioni & Kathleen Stokes*

In our previous website article of February 2007, it was argued that unions pose the greatest restrictions on the employer's rights to manage its operations. Much of the management literature appears to confirm this contention. For a traditionally union–free workplace, the certification of a union represents a huge culture shock in terms of an employer's right to unilaterally manage. Typically, the reaction is a combination of disbelief, anger and finally, forced resignation. In our experience, many employers have expressed feelings of deception and disloyalty from its workforce. In many circumstances, the employer views the union as an intrusive foreign body. Given this backdrop, it is not hard to imagine why there is difficulty in crafting a harmonious relationship between the employer and the union. In a sense, the relationship between the employer and the union becomes in fact a forced marriage.

Despite the typical reactions of the employer, labour relations legislation compels the parties to achieve a working relationship through the negotiation of a first collective agreement. The first collective agreement is a written contract between an employer and its union. The agreement contains the legally enforceable collective terms and conditions of employment for the unionized members of the workforce. In most jurisdictions, labour relations legislation requires the specific steps to occur soon after a successful union certification. These steps will be outlined with a discussion of the negotiation process to follow.

First, the union is required to provide the employer with a letter indicating its intention to bargain. The parties then set up mutually acceptable dates. The parties meet and exchange a first proposal. From the management perspective, this document should contain the best possible terms available for management. The union will provide the employer with its first draft of a collective agreement which will contain the best possible terms that the union would aspire to. The parties can then set a protocol for negotiations. This simply means determining such things as whether or not there will be a media boycott or whether or not the parties will sign off after each term. Meeting days are set and the parties meet to attempt to settle the terms of the collective agreement.

If the parties are unsuccessful in the negotiation process or as a tactical step, either side can request the appointment of a conciliation officer. The conciliation officer is a neutral Ministry of Labour employee who will attempt to effect a settlement. If he is unsuccessful he will issue a "no board" report. Fourteen days after the report is issued the union can engage in a legal strike or the employer can engage in legal lockout. Although, the Board rarely orders first contract arbitration either party can request it.

Once an agreement is reached through the negotiation process, the employees are given an opportunity to vote on it. They have the option to accept the collective agreement or reject it.

From a management perspective, the employer must prepare itself for the negotiation process. In the labour relations world, these negotiations are generally referred to as "collective bargaining". The first collective agreement provides the foundation to subsequent agreements in future years; therefore, it is critically important that the employer prepares in a very methodical manner its collective bargaining strategy. Much of the strategy is based on reconnaissance of what is happening in its sector and/or industry. The employer needs to amass key employment information regarding terms and conditions among its competitors. The employer should undertake a review of collective agreements from other similar-type businesses or organizations. Moreover, the employer should be cognizant of the type of demands that could be anticipated by the union. Unions typically follow some type of pattern in setting their demands. These demands are fashioned by their central bodies that try to establish industry and/or sectoral standards. This is often seen in the domestic car industry, where the CAW (Canadian Auto Workers) set the pattern for bargaining based on the deal reached with one of the big three automakers.

In terms of the development of its proposals for collective bargaining, the employer should also look inward. In other words, the employer needs to look at ways of trying to preserve much of its rights to manage, while keeping a lid on costs and maintaining operations efficiency. The employer should prepare its own set of proposals to present to the union at the opening meeting. Over the years, we have met employers that have adopted a negotiations strategy based on the philosophy of "the union demands and the employer counters". This approach implies that the employer should not make its own demands. This strategy is foolhardy since it does not allow the employer to advance its demands. Essentially, this misguided strategy places the employer on the defensive. It is important to remember that collective bargaining is a process of "give and take", which doesn't imply that the employer gives and the union takes. The approach should be one that is based on meeting the interests of both parties with the ultimate outcome of forging a contract that provides for industrial relations harmony in the long-run.

In preparing its list of demands via a proposal document, the employer should survey its management/supervisory personnel to solicit some of their suggestions. Frontline supervisors often times have a keen sense of what is needed to maintain an efficient and productive workforce. By eliciting their suggestions, the employer may craft a proposal document that contains the terms and conditions necessary to improve, or at least maintain its operational effectiveness.

In terms of the actual face-to-face negotiations, the employer should maintain a professional demeanour throughout the talks. Labour relations has evolved tremendously over the last thirty years. What was once a jousting match between the union and the employer has become more of a problem-solving forum for the achievement of a win-win agreement. Much of this evolution could be credited to the adoption of interest-based negotiations, which stresses the importance of the mutual interests of the parties, rather than the demands or positions of the parties. Ultimately,

it is important for the parties to understand that the relationship between the employer and the union is viewed as a long-term marriage. Therefore, it is incumbent upon the parties to seek out solutions and resolutions that provides for a collaborative (win-win) and harmonious working relationship.

---

* Kathleen Stokes is a Partner with the Law firm of Weaver-Simmons located in Sudbury, Ontario (CANADA). Kathleen's legal practice is focused primarily in the fields of labour relations and employment law.