

IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE PARTIES' COLLECTIVE AGREEMENT AND THE
LABOUR RELATIONS CODE OF BRITISH COLUMBIA, R.S.B.C. 1996, c. 244

BETWEEN:

TIMES COLONIST

(the "Employer")

AND:

TNG/CWA LOCAL 30403

(the "Union")

(R. West Severance Pay Grievance)

ARBITRATOR:

Christopher Sullivan

COUNSEL:

Michael Korbin for
the Employer

Nelson Roland for
the Union

DATE & PLACE OF HEARING:

October 15, 2004
Victoria, BC

PUBLISHED:

February 8, 2005

The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves an interpretive dispute arising out of a grievance filed by the Union on behalf of Russ West, alleging the Employer violated the Collective Agreement by failing to pay Severance Pay, pursuant to Section 12(a) of the Collective Agreement, subsequent to his mandatory retirement at age 65 in June of 2003.

Section 12 of the Collective Agreement provides:

Section 12 Severance Pay

- a) Upon dismissal for any reason other than for gross misconduct or for self-provoked dismissal for the purpose of collecting severance pay, or upon being laid off, an employee shall receive a minimum of ten (10) weeks severance pay in cash in a lump sum equal to one weeks pay for every six (6) months of service or major fraction thereof, up to a maximum of forty (40) weeks. Such pay shall be computed, at the highest straight time weekly wage paid to the employee during the period of fifty-two (52) weeks immediately preceding dismissal or layoff.
- b) If any employee is rehired following the payment of severance pay, and before the expiry of the number of weeks so paid for, the unearned severance pay shall be refundable to the Company. Reasonable terms of repayment shall be arranged if required by the employee.
- c) The period of any employee's service with the Company, for the purpose of this Article, shall mean the total period of consecutive and uninterrupted service of the employee concerned except that:
 - i) Breaks in service with the Company, which were occasioned in circumstances over which the employee had no control, shall not be regarded as an interruption.
 - ii) Leaves of absence granted by the Company to any employee, and the period of lay off of an

employee subsequently rehired following a dismissal to reduce the labor force, shall not be regarded as an interruption in continuity of service, but the time actually spent away from regular duties shall not count as time served.

- d) A senior employee shall have the option of claiming severance over a junior employee.

The circumstances surrounding the grievance are straight forward. The grievor was a long serving Journeyman Mailer with this Employer, having been employed for about 35 years.

In December of 2002 an opportunity became available for the grievor to claim severance over a junior employee pursuant to Section 12(d). His December 12, 2002 letter to the Employer's Production Manager reads as follows:

Layoffs for the Week: December 15, 2002

I wish to exercise my priority right to claim one of these layoffs under Section 12 and Letter of Understanding #6, as I have been continuously employed by the Times Colonist since May 1, 1967 (as shown on the union's priority board). My claim is stated for the maximum of 40 (forty) weeks pay and all vacation and statutory holidays owing me.

I will accept the company's offer without prejudice and will grieve the remainder of the 40 weeks.

Letter of Understanding #6, referred to in the first sentence of the grievor's December 12 letter, is entitled "Twelve man Substitute Board". It provides that laid off senior substitutes are to be "moved back to the top of the substitute board, or should they decided to leave, they will be entitled to severance pay".

The last paragraph of the grievor's December 12 letter refers to the Employer's offer to pay the grievor his severance to the date of his mandatory retirement in June of 2003, which constituted 25 weeks and three days. It did not, however, pay the "remainder of the 40 weeks" (14 weeks and two days), and it is this amount claimed by the Union's grievance, dated December 3, 2002.

The Employer's refusal to pay the grievor severance pay beyond his date of mandatory retirement is based on the Job Guarantee negotiated by the parties, including its Appendices A and B. These provide:

Job Guarantee

Victoria Mailers Union Local 121 (Now known as
Communications Workers of America Local 14003)

- 1) The employees named and specified in Appendix A hereto shall be permanent full-time or part-time employees until their employment status is lawfully terminated as provided for in paragraph 3 hereof or suspended as provided for in paragraph 4 hereof or varied by mutual agreement of the parties.
- 2) The rates of pay of each of the said employees shall be as negotiated between the Employer and the Union from time to time in Collective Agreements.
- 3) The employment status of each of the same employees will terminate only upon the happening of the first of any of the following events:
 - a) The employee ceasing to be a member in good standing of the Union.
 - b) The death of an employee.
 - c) The voluntary resignation in writing of the employee duly delivered to the employer.

- d) The retirement by the employee according to the schedule which is Appendix "B" hereto.
 - e) The acceptance by the employee of an early separation allowance as set forth in the schedule, which is Appendix "C" hereto.
 - f) The discharge of the employee by the Employer for just and reasonable cause.
 - g) Termination by the employer of all business activities associated with the production or publication of a newspaper, and/or commercial printing. In the event that business activities are resumed by the Employer, this Agreement will be deemed to have been renewed with effect from the date of resumption.
- 4) The events stated in paragraph 3 hereof are the only grounds upon which the employment status of each of the said employees may or can be lawfully terminated save that this Agreement shall be deemed to have been suspended during any lawful lockout by the Employer or strike by the bargaining unit of which the same employees are members, and deemed to have been revived upon the cessation of the said lockout or strike.
- 5) In the event of dispute as to the interpretation application or breach of this Agreement the grievance procedure to be followed shall be that provided for in the Collective Agreement between the Employer and the Union which is in effect at the time that the grievance is initiated.
- 6) The parties agree that the present publication schedule (separate morning and evening editions Tuesday to Friday inclusive, one combination edition Saturday, one morning edition Sunday, and one evening edition Monday) shall be maintained until the Employer shall advise the Union in writing of the implementation of the seven-day single edition schedule.

- 7) This Agreement shall continue in full force and effect until the employment status of the last survivor of the same employees has been lawfully terminated.
- 8) This agreement and any of its provisions shall not be the subject matter of any collective bargaining subsequent to its date between the Employer and the Union unless both mutually agree in writing signed by both to re-open this Agreement.
- 9) This Agreement will take effect as and from the 3rd day of November 1983, and as from the said date it shall form and be deemed to form part of the current Collective Agreement and of any Collective Agreement between the parties subsequent and in succession thereto.
- 10) This Agreement binds not only the parties executing the same but also their respective successors and assigns of any kind whatsoever, including, without prejudice to the said generality, any purchase of or successor to the enterprise (in whole or in part) of the Employer and any successor to the Union as the bargaining agent for the bargaining unit of which the said employees from time to time are members.

Appendix A, referred to in Section 1 of the Job Guarantee, contains a list of 28 employees, with their birth dates and ages "as of November 3, 1983". The grievor is fourth from the top of the list. His birthday is June 12, 1938, and he was 45 years of age as of November 3, 1983.

Section 3(d) refers to "retirement according to...Appendix B", which is entitled "Mandatory Retirement", and states:

Appendix B
Mandatory Retirement

- a) Employees who had attained 65 years of age on or before December 31, 1983, will retire not later than on December 1, 1987.
- b) Employees who had attained not less than 60 years and not more than 64 years of age on or before December 1, 1983, will retire not later than upon attaining the age of 70 years.
- c) Employees who had attained not less than 55 years and not more than 59 years on or before December 1, 1983 shall retire not later than December 1, 1993.
- d) Those employees who had not attained 55 years of age as of December 1, 1983, will retire no later than upon attaining 65 years of age.

The evidence reveals that the Job Guarantee and its Appendices were bargained in the early 1980s. Sections 12(a), (b) and (c) have been contained in the Collective Agreement for many years, but Section 12(d) was added during collective bargaining in 1999.

The evidence discloses that near noon on September 15, 1999 the Union submitted a document to the Employer containing a number of proposals, one of which provided:

Severance Pay

Amend 40 weeks to 52 weeks maximum.

A senior employee shall have the option of claiming severance over a junior employee. Craft Unions only.

At 3:05 p.m. that day the parties reconvened and the Company spokesperson, Bob McKenzie, replied to the Union's proposals. In relation to the matter of severance pay he

stated the Employer was “not interested” in raising the maximum to 52 weeks, but that it would agree to the second part of the proposal that allowed senior employees to exercise priority to claim severance. There was no discussion between the parties about the severance pay proposal at all, and their agreement on the matter was duly recorded in the “Joint Council Common Proposals Position for Settlement” dated September 16, 1999.

During these proceedings the Employer sought to call evidence regarding, essentially, its view about the effect of its agreement in 1999. Suffice it to observe the evidence the Employer sought to adduce related solely to its own views about the meaning of the agreed upon language, and what it would have said if the matter had been raised. Clearly, the Union walked away from the bargaining table with a completely different understanding. Significant to this case is the lack of any evidence suggesting a consensus was reached in regards to how the new provision would affect the longstanding job guarantee and mandatory retirement commitments. No mutuality was expressed in regards to the cost implications of the language.

SUMMARY OF PARTIES' POSITIONS

On behalf of the Union, Mr. Roland asserts this is a straightforward case of collective agreement interpretation resulting in the grievor being entitled to his full 40 weeks of severance pay as a result of his layoff from work on December 15, 2002. Counsel argues Section 12(a) of the collective agreement is dispositive of the issue. That provision expressly provides that “upon being laid off” an employee “shall receive” severance pay up to the prescribed 40 week maximum, which the grievor was entitled to by virtue of his 1967 seniority date.

Mr. Roland emphasizes the mandatory term “shall”, adding the grievor’s entitlement to all of his severance “crystallized” and became due as a lump sum at the point in time he was laid off. These significant elements support an interpretation that Section 12 severance pay is a deferred benefit, not a “forward looking” notice provision.

Mr. Roland points out Section 12 contains no “escape clause” that would operate in the present circumstances to limit the grievor’s entitlement to full severance pay. Counsel notes the parties did, in fact, turn their minds to making an exception to full entitlement, and they did so only in relation to a rehire situation pursuant to Section 12(b).

On behalf of the Employer, Mr. Korbin argues the grievor is not entitled to severance pay beyond the date of his mandatory retirement age 65. He states it makes no sense for the Employer to pay an employee beyond what he is entitled to under the “extraordinary” Job Guarantee.

Mr. Korbin argues the Union bears the onus of proving entitlement to the monetary benefit sought. Counsel cites Noranda Mines Ltd. and USWA, Local 898, May 19, 1981 (Hope), and asserts the Union has not met an onus to demonstrate the parties mutually intended that the Employer would be required to provide severance pay beyond the mandatory retirement age.

Alternatively, Mr. Korbin states that there was no meeting of the parties’ minds in regards to the specific matter before this board. He suggests an objective review of all of the circumstances would lead one to conclude the parties did not intend an employee to receive more money by being laid off prior to retirement, than that employee would have received had he worked to the date of his retirement.

ANALYSIS AND CONCLUSIONS

The arbitrator’s role in an interpretive dispute is to determine the intentions of the parties to the agreement. The primary interpretive tool is the written document of the contract itself and, specifically, the precise words used by the parties to capture their consensus.

In the present case it is clear the parties have not at all addressed the matter in dispute. A purposive reading of the negotiated severance pay, job guarantee and mandatory retirement commitments discloses no expression of mutuality on the precise matter before this Board. Without question, Section 12 captures an intention that severance be paid in the event of layoff. On its face, only subsection (b) restricts one's entitlement to severance, and that provision speaks to a rehire situation. At the same time, however, an appropriate review to ascertain intention must take into account the fact that prior to the negotiation of Section 12(d) in 1999 there was no basis upon which named Appendix A employees could be laid off. To this day, the established Job Guarantee only provides for seven specific concisely bargained grounds, contained in paragraph 3, upon which a named individual's employment may be terminated, and layoff is not one of them.

The strength of the longstanding prohibition against laying off Appendix A employees is underscored by the language used by the parties to express their consensus. On this matter paragraph 1 of the Job Guarantee provides for employment of Appendix A employees "until their employment status is lawfully terminated as provided for in paragraph 3 hereof...". Paragraph 3 confirms "(t)he employment status of each of the (Appendix A) employees will terminate only upon the happening of the first of any of the" seven expressed grounds. Paragraph 4 reiterates: "(t)he events stated in paragraph 3 hereof are the only grounds upon which the employment status of each of the said employees may or can be lawfully terminated...".

When the parties agreed in 1999 to allow Appendix A employees to, effectively, exercise priority rights to a layoff over a junior employee, they did so without any discussion about the impact this newly negotiated right would have upon the inextricably related longstanding job guarantee/mandatory retirement commitments. There was no talk as to how Section 12(d) would be reconciled with the prevailing prohibition against

the layoff of Appendix A employees, and “mandatory” termination of the employment relationship at age 65. The parties did not at all speak to the matter of severance entitlement for a job guaranteed employee exercising Section 12(d) rights. The matter of one’s entitlement to pay beyond mandatory retirement was not raised.

The entirety of the language used by the parties to express their intentions reveals no consensus on the specific matter in dispute. There is no indication as to what precisely the parties intended about their respective rights and obligations relating to the payment of severance for a period beyond the date of one’s mandatory retirement.

The matter of a particular issue not being dealt with by the parties at collective bargaining was addressed by the British Columbia Labour Relations Board in Andres Wines (B.C.) Ltd. and United Brewery and Distillery Workers, Local 300, 16 L.A.C. (2d) 422. In that case the Board considered a collective agreement provision establishing a broad obligation for the employer to “make available to all employees a Welfare Plan”. The Board found, however, an “apparent gap” in the parties’ bargain existed as it was evident they had not “turned their minds to the particular problem of the situation of an employee on lay-off”. Chair Paul Weiler, on behalf of the Board, commented:

There is nothing that unusual about the presence of such an apparent gap in the terms of a collective agreement. As a practical matter, it is impossible for the parties to a collective agreement to anticipate, to canvas, and then to reach agreement about every contingency which might arise during its term. That fact of life stems from the very nature of a collective agreement:

Collective agreements deal with the entire range of employment terms and working conditions often in large, diverse bargaining units. The agreement lays down standards which will govern that industrial establishment for lengthy periods - one, two, even three years. The

negotiators are often under heavy pressure to reach agreement at the eleventh hour to avoid a work stoppage, and their focus of attention is primarily on the economic content of the proposed settlement, not the precise contract language in which it will be expressed. Finally, the collective agreement, though the product of negotiations over many years, must remain a relatively concise and intelligible document to the members of the bargaining unit and the lower echelon of management whose actions are governed by it.

Simon Fraser University and Association of University and College Employees, Local 2, [1976] 2 Canadian L.R.B.R. 54 (Weiler) at p. 59.

(at p. 424)

In Andres Wines the Board outlined the appropriate common sense based analytical approach for resolving “apparent gaps” in collective agreement language. Chair Weiler stated:

In the absence of any clear indication of the mutual intent of the parties - gathered from either their language or their behaviour - the arbitrator must, in effect, reconstruct some kind of hypothetical intent. What is it reasonable to assume that typical labour negotiators, having analyzed the nature and purpose of the contract benefit in question, would agree to as a sensible judgment about who should enjoy the benefit in this unusual situation?

(at p. 425)

Applying this analytical framework to the precise circumstances before this Board leads me to conclude a mandatory retired Appendix A employee is not entitled to severance pay beyond the date of retirement. Viewed in the context of the agreement as a

whole, which is what the “typical labour negotiators” were faced with in their 1999 round of negotiations, the immutable job guarantee was tied to mandatory retirement and a level of cost certainty whereby Employer pay obligations to an employee would cease no later than the attainment of age 65. There is no indication the parties sought to alter these well entrenched key commitments. Prior to 1999 senior employees could not access layoff, and had to wait until retirement to optimize their pay. The 1999 agreement to allow these senior employees to access layoff constitutes an opportunity for one to sever the employment relationship prior to retirement, and avoid, or at least minimize, one’s financial loss.

From the standpoint of “typical labour negotiators” there is no reasonable reason to conclude the parties would have intended a windfall situation, whereby just prior to mandatory retirement a senior employee could exercise priority to access a layoff and consequently receive severance pay for a period beyond age 65, which he would not otherwise have been entitled to. This is the type of anomalous result typical labour negotiators generally seek to avoid.

This conclusion is buttressed by Section 12(b) which expressly refers to the concept of “unearned severance pay” that is “refundable to the Company” where one “is rehired following the payment of severance pay, and before the expiry of the number of weeks so paid for”. This provision suggests severance pay is not only a recognition of one’s past service; it is also a recognition of one’s loss of investment because of termination, and one having to go out and gain new employment, and commence building service elsewhere. The severance pay benefit is distinct from a retirement allowance or bonus based solely upon past service. The parties’ agreement reveals an intent that Section 12 severance pay, in part, addresses a future loss, and is not intended to provide a windfall. “Typical labour negotiators”, striving for a measure of internal consistency, would very likely view severance pay beyond mandatory retirement similar to a rehire situation as they both involve a diminished loss.

In context, the addition of Section 12(d) in 1999 represented a significant gain for the Union. In the case at hand it allowed a senior employee to essentially access 25 weeks and three days of paid time off to the date of his mandatory retirement. I do not accept that, particularly in these current economic times, typical labour negotiators would have intended this employee to be entitled to an additional 14 weeks and two days' pay, which he would not have received had he worked to the date of his retirement.

This reconstructed hypothetical intent based on the preexisting bargained landscape is consistent with the generally accepted notion of "severance pay", as a reflection of one's service, and loss of investment. In Telegram Publishing Co. Ltd. and Mark Zwelling & Gottlob Essig (1972), 1 L.A.C. (2d) 1 [award quashed (1972) 41 D.L.R. (3d) 176, 3 L.A.C. (2d) 247 (Ont. Div. Ct.); revd. in part 67 D.L.R. (3d) 404, 13 L.A.C. (2d) 112*n* (Ont. C.A.)], Arbitrator Carter observed:

Severance pay recognizes that an employee does make an investment in his employer's business - the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. Financial benefits, such as vacation pay, will be calculated on the basis of this seniority and, even more importantly to the employee, his job security in a lay-off situation will depend on the length of his seniority. Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment. The employee will lose this investment whether he is dismissed for reasons of health, or because the business is completely closed. In all three cases, he will lose his investment, and it seems reasonable that in all three cases he should receive at least partial compensation in the form of severance pay.

In Maple Leaf Mills Ltd. and Canadian Chemical Workers' Union, Local 18 (1979) 24 L.A.C. (2d) 269, Arbitrator Weatherill had opportunity to consider a relatively similar situation to the one before this Board, involving a situation where a senior employee took early retirement just prior to his scheduled "normal retirement date". The Company, as the Employer did in the present case, took the position severance pay "could not be for a greater amount than that that the grievor would have earned had he remained at work until his retirement date".

Arbitrator Weatherill commented the collective agreement language before him essentially provided that, "(i)n the case of a displaced employee...severance pay cannot be greater than the amount of his regular earnings had he remained at work." The issue he posed was whether retiring employees were "subject to the same limitation on...severance pay" as displaced employees. Arbitrator Weatherill responded with the following general comment on the nature and purpose of severance pay:

In our view such a limitation is intended in all cases where severance pay is payable. The original effect of the provision was to make a payment, based on service, to those whose employment with the company is severed at some time prior to what might otherwise be its normal termination. Where such a "severance" occurs shortly before an employee would retire in any event, the employee has not lost a great deal of earnings, and the "severance pay" need not be great. The "severance" referred to is, quite clearly, not the same sort of "severance" as that which occurs when an employee retires, although in each case, of course, employment is terminated.

(at p. 273)

In MacDonalds Consolidated Ltd. (Canada Safeway Ltd. and Retail Wholesale Union Loc. 580), (1997) 61 L.A.C. (4th) 129, Arbitrator McKee characterized severance pay as a "deferred benefit" whereby "(i)n essence, the employer withholds part of each

paycheque that represents the accumulating severance protection.” Arbitrator McKee added:

Severance entitlement is different than notice. Severance pay is for work already done; notice or pay in lieu looks to the future. Where the issue is failure to provide notice, mitigation is a consideration; in relation to severance pay, there is no issue of mitigation.

(at p. 132)

I do not accept “typical labour negotiators” in the present case would have intended Arbitrator McKee’s “deferred benefit characterization” of severance pay to apply in the present circumstances. Notably, he found strong support for that characterization because the collective agreement before him provided for the payment of severance pay upon retirement. Arbitrator McKee acknowledged:

The deferred benefit characterization of severance pay is particularly powerful under this collective agreement as there is severance pay entitlement not only on termination of employment but also on retirement.

(at p. 132)

The established collective bargaining context facing the typical labour negotiators in the present case is very different than the one in MacDonalds Consolidated. Suffice it to observe the present collective agreement does not provide for the payment of severance upon retirement. The “deferred benefit characterization” of severance pay is without support in the present collective agreement, which includes the entrenched Job Guarantee and the mandatory retirement commitments, together with Section 12(b)’s reference to the concept of “unearned severance pay”.

In the circumstances, therefore, I accept it is reasonable to infer that the Section 12 severance pay benefit was not intended by the parties to apply beyond the date of one's mandatory retirement. The benefit inherently connotes a loss of an investment, and contains a forward looking component to determine whether a certain portion of the pay is "unearned" and not payable.

In arriving at my conclusion I am mindful of the information that some employees have been called in to work subsequent to their retirement. The parties concur this has not happened in the past three years, and it has occurred only about five or six times in the past five or six years. On these occasions retired employees have been called in by the Union hiring hall to work a shift, without the Employer's involvement or knowledge, up until it was time to remit pay. To my mind these isolated and relatively rare incidents do nothing to alter the constructed hypothetical intentions of the parties.

Having arrived at my conclusion I do not accept the Employer's argument that the grievor, when invoking Section 12(d) to exercise priority to severance pay over a junior employee, is entitled to pay based on the junior employee's service, rather than his own service. There is no support in the existing language for the proposition that one's severance entitlement is actually based on the severance entitlement of another employee, whose employment is not severed.

In the present case the information reveals the junior employee who was originally given layoff notice had been employed since 2000, and was therefore entitled to ten weeks' severance pay pursuant to Section 12(a). The Employer, however, paid the grievor 28.6 weeks' severance pay to the date of his mandatory retirement. In all the circumstances I do not agree with Counsel for the Employer that it was "actually very generous" for the Employer to make the payment it did. I accept, however, it did fulfill its obligations and that the grievor received his entitlement.

The grievance is, therefore, dismissed.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 8th day of February , 2005.

Christopher Sullivan

Christopher Sullivan