CITATION: Canadian Union of Public Employees v. University of Windsor, 2012 ONSC 2399
DIVISIONAL COURT FILE NO.: 150/11
DATE: 20120502

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, HERMAN and van RENSBURG JJ.

B E T W E E N:	
CANADIAN UNION OF PUBLIC EMPLOYEES and its LOCAL 1393	*Gavin Leeb*, for the Applicant
Applicant	
- and -	
UNIVERSITY OF WINDSOR	*Nancy Jammu-Taylor*, for the Respondent
Respondent	
	HEARD at TORONTO: April 12, 2012

Swinton J.:

Overview

[1] The applicant, the Canadian Union of Public Employees ("CUPE"), has brought an application for judicial review to quash the decision of Arbitrator Mary Ellen Cummings dated January 4, 2011 in which she held that retroactive salary adjustments would date from the point at which an employee was either agreed or ordered to come within the bargaining unit represented by CUPE.

[2] In my view, the Arbitrator reached a reasonable conclusion on remedy in a set of unusual circumstances. Accordingly, I would dismiss the application for judicial review.

Factual Background

[3] CUPE is the bargaining agent for a unit of employees at the University of Windsor ("the University"). On February 3, 2005, CUPE filed a grievance alleging that approximately 97 positions were improperly excluded from its bargaining unit. The grievance was referred to arbitration. By agreement of the parties, the arbitration would deal with a subset of four people named in the grievance.

[4] After 16 days of hearing, Arbitrator Michael Watters issued a decision dated November 25, 2009 in which he held that three of the four positions were covered by the CUPE collective agreement. Arbitrator Watters did not make an order respecting remedy, but remained seized to deal with that issue.

[5] In the meantime, in November 2006, the University had made an application to the Ontario Labour Relations Board (the "OLRB") pursuant to s. 114(2) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A for a ruling as to the status of 18 people. Most were alleged to exercise managerial functions or to be employed in a confidential capacity in matters relating to labour relations and, therefore, excluded from collective bargaining.

[6] At some point, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) ("CAW") became involved in the dispute, as it also represented employees of the University. Subsequently, after discussions with CUPE and the CAW, the University filed a revised application with the OLRB in late November 2008 that listed approximately 228 positions in dispute.

[7] By agreement of the parties, the OLRB held a hearing respecting disputed positions in three areas of the University's operations. On August 27, 2009, the OLRB held that of the 24 positions it was able to dispose of, 20 were employees within the Act and entitled to be represented by a union.

[8] Through mediation, the parties were able to agree on the status of a further 80 positions. As well, they agreed on an expedited process before the OLRB to resolve the status of the 154 positions remaining.

[9] In addition, the University, CUPE and the CAW entered into a Process Agreement dated January 4, 2010 in order to deal with disputes about the remaining positions. In that agreement, the parties selected Arbitrator Cummings to determine disputes about the appropriate bargaining unit for an employee as between CUPE and CAW. As well, she was to determine disputes in relation to the specific collective agreement entitlements of individuals found to be entitled to union representation. The parties also agreed to stay other proceedings.

[10] A number of arbitration hearings have been held before Arbitrator Cummings. She has made determinations about the bargaining unit appropriate for a number of employees, although the parties have also been able to reach an agreement on some individuals' status and appropriate bargaining unit.

The Award under Review

[11] CUPE asked Arbitrator Cummings to make two determinations: that the University pay retroactive union dues, and that it pay any salary increases awarded to employees found to fall within the CUPE bargaining unit retroactive to January 26, 2005, six working days before the date of the first grievance. CAW did not participate in this hearing.

[12] In the award dated January 4, 2011, the Arbitrator rejected CUPE's request, finding that the University was not obligated to pay past union dues, and compensation for employees would run from the date an employee was found to come or agreed to come within the CUPE unit.

[13] CUPE seeks to overturn only the determination about the retroactivity of the compensation increases. Although the Arbitrator called this an interim award, it is, in fact, final for those employees who have been found to come within the CUPE bargaining unit and whose salaries have been adjusted upwards in the joint job evaluation process.

[14] In her reasons, the Arbitrator set out the respective arguments of the two parties, including the procedural history. She noted at para. 15 of her reasons that CUPE had emphasized that it did not want a remedial order with different dates for different persons. At para. 22, she stated,

> Although I agree with the principle, advocated by the union, that the breach of rights should attract a remedy, I also agree with the University's fundamental argument that rights and remedies under the collective agreement do not attach to individuals until they become members of the bargaining unit.

[15] She went on to describe the "multi-faceted litigation" that followed the 2005 grievance, including the University's application to the Board to determine the status of employees in disputed positions and the disputes between CAW and CUPE over bargaining rights. She noted that "there was never any certainty that all of the persons on whose behalf CUPE filed its grievance in 2005 would end up in CUPE's bargaining unit" (at para. 24).

[16] The Arbitrator concluded that "in the circumstances of this case", it was not reasonable to order compensation or benefits of membership in the bargaining unit for a period before employees became members of the unit (at paras. 25 and 28). She noted that "[a]n arbitrator would not typically order an employer to provide the benefits of collective bargaining to employees for a period of time before they were covered by the collective agreement", although there could be exceptions – for example, where the employer refused to recognize individuals obviously covered by the agreement. Therefore, she concluded that adjustments resulting from the evaluation of positions would be effective when the position was agreed or ordered to fall within the CUPE bargaining unit.

Analysis

[17] There is no question that the standard of review of the Arbitrator's decision is reasonableness, given that she was determining a dispute between the parties about bargaining

rights and determining the appropriate remedy for employees who are found to come within CUPE's bargaining unit. As the Supreme Court of Canada stated recently in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para. 45:

> ... labour arbitrators are authorized by their broad statutory and contractual mandates - and well equipped by their expertise - to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

[18] Pursuant to s. 48(1) of the *Labour Relations Act*, an arbitrator has the authority to resolve "all differences between the parties arising from the interpretation, application, administration or alleged violation" of the collective agreement. In the present case, the University and the two unions have designed a special dispute resolution process in which they have given the Arbitrator the authority to determine whether employees fall within the CUPE unit or the CAW unit and to determine associated rights issues.

[19] CUPE argues that the decision of the Arbitrator on retroactivity is unreasonable, because she failed to respect the general principle accepted by arbitrators that monetary compensation, in the case of a continuing grievance, will normally be retroactive to the date of the latest violation, which is the date in the collective agreement that disputes must be grieved (*Re St. Raphael's Nursing Homes Ltd. and London and District Service Workers' Union, Local 220* (1985), 18 L.A.C. (3d) 430 (Roberts)). However, by the end of the oral argument, CUPE's counsel conceded that the real issue was not whether there was a continuing grievance. Rather, CUPE takes issue with the Arbitrator's statement that employees could not claim benefits under the collective agreement for a period before they were found to be in the bargaining unit subject to that collective agreement.

[20] Neither CUPE nor the University could point to a case with facts similar to those before the Arbitrator. The cases on continuing grievances put forth by CUPE do not assist here, as they are often dealing with the timeliness of a grievance (for example, *St. Raphael's* at 433; *Re Port Colborne General Hospital and Ontario Nurses' Association* (1986), 23 L.A.C. (3d) 323 (Burkett) at 328-29; *Re Atlantic Packaging Products Ltd. and Canadian Paperworkers Union, Local 333* (1993), 34 L.A.C. (4th) 59 (Starkman) at 66). As pointed out in Brown and Beatty, *Canadian Labour Arbitration*, (Canada Law Book, 4th ed.) at p. 2-104, in the case of a continuing grievance, retroactive compensation may be limited to the date of the launching of the grievance.

[21] In this case, the issue was not whether a grievance was out of time. The Arbitrator here has been dealing with a large number of positions whose status and bargaining unit membership have been disputed over a long period of time. About 100 of the positions were identified in the original CUPE grievance, but many more have been added through the application at the OLRB

launched by the University. Even if CUPE were right in saying that arbitrators generally make compensation retroactive to the date of the grievance, at most, that it would assist only a subset of the employees affected by the dispute resolution process. Moreover, CUPE indicated to the Arbitrator that it sought one date to be used for all employees.

[22] In any event, the Arbitrator commented that she was dealing with unusual circumstances in this case, given the lengthy and complex dispute between CUPE, CAW and the University concerning the status of a large number of employees and their appropriate bargaining units. The cases cited by CUPE were not like the fact situation before her, nor were they binding in any way.

[23] CUPE argues that the Arbitrator failed to recognize the injustice to the employees here if they are not given retroactive compensation. The Arbitrator acknowledged CUPE's argument about unfairness. However, she did not find it persuasive, given the lengthy litigation first, about employee status and then about bargaining unit membership, as well as the lack of fault on the part of any of the entities involved. There was nothing unreasonable in her statement that arbitrators generally would not order benefits under a collective agreement to an employee for a period when they were not covered by the agreement.

[24] The Arbitrator's task was to determine a remedy that was just and equitable in the circumstances before her. She gave clear reasons for her decision, in which she set out the positions of CUPE and the University. She concluded that in the unusual circumstances before her, the reasonable remedy would be to calculate benefits to employees from the time employees are assigned to the CUPE bargaining unit. That result falls within the range of reasonable, acceptable outcomes.

[25] While CUPE argues that the result of the award is to leave it and its members without a remedy, that is not the case. There has been a remedy for the original grievance in that a number of individuals have been found to come within the CUPE bargaining unit and some of them have, as a result, been awarded significant salary increases as a result of the joint job evaluation process.

Conclusion

[26] Accordingly, the application for judicial review is dismissed. Costs to the University are fixed at $5,000.00, an amount agreed upon by the parties.

K. Swinton J.
Swinton J.

Herman J.
Herman J.

van Rensburg J.
van Rensburg J.

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