

Ontario Court rules arbitrator lacks jurisdiction to order loss of seniority

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Employers of unionized workplaces are probably aware that an arbitrator has the power, in most instances, to substitute another penalty for that imposed by the employer. The source of this authority lies in subsection 48(17) of the *Labour Relations Act*, which reads: "Where an arbitrator ... determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the arbitration, the arbitrator ... may substitute such other penalty for the discharge or discipline as to the arbitrator ... seems just and reasonable in all the circumstances."

Read by itself, this provision would appear to indicate that the arbitrator's power to substitute a penalty is constrained only where the collective agreement contains a specific penalty for the infraction at issue. However, as the Ontario Divisional Court decided in *UFCW, Local 175 v. Maple Leaf Meats Inc.*, a decision released on July 25, 2000, the arbitrator's power is also limited by the *Labour Relations Act* and the other terms of the collective agreement.

This case involved two grievors who were terminated for time card fraud. At arbitration, the union conceded that one grievor had punched in for the other grievor between 50 and 100 times over the year preceding their termination.

A SLOW MOVING GRIEVOR

The grievors asserted that there was no venal motive for their practice. They stated that the practice was more a matter of convenience, and that the employee who did not punch in, whom they described as being rather slow moving, was always close behind the one who did. In response to the suggestion that the practice had the effect of concealing one employee's lateness, they stated that, because of the nature of their jobs, they often had to remain past the end of their shifts without claiming overtime.

The arbitrator concluded that, while the arrangement between the grievors had not been made for the purpose of defrauding the company, it was motivated by their desire to hide one grievor's lateness. This, he held, although not as serious as a scheme to obtain payment for time not worked, was still a breach of trust by the grievors.

Despite finding that the grievors had indulged in serious misconduct, the arbitrator concluded that the misconduct was an aberration from their normal behaviour, and that, if given a second chance, the likelihood of their repeating "their misguided acts" was remote. Accordingly, he exercised his

jurisdiction under subsection 48(17) to substitute a lengthy suspension from the day of their dismissal to the first shift they would have worked following the release of his award. Then he made this additional comment: "However, they will not accumulate seniority during the period October 27, 1997 [the date of termination] to the date of this decision."

The union went to court to quash this part of the award, arguing that the arbitrator had exceeded his jurisdiction in ordering that seniority not accrue.

SCOPE OF PENALTIES "CIRCUMSCRIBED" BY COLLECTIVE AGREEMENT

The Court ruled in favour of the union. It noted that Article 5.07 of the collective agreement provided that an arbitrator may not amend, alter or modify any provisions of the agreement, nor give any decision that is "inconsistent with the terms and provisions of the Agreement". Further, Article 16.01 provided that seniority was to accrue from the day of last hire, and the article governing loss of seniority had no application to the grievors' case.

Referring to subsection 48(17) of the *Labour Relations Act*, the Court stated that the exercise by arbitrators of their jurisdiction under this provision to substitute penalties is normally given considerable deference by the courts. In this case, however, while the "specific penalty" exception did not apply to constrain the arbitrator's choice of penalty, other aspects of the collective agreement did: "[I]n our view Article 5.07 and 16.01 of the Collective Agreement limit an arbitrator's authority under section 48(17) ... in that the scope of the penalties are circumscribed to the extent that there cannot be a loss of seniority. Section 48(17), in allowing freedom to contract to impose specific penalties, necessarily means the parties to a collective agreement can limit penalties to be imposed by an arbitrator. This interpretation is given support by the language of [Article] 16.09(a) which provides an employee will lose seniority when discharged and not reinstated through the grievance procedure."

In the result, the Court ruled the arbitrator had exceeded his jurisdiction and referred the matter back to him to fashion an appropriate penalty within his jurisdiction.

In Our View

This case serves as a reminder that *all* the provisions of a collective agreement, and not merely those providing a specific penalty for a given infraction, serve as a limitation on the penalty imposed by an arbitrator. It should be noted also that, where the issue raised at judicial review concerns jurisdiction, courts will give closer scrutiny to the matter, and hold the arbitrator to a standard of "correctness", as opposed to determining whether the decision under review was reasonable.

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