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Discussion after the Speeches of David J. Millstone and Roy L. Heenan

Discussion

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Discussion After the Speeches of David J. Millstone and Roy L. Heenan

QUESTION, *Professor King*: The structure of the Canadian and American governments is such that where there is a split between the provincial state level and the federal level it is an expense to determine which employee rights are covered. What are the cost effects, in terms of our competitiveness with other countries which do not have this split?

Is there a need for uniformity in the United States, perhaps less so in Canada, on the coverage of some of these important factors?

ANSWER, *Mr. Millstone*: With the level of state and federal bureaucracy that we have in this country, whether you are dealing with the state OSHA or the federal OSHA, or whether you are dealing with the Ohio Civil Rights Commission or the EEOC, it is just the cost of doing business. We need more unitary or single forms of relief and jurisdiction to handle the problem on a competitive basis.

COMMENT, *Mr. Heenan*: Under our constitution, we are supposed to have a strong federal government and a weak provincial government. The United States is supposed to have strong state governments and a weak federal government. The courts, of course, went in exactly the opposite direction and we now have a much more federalized system in the sense of strong provincial powers.

A significant cost factor to the provincial governments is the federal system. But in terms of labor legislation, I do not find that to be true. Since we have eleven jurisdictions, it is an unbearable cost.

Also, the nuances between the provincial legislation is interesting, but we have a common approach. Usually an idea flows very quickly across the structure. When travelling to a different jurisdiction, you have to know some of the nuances. And it is a rather wasteful system. We have one of the worst records, in terms of strikes and mandates lost, and I think that our real costs and competitive costs are in the legislative flaws themselves.

QUESTION, *Mr. Harwood*: There is currently a case that is in the U.S. federal system that involves Johnson Controls. It involves a work place policy where the employer did not permit fertile women to work in a lead permeated environment because of the risk to the fetus. Johnson Controls, as I understand, recently lost on appeal. How would you expect the Canadian system to handle such work place rules?

ANSWER, *Mr. Heenan*: I would expect it to go the same way. We would have two courts going in opposite directions in the early stages. It would then proceed to the Supreme Court. Then we would receive the evidence and if it is properly presented, the employer should be able to

justify the rule, leaving the simple question as to whether there is a reasonable threat that justifies that rule.

QUESTION, *Mr. Harvey*: Does an employer have an obligation to pre-employment testing for drug addiction, particularly in hazardous work environments?

ANSWER, *Mr. Millstone*: With the pending federal legislation on Americans with disabilities, there is a strong likelihood that drug addiction and alcoholism will probably be considered disabilities or handicaps.

I currently have a case pending before the Ohio Civil Rights Commission which involves a school bus driver who, after being hired, was determined to be an alcoholic with a cross addiction to an anti-depressant. The Ohio Civil Rights Commission found that there was an obligation to retain this person. I anticipate that if we are unsuccessful, the case will go to the Ohio Supreme Court and even further if necessary.

If an employer negligently hires employees who will work with hazardous materials and as a result pose a hazard to other employees, a positive drug test result would make such employees non-qualifying employees. With unions, there is an obligation to negotiate with respect to post-employment drug testing. Where the employer can show a reasonable need or is a federal contractor falling under the Drug-Free Work Place Act, there will be pre-employment drug testing.

COMMENT, *Mr. Heenan*: In Canada, pre-employment testing is legal in most circumstances; the true debate concerns post-employment. As long as there is a reason for testing with pre-employment, the testing will be legal. However, where there is no contractual relationship posed, if there is a collective bargaining relationship, an employer may have an obligation to negotiate with the union and justify why the testing is being required.

QUESTION, *Mr. Drotning*: Can an employer make termination and retention decisions based upon alcoholism and drug abuse if they are viewed as disabilities?

ANSWER, *Mr. Millstone*: I do not know how far the Americans with Disabilities Act will extend, so I can only tell you what the executive order handicap discrimination prohibitions and the state handicap prohibitions provide. Here, as long as it does not substantially prevent the employees from performing their duties, alcoholism and drug abuse are handicaps and must be accommodated.

If employers take the appropriate measures and the employee is not rehabilitated and continues to take drugs on the job, then it is not dealing with the handicap, it is dealing with the act.

QUESTION, *Ms. Murray*: The United States and Canada have severed the employment relationship and are forced to seek accommodation through common law and statutes. Is there a simpler way?

ANSWER, *Mr. Heenan*: McGill has been drafting amendments to the Civil Code and in Quebec's jurisdiction for implementing an employ-

ment contract and a section of the Civil Code devoted entirely to a uniform employment contract. It certainly seems attractive to combine the laws.

However, human rights discrimination provisions are difficult to draft in an employment contract. A charter or a human rights statute is difficult to incorporate. Also, union and non-union employees must be handled differently because there are different statutes dealing with each.

There certainly would be a great advantage to having more uniformity in employment. Having looked at it, it is not realistic to think that we can mix all the legislation together and deal with it as an employment contract problem. It would be an impossible task from a safety and health perspective, quite apart from the constitutional problems.

