COURT FILE NO.: 06-DV-1242
Ottawa
DATE: 20070412

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: The Corporation of the City of Ottawa
Applicant

-and-

The Ottawa-Carleton Public Employees Union, Local 503
Respondent

HEARD: April 2, 2007

BEFORE: Leitch, R.S.J., Lane and Hambly JJ.

COUNSEL: Andrew J. McCreary, for the Applicant;

John McLuckie, for the Respondent.

REASONS FOR DECISION

LANE, J.:

[1] This is an application for judicial review of the Award of Arbitrator Joseph Potter dated May 16, 2006 addressing a policy grievance filed by the Local alleging that the City had failed to provide uninterrupted eating periods to paramedics employed by the City's Emergency Services, contrary to section 20 of the *Employment Standards Act*, S.O. 2000, c. 41.

[2] The arbitrator accepted that the paramedics were entitled to a 30-minute "eating period" for each 5 hours worked, found that such breaks were not always provided, rejected the City's submissions and directed that the City comply with the *Act*. He also ordered that where, as was unavoidable due to the need to respond to emergency calls in a timely way, this could not be

accomplished on a particular occasion, the City must pay damages in an amount to be fixed by him in a further Award. The quantum of damages issues have not yet been decided.

[3] As the *Act* has been amended since the Award to largely exempt paramedics from the relevant sections, the application affects whether the arbitrator will award damages for the past failure to provide the eating periods.

[4] The City seeks to quash the Award on two grounds:

> (a) the arbitrator's conclusion that work cannot be performed during an eating period under the *Act* is patently unreasonable;
> (b) the arbitrator's conclusion that the City's agreement in the Collective Bargaining Agreement to pay for all eating periods and to make best efforts to keep them uninterrupted did not provide a greater benefit than the *Act* did, is also patently unreasonable.

Background

[5] In January 2001, the provision of ambulance services was "downloaded" from the Province to the City. The legislation did not continue an exemption applicable to the paramedics as Crown employees from certain provisions of the *Act*, including the eating period provisions. The City and the Local negotiated language for an interim CBA, which was included in the CBA established by the Award of arbitrator Mitchnick in 2003. The City agreed to pay for the eating periods and to employ its best efforts to ensure that the paramedics received uninterrupted eating periods during their shifts. The Local recognized that there might be occasions where it was not possible to do so.

[6] The City operates a "dynamic deployment model" for the despatch of ambulances, mandating minimum response times to maximize the opportunity for lifesaving. The paramedics normally work 12 hour shifts during which they receive, on average, three to five calls lasting one to one and a half hours each. They also have paperwork to perform and cleaning and other duties in respect of their vehicles. The hope is to work the eating periods into the "down time" between calls, but the reality is that the crews are on call for emergencies at all times during the shift. If a code 3 or code 4 call is received, i.e the 911 calls, the meal is interrupted. The protocol requires the crews to be en route within 90 seconds of such a call. The timing of such calls is

inherently random, so that there is no time when the crew is relieved from the need to be alert for a call. The witnesses agreed that nothing could guarantee an uninterrupted eating break on every shift.

The Standard of Review

[7] The parties are in agreement that the standard of review of a labour arbitrator dealing with issues arising from a CBA or a related Act such as the *Employment Standards Act* is patent unreasonableness. We agree with that submission. There is a strong privative clause. The arbitrator is adjudicating issues at the core of his expertise including both the language of the CBA and the provisions of the *Employment Standards Act*, a statute intimately connected with labour relations and encountered frequently as a result[1]. The purposes of both the *Labour Relations Act* and the *Employment Standards Act* are advanced by recognizing the usefulness and expertise of labour arbitrators in determining disputes involving both. Finally, the problem does involve the language of the *Employment Standards Act*, but, as noted, that Act is one of those encountered frequently by arbitrators.

[8] The content of the standard of patent unreasonableness was addressed by the Supreme Court in *Southam*[2] where the Court stated that if the defect is apparent on the face of the tribunal's reasons, the decision was patently unreasonable, but if it takes some significant searching to find the defect, then it is not patently unreasonable. This is obviously a very high standard of review, which has variously been described as "clearly irrational"[3] or as "so flawed that no amount of curial deference can justify letting it stand."[4]

The Legal Framework

[9] The *Employment Standards Act*:

> 5(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract apply and the employment standard does not apply.

---

[1] *Toronto Board of Education v. Ontario Secondary Teachers' Federation District 15*, [1997] 1 S.C.R. 487.
[2] *Canada (Director of Investigation and Research v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 57.
[3] *Canada (Attorney General) v. P.S.A.C.* [1993] 1 S.C.R. 941, 963-4.
[4] *Ryan v. Law Society (New Brunswick)*, (2003) 223 D.L.R. (4th) 577 (S.C.C.), paragraph 52.

> 20 (1) An employer shall give an employee an eating period of at least 30 minutes at intervals that result in the employee working no more than five consecutive hours without an eating period.
>
> 21. An employer is not required to pay an employee for an eating period in which work is not being performed unless his or her employment contract requires such payment.

Analysis

[10] There are essentially three points raised and dealt with by the arbitrator. One, whether the employer failed to use its "best efforts" to "ensure that all employees are given uninterrupted eating periods", was decided in favour of the employer and is not the subject of this application. The remaining two are as set out in paragraph 4, supra:

> (a) the arbitrator's conclusion that work cannot be performed during an eating period under the *Act* is patently unreasonable;
> (b) the arbitrator's conclusion that the City's agreement in the Collective Bargaining Agreement to pay for all eating periods and to make best efforts to keep them uninterrupted did not provide a greater benefit than the *Act* did, is also patently unreasonable.

[11] I will deal with the second issue first, as did the arbitrator. The employer contended that the provision in the CBA for payment for all eating breaks was a superior benefit than the taking of unpaid breaks. The *Act* did not require payment for the eating breaks; section 21 contemplates that there will be times when work is performed during such breaks; and the CBA also requires the City to expend its best efforts to ensure uninterrupted eating breaks. This was a better arrangement because the paramedics would be paid for their entire shift regardless of actual time taken for eating breaks. The arbitrator held that pay and time off were not comparable and this was patently unreasonable because he was bound to consider the entire package offered by the employer in lieu of the employment standard. When that was considered, the CBA was better.

[12] In his reasons, the arbitrator held that the CBA benefit, in order to be considered as a superior benefit, must relate to the same subject as the employment standard. He considered arbitral jurisprudence stressing that the subject matter of an employment standard for time off, is time off, not compensation; it is about "time in" and "time off"; not about payment for work or extra work or overtime work. It is not about payment at all. Founding himself upon that arbitral jurisprudence, he said:

> The ESA provides for a meal break at some point in an employee's shift. The collective agreement provides for compensation during the meal break. The two issues are not, in my view, comparable for the purposes of invoking section 5 of the ESA. The ESA is quite specific in saying employees are entitled to a break, and that is the benefit. ... The law is clear: employees are entitled to a break. The law is not about payment for breaks or pay for work..

[13] In my view, the arbitrator did consider the whole package offered by the CBA and rationally analysed it as falling short of actual time off. On a shift of 12 hours, being continuously on stand-by for an emergency call means having no "break" at all for the whole period. Whether being paid for the foregone time off, plus the "best efforts" obligation is a better benefit than the time itself is a judgment call which lies deep in the expertise of the arbitrator. It is significant that other arbitrators have reached similar conclusions. What factors are to be weighed in this comparison, and the weight to be given to them are part of the labour relations expertise possessed by the arbitrator. The decision is not clearly irrational. There is a discernible line of reasoning by which he reaches the conclusion. One may disagree with that line of reasoning (although I do not), but one cannot deny its existence.

[14] Turning to the remaining point, the employer relied on section 21, that an employer is not required to pay an employee for an eating period in which no work is done unless required by contract, as evidence that the *Act* contemplated that interruptions in the eating break could be compensated by pay. The arbitrator considered this submission in the light of the Ministry policy guideline which provided that interrupted breaks must be rescheduled so as to provide a clear uninterrupted thirty minutes. He concluded that where possible there must be rescheduling and if that proved impossible, he would consider the issue of damages. In my view, this response is not clearly irrational; it is no less logical than the employer's interpretation which requires a lot of imagination to read into the language. Even if the section means that the employer is bound to pay if work is done, which seems reasonable enough, the section does not speak to the replacement of the foregone time off.

[15] For these reasons, I would dismiss the application for judicial review.

Lane J.

Leitch R.S.J.

Hambly J.

DATE: 2007/04/[illegible]