1. Transfer versus dismissal – which is appropriate and when?

Gendron v. Treasury Board (March 9, 2006)

The grievor was employed at Heritage Canada since 1999 as a senior program officer in the Department's Official Languages Support Programs Branch. Gendron's job required her to represent the department in the negotiation and implementation of official languages agreements with provincial governments, governmental agencies and non-governmental organizations.

The grievor informed her superiors that she intended to run for the presidency of a new Quebec separatist organization named "Le Quebec, un pays!" ("Quebec, a Country!"). The managers informed her that she could be a member of a separatist organization but assuming its presidency would be regarded as a conflict of interest and she could be subject to discipline if she ran. She was also ordered by the deputy minister of the department not to become the president of the organization. She ran for the presidency and was elected, and she was terminated from her job with "conflict of interest" as the reason for the dismissal. Gendron filed a grievance under the *Public Service Labour Relations Act.*

Gendron argued that the employer violated her rights under the *Canadian Charter of Rights and Freedoms* in limiting her freedom of association. She stated that such a limitation was not justified under section 1 of the *Charter* since in view of the nature of her work and the limits of her decision-making power and her responsibilities, there was no actual conflict of interest between her personal activities as president of the separatist organization and her work on behalf of the government. She additionally contended that even if there were a conflict of interest, the employer had not established that there was no way to reconcile her rights with her duty of loyalty nor had it made any efforts to accommodate her situation.

Heritage Canada argued that it did not limit her freedom of association, in that she was free to belong to the separatist organization. However, limiting her running for presidency of the organization was justified under section 1 of the *Charter*, for reasons of the employee's duty of loyalty, particularly when it would undermine the public appearance of impartiality in the public service.

DECISION

Gendron's high-profile role as president of a separatist organization was incompatible with the duties of the position that she held at Heritage Canada and created an apparent conflict of interest. However, the employer had gone too far in dismissing Gendron outright from the public service. Adjudicator Matteau ordered that the grievor be reinstated and transferred to such a position where the conflict of interest would not be an issue. The adjudicator cited the statement of the Supreme Court in *Fraser* that "[A] public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies….[T]here is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service…". The adjudicator Matteau went on to state that "[t]he public stand taken by [Gendron] in her role as president can be viewed as indirect criticism of OLSP programs and their objectives." However, 'in the present case there were a number of solutions that the employer should have offered to [Gendron] before opting for termination of employment. The disciplinary measure imposed by the employer was "excessive given the circumstances here, particularly in the case of an employee the quality of whose work has not been contested,". The government was required to reinstate Gendron with full back pay and benefits and to "offer [her] a

position at the same or an equivalent level, as soon as possible, that will not give rise to an apparent conflict of interest with her duties or the objectives and programs of the Department of Canadian Heritage promoting Canadian unity".

2. Admissibility of video evidence – what is the test?

Olmstead Foods Ltd. and United Food v. Commercial Workers Union, Local 459
(May 24, 2005)

The case involved an alleged campaign of harassment by some employees against another employee. There was a practice of employees always sitting in the same seat in the lunchroom, and while on break offensive graffiti had been written on the table and walls near the place usually occupied by the targeted employee. One employee was caught in the act and discharged. On the day of that employee's discharge, the employer installed a camera above the targeted employee's place in the lunchroom and images were captured of another employee, the grievor, writing a harassing message on the table. The issue before the arbitrator was whether those images could be entered into evidence.

DECISION:

The arbitrator stated: "What is really going on here? An Employer sets up a camera to view a place, not a person's activity. It has reasons for this, said to be threefold. It is concerned that others might be involved in the harassment. It is concerned that a new individual might take up where the discharged employee left off. It is concerned that someone might continue the practice to draw suspicion away from the discharged employee. It is not a matter of speculative spying, … but of watching a place with at least a strong suspicion that such an activity will provide information about a problem considered by both the Employer and the Union to be serious. I distinguish this from watching an individual for no particular reason. If there were a right to privacy that might engage it."

In the arbitrator's view, what was called for was the "simple test" applied by courts: relevant evidence should be admitted if its probative value outweighs its prejudicial effects. The tape clearly had strong probative value because the grievor could be identified from it. As for the tape's prejudicial effect, the arbitrator held that the fact that it could weaken the grievor's defence was not relevant. Moreover, the camera had not caught anything of a personal or intimate nature or anything embarrassing to the grievor or his family. Nor was the grievor singled out as the target of the taping.

The arbitrator concluded that the tape should be admitted into evidence:

"Rules governing admissibility of evidence rest first upon an assumption that the evidence, if relevant, is admissible. Exclusionary rules have been created based upon reliability (hearsay, for example), protection of relationships (privileges, for example), on statutory protections as in the Charter, on disciplining authorities, or for other reasons. Here I have no evidence of prejudice to a person or principle."

3. Aggravated and Punitive Damages – have we finally heard the last word?

Ontario Public Service Employees Union v. Seneca College (May 4, 2006)

A professor at Seneca College in Toronto, Ontario was fired in February 1998, after being accused of sending a number of anti-Semitic letters to a college administrator in 1990. Although a 1992 police investigation could not confirm that the grievor was the culprit, a privately retained handwriting expert concluded, six years later, that the grievor was behind the hate letters. and terminated the grievor. However, on May 25, 2000, following the filing of the discharge grievance, a board of arbitration chaired by Pamela Picher unanimously reinstated the grievor with full compensation, ruling that the College's eight-year delay in imposing discipline rendered the dismissal null and void.

The union then pressed ahead with a claim on the grievor's behalf for $5,000 in aggravated damages and $5,000 in punitive damages, alleging intentional infliction of mental distress, defamation, and discrimination based on union activity. In a decision issued on December 4, 2001 by a majority of the board, Arbitrator Picher ruled that, in this case, the board lacked jurisdiction under the collective agreement to award damages for torts, i.e. civil wrongs, such as defamation and intentional infliction of mental distress, since no clause in the collective agreement "might give rise to an inference that the parties intended a board of arbitration to adjudicate alleged tortious wrongdoing."

ARBITRATION BOARD

A majority of the arbitration board concluded that the collective agreement did not give the board jurisdiction to award aggravated or punitive damages. It applied the principles established in Weber and held that the essence of the dispute involved an allegation by the grievor that the employer had committed the torts of defamation and intentional infliction of mental distress. In the view of the majority, that dispute did not arise under the collective agreement. It noted that the agreement in Weber contained a clause that extended the grievance and arbitration process to "any allegation that an employee has been subjected to unfair treatment". The agreement before the board contained no such clause. The board also found no evidence that the parties had intended their collective agreement to cover such tort damages.

DIVISIONAL COURT

The Divisional Court quashed the award, holding that the board had concluded incorrectly that it had no jurisdiction to award aggravated or punitive damages. The court held that the essence of the dispute was the unjust dismissal and the appropriate remedy for that dismissal.

COURT OF APPEAL

The Ontario Court of Appeal held that the "pragmatic and functional" approach from *Voice Construction* applied, where decision on judicial review should be based on 4 criteria: (1) any privative clause or statutory right of appeal; (2) the purposes of the legislation; (3) the nature of the question as one of law, fact, or mixed law and fact; and (4) the expertise of the tribunal compared to the reviewing court on the issue in question. Based on these 4 criteria in the case at hand the Court found that deference should be accorded to the board. The board was not deciding a jurisdiction-conferring or jurisdiction-limiting issue in the broad sense. The decision was on whether this collective agreement gave the board authority to grant specified remedies for unjust

dismissal. The Board was entitled to decide whether the parties intended to include specific remedies for unjust dismissal through powers granted by the legislation and common law.

4. Job requirements – when is a bilingual or gender requirement essential?

Ottawa Hospital v. Ontario Nurses' Association (November 3, 2005)

This case involved the grievance of an unsuccessful candidate for a permanent job share position in the Cardiac Reference Centre at the Heart Institute. The grievor met all of the clinical requirements for the position but did not meet the requirement for bilingualism, which was rated at a B plus level. Her score was B minus. The position was awarded to a junior candidate who met both the clinical and linguistic requirements.

The union grieved the decision, arguing that there was no significant difference between abilities at the B plus and B minus levels and that the requirement was arbitrary because other positions had recently been filled with nurses who were even less bilingual than the grievor.

DECISION

The arbitrator dismissed the grievance, holding that the requirement was reasonable and proper. Turning first to the union's argument that there was no real difference between assessments of B plus and B minus, the arbitrator found that there was a significant difference between the two levels in the ability to carry on a conversation. Accordingly, he held that the two candidates were not relatively equal in linguistic ability.

The arbitrator also held that the requirement was reasonable because it bore an appropriate relationship to the work in question: it could be expected that patients and their families would be under considerable anxiety in a cardiac facility and that it would be best to be able to communicate with them in their primary language.

The arbitrator also pointed to the fact that the hospital was in the process of obtaining a designation as a bilingual facility under the province's *French Language Services Act* and that it had some progress to make before it attained the requisite proportion of bilingual staff. While noting that the hospital had no official target or deadline to meet, the arbitrator stated that this did not relieve it of its obligation to work towards the designation:

> "There is no doubt that at present, the staff of Registered Nurses at the Cardiac Reference Centre is simply not able to provide francophone patients with nursing care in French on a permanent, twenty-four hour basis. While it is true that no precise target had been established, the Hospital knew that it was far from meeting any target which might reasonably be expected to be established, and that it must do everything possible to remedy this situation. The Hospital, I find, acted correctly in including a bilingual requirement, at the B+ level, in the job posting in question."

By awarding the position to the junior candidate, the hospital had gained an extra 7.5 hours of bilingual capacity per pay period. The fact that other positions had recently been filled with unilingual candidates did not make the linguistic requirement for this position unreasonable. In those cases, the employer had advertised for bilingual candidates but no qualified bilingual candidates had applied.

In the result, the grievance was dismissed.

5. Other Important Developments

Canadian Union of Postal Workers v. Canada Post Corp (March 7, 2006)

The grievor had been fired as the union's Health and Safety Officer by P, the new president of the Upper Valley Local of CUPW, for starting early and working through lunch, in contravention of the collective agreement. According to P, the grievor then started reporting for his 7 a.m. shift up to 3 hours early, in order to harass the postal clerks on the 11 p.m. – 7 a.m. shift, which included P and M, the vice-president of the local. Written complaints were filed that the grievor caused at least 4 employees to feel intimidated and afraid by staring at them, that he had a problem controlling his anger, and that he would start speaking loudly to employees, "utter[ing] obscene and disparaging remarks," and at one time offered to "fight anyone on the floor."

Grievor waived his right to notice of a meeting with the employer, and his right to union representation but terminated the interview after a few preliminary questions. He received a letter of discipline due to his refusal to participate in the interview. He received a second letter of discipline indicating that it was believed that the grievor "ha[d] conducted [him]self inappropriately in the workplace resulting in employees feeling threatened, intimidated and harassed by [the grievor]." As it was the employer's policy to temporarily separate employees who were involved in a harassment complaint, the grievor was reassigned to the Abbotsford Delivery Unit effective the following day, and was required to "cease and desist from any and all inappropriate workplace behaviour," or else his employment would be terminated. The grievor went off on sick leave immediately, in order to attend counselling.

The union interviewed employees and concluded that there was no reason for the grievor not to return to work or for him to be transferred. However, the employer maintained that it could not take the risk of allowing the grievor to remain at the worksite. The union did not agree to the imposition of any conditions. The Zone Manager wrote a letter to the grievor, indicating that it would be prepared to accept the grievor's return to work provided that he was cleared to return to work by both his doctor and the Corporation's Occupational Health Consultant, he did not report for his shift more than 30 minutes early, and he did not "engage in any behaviour that is confrontational in nature." When the final meeting between the employer, the union, and the grievor was held the grievor was still away from work on sick leave at that time and the employer reaffirmed its position that the grievor could not return to work until he was "medically fit." The grievor returned to work in Chilliwack, and was never transferred to Abbotsford.

The grievor claimed damages, both general and punitive, for the employer's arbitrary decision to transfer him, and for issuing discipline letters without cause.

DECISION:

Arbitrator Stan Lanyon dismissed the grievance. He held that the employer had acted reasonably and in good faith in deciding to transfer the grievor and in requiring him to complete medical treatment before returning to work. As the employer had not acted arbitrarily, Lanyon dismissed the grievor's claim for damages due to the alleged intentional infliction of mental distress. The arbitrator found that the grievor did not have the opportunity to hear and respond to the allegations against him only because he terminated the interview of his own accord. In further response to the union's assertion that the grievor was not fully informed of the case against him, the arbitrator remarked that the union had been fully consulted and informed throughout the employer's investigation.