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Labour and Employment Communiqué

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Agreements with Unionized Employees: A Case Summary

The Board of Governors of
Loyalist College of Applied Arts and Technology
vs. OPSEU
(March 6, 2003)
(Ontario Court of Appeal)

Ms. Bergman was hired as a teacher on the condition that she pursue a graduate program in her field of study. After 10 months when she had still not enrolled in a graduate program, the College fired her. She grieved and the arbitration Board reinstated her saying that the condition on her hiring was invalid because the law prohibited a unionized employer and an employee from negotiating a condition of employment. In addition, it said that the condition was invalid, because it conflicted with the Collective Agreement. The College appealed that decision to the Divisional Court and the appeal was dismissed. The College then appealed to the Court of Appeal of Ontario.

The first issue to be decided was what standard the College had to meet in proving its case. In most cases, if someone appeals a decision of an arbitrator, they must prove that that decision was "patently unreasonable". This means that the court should not interfere in the arbitrator's decision even if it thinks that decision is wrong. It should only interfere if it thinks that decision was unreasonable. This is done in deference (i.e. respect) for the expertise of the arbitrator.

But in some cases, the person appealing only has to show that the arbitrator was incorrect. In these cases, the arbitrators have been interpreting common law rules and principles outside of their special expertise in labour legislation and collective agreements.

The court concluded that four previous Supreme Court of Canada decisions on this issue established the following rules:

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1. similarly situated employees in a bargaining unit are governed by identical terms of employment. When the College attempted to impose upon Ms. Bergman a condition that was different from her co-workers, the College violated this rule;
2. a condition determining whether an employee retains their job is a condition of employment and conditions of employment that govern job retention must be in the collective agreement. The condition for Ms. Bergman was not in the Collective Agreement and, therefore, violated this rule;
3. when there is a collective agreement, anything more than the bare offer and acceptance of a job is invalid. By putting a condition on the offer to Ms. Bergman, the College violated this rule; and
4. Individual employees have no authority to negotiate on their own behalf and any individual contracts of employment are invalid. The condition in Ms. Bergman's offer to hire was an individual contract and, thus, invalid.

The court then went on to adopt the following statement from Brown and Beatty:

> The only scope for individual bargaining with regard to terms and conditions of employment would appear to be where it is sanctioned by the collective agreement, by the collective bargaining agent, where it is ancillary to routine administration of the Collective Agreement, where the terms fall outside the scope of the agreement, such as an agreement concerning an early retirement arrangement or reimbursement for relocation expenses, or in some cases where there is a voluntary waiver of a collective agreement benefit that does not undermine the collective agreement.

The court stated that none of these exceptions applied when the condition imposed on Ms. Bergman determined her continued employment.

Neither did the management rights clause protect the College in an issue as important as a condition of employment, the breach of which would result in dismissal.

The court concluded that the Board's decision was not unreasonable and, in fact, was correct.

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The Collective Agreement stated that the dismissal of an employee during the probationary period could not be grieved. Ms. Bergman was dismissed during her probation. But the court stated that arbitrators are entitled to review a dismissal if the decision is made in bad faith or is based on an illegal or invalid consideration. The College's decision was based on the invalid consideration of the condition in her letter of hire.

What happens when it is the employee who is trying to rely upon an agreement made during the hiring process?

In a case called *Dresser*, the employer promised six employees that they would be employed for at least two years. But before that, laid them off under the seniority provisions of the collective agreement when there was a downturn in the business. The trial Judge decided that there was a pre-employment contract, which was enforceable in the courts despite the existence of a collective agreement. Because the employer had breached these contracts, the employees were entitled to damages. The Court of Appeal upheld this decision.

It is often said in legal circles that sympathetic facts make for bad law and this may be one of the examples. It would appear from these two decisions that when an employee attempts to rely upon a pre-employment condition, they will be successful, but when the employer tries, they will not be. In attempting to distinguish the *Dresser* decision, the Court of Appeal in the *Loyalist College* decision stated:

> I consider that *Dresser* and this case differ in two material ways. First in *Dresser* this court upheld the finding of a separate, stand alone pre-employment contract outside the scope of the collective agreement. In this case the condition of Ms. Bergman's hiring did not amount to a separate pre-employment contract outside the agreement but instead, as I have said earlier, was a condition of her continued employment under the agreement. Second, in *Dresser*, the employees, who were not parties to the collective agreement sought to enforce their contractual rights in the court. In this case the party seeking to rely on the condition, the College, was a party to the collective agreement and was subject to its terms, not in a court, but before a board of arbitration.

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Is that a distinction without a difference? Any time an employee relies upon a pre-employment agreement, it might be said to be a "separate, stand alone pre-employment contract". Meanwhile, the circumstances in which an employer could rely on such an agreement are very limited.

This employee made an agreement, breached it, and got away with it.

About the author:

Robert Hickman is a member of our Labour and Employment Group. He provides legal services and advice to clients in the private and public sectors.

Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com.

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