



ONTARIO  
CROWN EMPLOYEES

GRIEVANCE  
SETTLEMENT  
BOARD

EMPLOYÉS DE LA COURONNE  
DE L'ONTARIO

COMMISSION DE  
RÈGLEMENT  
DES GRIEFS

180 DUNDAS STREET WEST, SUITE 600, TORONTO ON M5G 1Z8 TELEPHONE/TÉLÉPHONE, (416) 326-1388  
180, RUE DUNDAS OUEST BUREAU 600, TORONTO (ON) M5G 1Z8 FACSIMILE/TELECOPIE: (416) 326-1396

GSB #1723/99, 1006/00  
OPSEU #00U002, 00U137

**IN THE MATTER OF AN ARBITRATION**

**Under**

**THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT**

**Before**

**THE GRIEVANCE SETTLEMENT BOARD**

**BETWEEN**

Ontario Public Service Employees Union  
(OPSEU)

**Grievor**

- and -

The Crown in Right of Ontario  
(Ministry of Health and Long-Term Care)

**Employer**

**BEFORE**

Richard Brown Vice Chair

**FOR THE  
GRIEVOR**

Richard Blair, Counsel  
Ryder, Wright, Blair & Doyle  
Barristers and Solicitors

**FOR THE  
EMPLOYER**

John Smith, Counsel  
Legal Services Branch  
Management Board Secretariat

**HEARING**

October 20, 2000.

The union has filed two policy grievances, one relating to the transfer of Brockville Psychiatric Hospital and the other relating to the transfer of Hamilton Psychiatric Hospital. Each of these institutions is about to be transferred to a local hospital in the broader public sector. Pursuant to a transfer agreement negotiated with the crown, each receiving facility has made a offer of employment to all affected employees on terms and conditions which include a salary of at least 85% of their former earnings and recognition of service and seniority acquired in the Ontario public service.

The instant dispute concerns entitlement to severance pay for employees who at the date of transfer will have completed more than one year and less than five years of service with the provincial government. The parties agree employees with less than one year of service are not entitled to severance pay under the collective agreement. Employees with more than five years of service will receive severance pay. As to employees with between one and five years of service, the Ministry of Health and Long-Term Care claims they are not entitled to severance pay. The union disagrees.

## I

Entitlement to severance pay is governed by article 53.4 relating to full-time employees and by article 78.1 relating to part-time employees. As the relevant language in these two provisions is identical, only the applicable portion of the former article need be reproduced:

53.4 An employee,

(a) who has completed a minimum of one (1) year of continuous service and who ceases to be an employee because of,

...

(3) release from employment under section 22(4) of the P.S.A.,  
or

(4) resignation during the surplus notice period; or

(b) who has completed five (5) years of continuous service and who ceases to be an employee for any reason other than,

(1) dismissal for cause under section 22 of the P.S.A., or

(2) abandonment of position under section 20 of the P.S.A.;

is entitled to severance pay ...

Applying paragraph (a) to the facts at hand, counsel for the union contends an employee with between one and five years of service is entitled to severance pay under sub-paragraph (4) as having resigned during the surplus notice period. In the alternative, counsel submits an entitlement to severance pay arises under sub-paragraph (3) because the employee has been released under section 22(4) of the *Public Service Act*.

## II

I begin with the union's alternative argument concerning article 53.4(a)(3) which creates an entitlement to severance pay when an employee has been released under section 22(4) of the *Public Service Act*. That section states:

A deputy minister may release from employment in accordance with the regulations any public servant where he or she considers it necessary by reason of shortage of work or funds or the abolition of a position or other material change in the organization.

Counsel for the union contends an employee has been so released when he or she ceases to be a public servant because of the transfer of a government facility to a new employer.

The same argument was made by the union and rejected by this board in analogous circumstances in *OPSEU and Ministry of Consumer and Commercial Relations*, File 201/97, dated May 30, 1997 (Fisher) and *OPSEU and Ministry of Finance*, File 2105/96, dated March 23, 1999 (Leighton).

In *Ministry of Consumer and Commercial Relations*, the employees affected by the transfer had accepted employment with the receiving employer (page 4). The decision that they were not entitled to severance pay was based upon the last sentence of section 1(a) of Appendix 9 to the collective agreement which states:

When an employee has been transferred to a new employer he or she will be *deemed to have resigned* and no other provisions of the collective agreement will apply except Article 53 or 78 (Termination Pay).

The union argued a transferred employee “is deemed to have resigned for all purposes except for the purposes of articles 53 and 78” (page 7). Mr. Fisher rejected this argument and concluded the employees concerned were not entitled to severance pay “as they are deemed to have resigned, and therefore have not been released from employment under section 22(4) of the *Public Service Act*” (page 9).

In *Ministry of Finance*, the union again claimed employees transferred to a new employer were entitled to severance pay because they had been released from employment under section 22(4) of the *Public Service Act*. Counsel suggested a deemed resignation under Appendix 9 was not

voluntary and, therefore, should not bar the conclusion that an employee had been released. Ms. Leighton rejected this argument. Deferring to Mr. Fisher's earlier decision, she wrote:

The argument that transferees to private employers pursuant to the provisions in Appendix 9 have been released under section 22(4) of the Public Service Act ... was addressed and rejected in [*Ministry of Consumer and Commercial Relations*]. There was nothing in the union's submission to persuade me that it was patently unreasonable. page 16).

Both of these cases were decided before Appendix 18 was added to the collective agreement. Section 6.4 of Appendix 18 reiterates the point made in the last sentence of section 1(a) of Appendix 9: an employee who transfers to the receiving employer is deemed to have resigned. Section 6.4 states:

Employees who accept a job offer in accordance with Article 6.1.1 with a receiving employer will be *deemed to have resigned* effective the date they commence employment with the new employer, and no other provisions of the Collective Agreement will apply except for Article 53 or 78 (Termination Pay). (emphasis added)

Section 6.5 of Appendix 18 makes explicit a point which arguably was implicit in Appendix 9: an employee is deemed to have resigned if he or she declines what might be described as a "good" offer of employment. Section 6.5 states:

6.5 If an employee refuses a job offer which provides a salary of at least 85% of the respective employee's weekly salary at the time of the transfer and recognizes the service and seniority in the Ontario Public Service (OPS) of each employee for the purpose of qualification for vacation, benefits (except pension), layoff, job competition, severance and termination payments to the extent that they are provided in the proponent's workplace, the employee shall be deemed to have resigned effective the date of the transfer of their job and no other

provision of the collective agreement will apply except for Article 53 or 78 (Termination Pay).

Read together, sections 6.4 and 6.5 indicate an employee who receives a “good” job offer is deemed to have resigned, regardless of whether it is accepted.

In the instant case, the employees concerned received “good” job offers. As they are deemed to have resigned by Appendix 18, the question whether they have been released under section 22(4) of the *Public Service Act* is indistinguishable from the question addressed by Mr. Fisher in *Ministry of Consumer and Commercial Relations*. Like Ms. Leighton in *Ministry of Finance*, I conclude Mr. Fisher’s initial decision on this point must be followed because it is not patently unreasonable. Accordingly, employees are not entitled to severance pay under article 53.4(a)(3).

In neither *Ministry of Consumer and Commercial Relations* nor *Ministry of Finance* did the union contend the employees concerned were entitled to severance pay under article 53.4(a)(4) as having resigned during the surplus notice period.

### III

The union’s claim under article 53.4(a)(4) remains to be considered. The board has not previously considered the application of this article to employees who leave the public service in the context of a transfer governed by Appendix 9 and Appendix 18.

Article 53.4 predates Appendix 9 and Appendix 18. Before these appendices were added to the collective agreement, an employee with more than one year of service would have been entitled to severance pay under

article 53.4 if she left the public service because the facility where she worked was being transferred from the crown to another employer. An employee with more than five years of service would have received severance pay under article 53.4(b) as having ceased to be employed other than by reason of dismissal for cause or abandonment. An employee with between one and five years of service, who did not resign after being declared surplus, would have been entitled to severance pay under 53.4(a)(3) as having been released from employment under section 22(4) of the *Public Service Act*. An employee who resigned during the “surplus notice period” would have been entitled to severance pay under article 53.4(a)(4). This notice period is described in article 20.2.1 and 20.2.2:

20.2.1 An employee identified as surplus shall receive *six (6) months notice of lay-off* or, with mutual consent, an employee may resign and receive equivalent pay in lieu of notice. ...

20.2.2 The notice period will *begin when the employee receives official written notice*. Copies of such notice shall be provided to the Management Board Secretariat and to the Union. (emphasis added)

An employee who received notice of layoff and resigned during the notice period would have been entitled to severance pay. All of this is common ground between the parties.

The crux of the dispute is whether Appendix 9 and Appendix 18 have altered entitlement to severance pay. As there is no material difference in the relevant provisions of these two appendices, I will restrict my analysis to the impact of the language of Appendix 18 on entitlement to severance pay.

Section 6 of Appendix 18 divides employees into three categories; (1) those who accept a job offer from the receiving employer; (2) those who decline a “good” job offer; and (3) those who reject a “poor” job offer.

Under section 6.6, employees who decline “poor” job offers maintain their entitlements under the collective agreement including article 20:

6.6 Where the salary of the job offered by the receiving employer is less than eighty-five percent (85%) of the employee’s current weekly salary, or if the employee’s service or seniority are not carried over to the receiving employer, the employee may decline the offer. In such a case, the employee may exercise the rights prescribed by Article 20 (Employment Stability) and/or paragraphs 2 to 5 of Appendix 9. The employee must elect whether or not to accept employment with the receiving employer within three (3) days of receiving an offer. In default of election, the employee shall be deemed to have accepted the offer.

Section 6.6 preserves article 20 rights for employees who reject a “poor” job offer, but such rights are not preserved by section 6.5 concerning employees who decline a “good” job offer. Nor are they preserved by section 6.4 concerning employees who transfer from the crown to the receiving employer. Employees to whom these latter two sections apply are deemed to have resigned and their contractual rights are expressly limited to those found in article 53. Their entitlements under article 20 are abrogated. In short, they forfeit their article 20 rights but maintain their rights under article 53.

For employees who accept a job with the receiving employer or who decline a “good” job offer, the impact of Appendix 18 on rights under articles 20 and 53 is clear-cut in most respects. These employees lose entitlements under article 20, including those relating to notice of layoff or pay in lieu, displacement and re-deployment. Employees with more than five years of service retain their entitlement to severance pay under article 53.4(b). About this there is no contest.

The dispute is limited to the application of article 53.4(a)(4) concerning severance pay for employees with between one and five years of service.

Counsel for the union contends these employees are surplus because their services will not be required by the provincial government after the facilities in which they work have been transferred. According to this line of argument, their surplus notice period began when they got letters saying they will be deemed to have resigned on the transfer date because they had received “good” job offers. Their deemed resignation, effective the date of transfer, is said by counsel to occur during the surplus notice period.

Counsel for the employer contends that employees who have received a “good” job offer are not surplus. Counsel notes the ministry requires the services of these employees until the date of transfer. I was reminded the word “surplus” does not appear in sections 6.4 and 6.5 of Appendix 18 which apply to these employees. As they are not surplus, counsel suggests their deemed resignation upon transfer will not occur during the “surplus notice period” within the meaning of article 53.4(a)(4).

In reply, counsel for the union notes that section 6.2.1 of Appendix 18 applies the label “surplus” to employees without regard to whether they have received a “good” offer. This section states:

In the event that a receiving employer does not fully agree to the request in article 6.1.1, including the matter of a probationary period, the employer may offer the receiving employer a financial incentive up to the amount that would have been payable as enhanced severance pay (calculated as provided in paragraph 4 of Appendix 9) to each employee affected by the transfer that the employer determines will be declared surplus, in order to secure or improve a job offer to the employee equivalent to a job offer as described in Article 6.1.1 above or to ensure where job offers are received from the receiving Employer for less than the full complement of employees identified by the Employer, that the receiving Employer offer employees jobs on the basis of seniority. The parties agree in no case will the employer be

required to pay a financial incentive in excess of the maximum of enhanced severance for the affected employees.

Section 6.1.1 requires the ministry to propose that the receiving employer make job offers with no loss of salary and with recognition of service and seniority. When the new employer does not fully agree with this proposal, section 6.1.2 contemplates the ministry offering a financial incentive up to the amount of enhanced severance pay for the employees who “will be declared surplus”. If the receiving employer initially suggests offers that include recognition of service and seniority and a salary of at least 85% but less than 100% of previous compensation, they would be “good” offers. Nonetheless, section 6.1.2 would apply and the employees would be treated as “surplus” for the purpose of calculating the financial incentive. In this sense, section 6.1.2 characterizes as surplus an employee with a “good” offer.

Do sections 6.4 and 6.5 of Appendix 18 defeat a claim to severance pay under article 53.4(a)(4)? The answer to this question is not obvious. Entitlement to severance pay under this article depends upon whether an employee resigns during the “surplus notice period”. The contractual right to a surplus notice period is created by article 20.2. Sections 6.4 and 6.5 remove article 20 rights from employees with ‘good’ job offers. As these sections disentitle employees to notice of layoff under article 20.2, one might conclude they are not surplus and have no surplus notice period. If so, their deemed resignation could not occur during such period. This reasoning would indicate employees with between one and five years of service are not entitled to severance pay under article 53.4(a)(4). This is the essence of the employer’s argument.

On the other hand, the entitlement of employees to severance pay under article 53 is explicitly preserved by sections 6.4 and 6.5, without any distinction being drawn between employees with more than five years of service and those with less. This express preservation might lead one to conclude that the entitlement of employees to severance pay under article 53.4 is not affected by these two sections of Appendix 18, not only for employees with more than five years of service but also for those with less. Moreover, employees who receive “good” offers are nonetheless surplus in the sense that they are superfluous to the needs of the public service after the date of transfer, as acknowledged by the use of the word “surplus” in section 6.2.1. Because they receive notice of their redundant status in the public service before the transfer occurs, their deemed resignation on the date of transfer might be said to occur during their “surplus notice period” within the meaning of article 53.4(a)(4). This is the essence of the union’s argument.

The foregoing analysis of the language of sections 6.4 and 6.5 of Appendix 18 leads me to conclude it is patently ambiguous as to whether employees with between one and five years of service are entitled to severance pay. In other words, when the parties agreed in Appendix 18 to negate article 20 rights and to reaffirm article 53 rights, they failed to clearly indicate their intention regarding entitlement under article 53.4(a)(4) which might be seen to depend upon the existence of article 20 surplus rights. Perhaps the negotiators did not turn their minds to this precise issue.

What bearing does this ambiguity have upon the proper interpretation of the collective agreement as a whole? As noted above, article 53.4 was part of the collective agreement before Appendix 9 and Appendix 18 were added to it. Before these appendices were negotiated, an employee with between

one and five years of service would have received severance pay under article 53.4(a)(4) if she had resigned from the public service after receiving official notice that the facility where she worked was about to be transferred from the crown to another employer. The right to severance pay in these circumstances was clearly expressed in this article. I conclude this entitlement continues to exist today because it was not clearly negated when the parties fashioned Appendix 9 and Appendix 18.

Employees at the two psychiatric hospitals, with one to five years of service, are entitled to severance pay under articles 53.4(a)(4) and 78.1(a)(4).

Dated at Toronto, this 9<sup>th</sup> day of November, 2000.

A handwritten signature in cursive script, appearing to read "Richard Brown".

Richard Brown, Vice-Chair.