



earlier findings that the applicant had breached its obligations to the members of the Ontario Public Service Employees Union ("OPSEU"), in respect of the terms on which certain facilities were divested by the applicant.

## **BACKGROUND**

[2] The issues before the Board arose from the filing of three grievances by OPSEU which related to the applicant's divestment of three of its young offender facilities. OPSEU asserted that the applicant had breached Appendix 18 of the Collective Agreement.

[3] At issue in the grievances was the absence of any clause in the Requests for Proposals ("RFP") issued by the applicant requiring the new operators to recognize the Ontario Public Service ("OPS") seniority of employees for the purposes of layoffs and job competitions. OPSEU grieved that the applicant's failure to ensure inclusion of seniority recognition was a breach of the terms of the provisions of s. 5.3 of Appendix 18 of the CBA, which provides, so far as is relevant:

For employees electing to be included in the RFP, the Employer shall include, in the RFP, the mandatory requirement that proponents must commit in their proposal to make job offers to all of the identified classified OPSEU employees. Such job offers shall ... recognize the service and seniority in the Ontario Public Service 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.

[4] In its decision released on December 6, 2000, the Board agreed with OPSEU's interpretation of the article in question, ruling that s. 5.3 of Article 18 mandated that RFPs require successful proponents to make job offers which included recognition of seniority in the OPS for the purposes of job competitions and layoffs.

[5] The parties requested a further interpretation of s. 5.3. In its decision released on March 21, 2001, the Board found that s. 5.3 preserves the core protections of seniority for job competition and lay-offs. Where the results of a job competition reveal relatively equal candidates, the most senior employee shall be offered the position first. With respect to protection of seniority for the purposes of lay-offs, the RFP must include a term that employees who opt in obtain a contract provision that the most junior person is laid-off first, provided that the more senior person can do the work in issue.

[6] As a result of these two decisions, the Board commenced hearings to determine what remedy should be ordered.

### ***The March 2003 Decision***

[7] In its first remedial decision, the Board determined there had been a loss of the opportunity to make an election under the conditions required by the collective agreement, and that monetary damages were the only feasible remedy. The Board required further submissions concerning the assessment of damages.

## The July 2004 Decision

[8] Following submissions by the parties, the Board issued its second remedial award, in which it assessed the quantum of damages. The Board held that seniority protection was "a critical part of the complex divestment schema negotiated by the parties" and noted, "seniority clearly affects job security."

[9] The Board found that the grievors lost the opportunity of getting a job offer with the protection of seniority for the purpose of lay-off and promotion. This loss was a result of the applicant's breach of the collective agreement and was neither trivial nor non-existent. Though it was difficult to put a value on the loss, the Board found that each employee entitled to a remedy should be awarded an amount based on the multiplication of their years of service by what each was paid for two weeks' salary, plus interest.

## Positions of the Parties

[10] The applicant submits the Board erred in the relief which it awarded. The Board engaged in an erroneous interpretation of common law principles associated with an award of damages and with loss of opportunity. Although there was no evidence to show any actual loss to any individual, the Board awarded damages to every employee. Employees in a facility which is to be sold to the private sector are entitled to certain enhanced severance provisions as well as having the opportunity to opt to take employment with the purchaser. By making a blanket award to all employees without regard to their personal circumstances and the choices they have made, the Board put many employees in a better position than they would have been if the applicant had not breached the collective agreement.

[11] The applicant further submits that the Board has no particular expertise in the law of damages which would entitle it to a high degree of deference. It is obliged to be correct in its legal analysis even though it is fashioning a labour relations remedy, a field in which it does have expertise not possessed by the court.

[12] The respondent submits that the Board was not engaged in awarding damages at common law, but was fashioning a labour relations remedy for a complex situation. It was bound to have reference to the common law, but was entitled to formulate a remedy appropriate to the particular labour relations context.

## The Standard of Review

[13] The first element in the pragmatic and functional review is the consideration of any privative clause. The language used in s. 7(3) of the Crown Employees Collective Bargaining Act (CECBA) calling for the "final and binding settlement by arbitration" of grievances has been found to have only a limited a privative effect. [1] Nevertheless, within the field of the resolution of grievances as to collective bargaining agreements (CBA), the clause signals moderate deference.

[14] The second element is the expertise of the Board. It is a highly specialized tribunal

with expertise in the adjudication of grievance disputes between the Union and the Employer. Such tribunals with a high degree of specialization and an ongoing, permanent role are best positioned to undertake the assessment of issues involving important policy implications. In particular, the technique of fashioning suitable remedies for breaches of the CBA is an important part of the expertise of the Board and an area in which it possesses expertise not shared by the court. This factor calls for a degree of deference in the 'reasonableness' or 'patent unreasonableness' range.

[15] The third element is the purpose of the Act creating the Board. The primary purpose of the CECBA is the creation of the Board, whose sole function is the full and final resolution of disputes arising between the Crown and employees of the Crown. CECBA intends to bring labour peace without interruption of work by establishing the Board to provide prompt and final adjudication of grievances. This purpose tends to support a more, rather than a less, deferential standard.

[16] The fourth element is the nature of the problem. The problem before the Board was the task of fashioning the remedy. Having determined that no other remedy, such as re-opening the process, was feasible, the Board chose a monetary award. Determining the quantum of compensation falls squarely within the jurisdiction and expertise of the Board; and its decision should be given considerable deference. The applicant stressed that the Board had recourse to the common law to inform itself on the issue of assessing the value of the loss of the opportunity to obtain a job offer with the contractually required protection of seniority. The applicant submits that in applying this law, the Board had to be correct.

[17] However, the problem is not merely one of applying the common law. Its essence is the creation of a remedy which bears a rational relationship to the consequences of the breach, can be readily administered, and will likely bring labour peace to the workplace. The applicant contends that each employee's situation must be separately assessed to determine if he or she has suffered a real loss or a loss likely to have some actual monetary value. In an action by an employee for damages, this may be a realistic requirement and a correct statement of the law that would be applied. In the different context of a breach of a CBA covering a multitude of employees, such an approach is not practical. Simply because common law principles are to some extent 'in play' does not eliminate the deference to be given to an arbitrator engaged, not in deciding an action, but in the quite different task of resolving a labour relations dispute in a practical and workplace-appropriate fashion.

[18] Nor is it the law that every question of law to which an arbitrator resorts must be decided "correctly", i.e. as a judge would decide it. In *CUPE v. Toronto* [2] the reasonableness of an arbitrator's decision to reinstate the grievor was predicated entirely upon the correctness of his decision that he was not bound by the criminal conviction of the grievor as a result of the same facts. The arbitrator incorrectly concluded that the law of *res judicata* and issue estoppel did not prevent this result. The lower courts set aside the award. The Supreme Court dismissed the Union's appeal. At page 398, the Court stated that the decision rested on the correct interpretation of the complex legal rules as to the relitigation of issues finally decided by the courts:

The application of these rules, doctrines and principles is clearly outside the

sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. (emphasis added)

[19] In short, the error of law went to the heart of the decision and led to a patently unreasonable result. If the error had not led to such a result, what then? I will return to this point shortly.

[20] In *Paccar* [3] the issue was whether the Labour Relations Board decision, which permitted an employer to unilaterally alter terms and conditions of employment after the termination of a collective agreement, was patently unreasonable and therefore subject to review by the Court. It was held unreasonable in the lower courts. In the Supreme Court, LaForest J. wrote:

24. The Court of Appeal was also influenced by its view of the role of the common law in labour relations. While it accepted that individual contracts of employment no longer arise if the parties are in a collective bargaining relationship, a conclusion inescapable since the decision of this Court in *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, they limited the ratio of that decision to the rejection of common law only in so far as it relates to individual employment contracts. They maintained that the essence of [page1007] employment is not a "relationship", but agreement. Since the employer cannot "agree" directly with the employee, because that is precluded by statute (s. 46(a)), and since an agreement cannot be altered if one party does not expressly or impliedly consent to the alteration (see *Hill v. Peter Gorman Ltd.*, supra), even though the agreement has by its own terms expired, the same terms and conditions must continue in force. Before this Court, counsel for the union did not try to defend the approach taken by the Court of Appeal with respect to the common law. While he submitted that the common law remains the substratum underlying the Labour Code, a position it is not necessary to accept or reject in this appeal, he submitted that the common law was only relevant to this appeal in that no express power to unilaterally alter a collective agreement could be found in it.

¶ 25 I do not see that the common law has any relevance to this appeal. The Labour Relations Board dealt with the application of the common law in specific response to the argument of the union that on termination of the collective agreement individual contracts of employment revive. The tribunal correctly rejected that argument as inconsistent with the decision of this Court in *McGavin Toastmaster Ltd. v. Ainscough*, supra. In that case, Laskin C.J. found that employer-employee relations governed by a collective agreement displaced the common law of individual employment. He noted at pp. 726-27:

Neither this Act [The Mediation Services Act, S.B.C, 1968, c. 26] nor the companion Labour Relations Act could operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists.

[21] In short, in *Paccar* LaForest J. indicated that the Board's finding that the Employer could unilaterally alter the terms of employment after the expiry of a CBA was neither incorrect nor unreasonable, despite the fact, relied on in the courts below, that such a notion was contrary to common law concepts of the necessity of agreement to underpin a contract.

[22] Returning to *CUPE*, LeBel J., for himself and Deschamps J., concurred with the decision of Arbour J., (who wrote for the rest of the Court), but went further and elaborated on the relationship between 'correctness' and 'patent unreasonableness'. He pointed out (paragraph 68) that the Court has repeatedly stressed the importance of judicial deference in matters of labour law, a sensitive and volatile field. The application of a standard of correctness in that field is thus rare. The requirement that the question of law in *CUPE* be answered correctly was very much a product of the nature of the particular legal question. At paragraph 70 he said:

... determining whether relitigating an employee's criminal conviction in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

[23] However, not all questions of law must be reviewed under a standard of correctness (paragraph 71). Some were inextricably intertwined with questions of fact, and, as Bastarache J. said in *Pushpanathan*[4]:

... even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention.

[24] LeBel J. continued by pointing out that the critical factor in this analysis was expertise. He referred to the deference given to tribunals interpreting their home statute, or external statutes intimately connected with the mandate of the tribunal, or principles of the common law frequently applied by a tribunal in its specialized context. At paragraph 73, he turned specifically to labour law, noting that common law questions may become intertwined with questions of labour law:

Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop a body of jurisprudence that is tailored to the specialized context in which they

