

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, Ducharme and Tzimas JJ.

BETWEEN:)
)
MUNICIPAL PROPERTY ASSESSMENT)
CORPORATION) *Frank Cesario and Amanda Cohen, for the*
) Applicant)
)
- and -)
) *David R. Wright and Esther Y. Song, for the*
) Respondent)
ONTARIO PUBLIC SERVICE)
EMPLOYEES UNION)
)
Respondent)
)
)
)
) **HEARD at Toronto: December 9, 2019**

REASONS FOR DECISION

H. SACHS J.

Overview

- [1] The Applicant (“MPAC”) seeks to overturn a portion of an award (the “2016 Award”) granted by Arbitrator Howe on December 6, 2018. The impugned portion of the Award granted three employees a portion of an enhanced severance payment that was created for the employees of the Ministry of Finance who, on December 31, 1998, became employees of MPAC.
- [2] The enhanced severance payment is governed by a Letter of Understanding (“LOU #1”), which forms part of the collective agreement between the parties. LOU #1 specifies that the employees of the Ministry who were entitled to the payment are “full-time employees who accepted employment with MPAC on December 31, 1998.”

- [3] In an earlier award (the “2001 Award”), a panel chaired by Arbitrator Howe decided that unclassified (i.e. temporary) employees of the Ministry of Finance who became temporary employees of MPAC on December 31, 1998 and whose contracts had expired were not entitled to the enhanced entitlement under LOU #1; even though they worked full-time hours and the LOU states the benefit will be payable to “full-time employees.” The reasoning behind the 2001 Award was that the Collective Agreement contained a specific provision providing that temporary employees were entitled to 10% of base wages in lieu of benefits. Since the enhanced payment was a benefit, this clause ousted their entitlement to that benefit.
- [4] In the 2016 Award, the three partially successful grievors were temporary employees working full-time hours who transferred from the Ministry to MPAC on December 31, 1998. At various points after that date, they each became non-temporary employees of MPAC. The Arbitrator decided that these employees were entitled to accrue credit toward the enhanced severance payment for the period in which they were non-temporary employees.
- [5] MPAC argues that the Arbitrator’s decision is an unreasonable one because it does not reflect the intention of the parties who negotiated LOU #1; it is inconsistent with the 2001 Award; it ignores the past practice of the parties since the 2001 Award; and it fails to take account of a subsequent Letter of Understanding (LOU #7) that the parties negotiated after the 2001 Award.
- [6] For the reasons that follow I would dismiss MPAC’s application. The Arbitrator’s decision is consistent with the language of LOU #1 and consistent with the 2001 Award. The evidence of past practice is not relevant as there was no finding that LOU#1 was ambiguous and MPAC did not make an estoppel argument. LOU #7 deals with seniority rights. It does not address enhanced severance payment entitlement, and therefore does not assist MPAC in this case.

Factual Background

The Transfer that Took Place on December 31, 1998

- [7] OPAC, the precursor to MPAC, was a Crown corporation that performed property assessment functions. The people who performed those functions were employees at the Ministry of Finance. Employees at the Ministry of Finance were considered either classified or unclassified workers.
- [8] Classified workers were permanent employees and were part of the Ontario Public Service (“OPS”) bargaining unit with OPSEU. Under the old OPS collective agreement, classified employees were entitled to receive the enhanced severance payment. The benefit was equal to one week per year of service beyond five years of service up to a maximum of 26 weeks.
- [9] Unclassified employees were workers who were employed through individual employment contracts that ran from one specified date to another. They were also governed by the OPS collective agreement, but had limited rights under that agreement and no job security. The

agreement contained provisions governing the conversion of unclassified employees to classified employees, a conversion that would then entitle an employee to all of the benefits under the agreement, including the enhanced severance payment.

- [10] On December 31, 1998 the Ministry of Finance employees who were performing property assessment services for OPAC became direct employees of OPAC, which was subsequently renamed MPAC (I will refer to the post-transfer-date employer as MPAC in these reasons). As a result of the transfer, 381 unclassified Ministry of Finance employees (including the three grievors who benefited from the 2016 Award) became “temporary” employees of MPAC and 1200 classified Ministry of Finance employees became “non-temporary” employees of MPAC. All of the transferred employees became members of the OPSEU bargaining unit.

LOU #1

- [11] During the transfer of employees from the Ministry of Finance to MPAC, MPAC and OPSEU entered into LOU #1, which formed part of their collective agreement. LOU #1 provides:

This will confirm that full-time employees who accepted employment with MPAC at the time of the transfer, December 31, 1998...will receive a special compensation entitlement equal to one (1) week per year of combined service with OPS and MPAC to a maximum of twenty-six (26) weeks ending January 1, 2016...

- [12] The original LOU #1 provided that the payout of the enhanced severance payment was to occur on termination or death. The payout date was subsequently amended by agreement to January 1, 2016.

The 2001 Award

- [13] In March of 2001 MPAC and OPSEU asked a Board of Arbitration (the “Board”) chaired by Arbitrator Howe to determine whether unclassified Ministry of Finance employees who became temporary employees of MPAC on December 31, 1998 and whose contracts would expire “through the effluxion of time” were entitled to the enhanced severance payment under LOU #1. OPSEU argued that they were, as they were full-time employees. MPAC submitted that they were not, because the collective agreement contains specific clauses dealing with the entitlements of unclassified or temporary employees and the enhanced severance entitlement was not one of them.
- [14] The Board concluded that the enhanced severance payment provided for in LOU #1 was a “benefit” within the meaning of Article 5.02 of the collective agreement between the parties. Article 5.02 provided that “[t]emporary employees shall receive 10 percent of base wages in lieu of holidays, vacations and *benefits* and in lieu of pay therefor” (emphasis added). Thus, Article 5.02 ousted the right of temporary employees to receive the enhanced severance payment.

LOU #7

- [15] After the 2001 Award, the parties negotiated another Letter of Understanding (“LOU #7”) that deals with the issue of the seniority to be credited to people who were unclassified Ministry of Finance employees and who became temporary MPAC employees on December 31, 1998. The relevant portion of LOU #7 states:

Subject to the provisions of this letter, it is agreed that such persons will be credited with seniority, for the sole purpose of vacation, layoff, recall and the filling of vacancies, for continuous service with the Ministry of Finance immediately prior to and contiguous with December 31, 1998.

2016 Award

- [16] After January 1, 2016, MPAC calculated and distributed the enhanced severance payments to the employees it determined entitled to receive it. Forty employees filed grievances contesting MPAC’s approach to the compensation entitlement and arguing that they were entitled to the enhanced severance payment. Twenty-one grievances came formally before Arbitrator Howe, who partially allowed three of those grievances. The three partially successful grievors had been previously employed by the Ministry of Finance as unclassified employees, became employed by MPAC on December 31, 1998 as temporary employees, and subsequently obtained non-temporary positions at MPAC.
- [17] In the 2016 Award the Arbitrator found that the question of whether such employees were entitled to the enhanced severance payment had not been decided in the 2001 Award. More specifically, that Award did not address whether an employee who was temporary on December 31, 1998 and subsequently became non-temporary could accumulate credit toward the enhanced severance payment under LOU #1.
- [18] In the 2016 Award, the Arbitrator followed his reasoning in the 2001 Award and re-affirmed that employees were not entitled to the enhancement for the period in which they were temporary employees, because that entitlement was ousted by Article 5.02 (now Article 6.02). Arbitrator Howe went on to find that all three of the grievors were entitled to accrue entitlement to the special enhancement when they became non-temporary employees, because they were no longer receiving the payments in Article 6.02.

Issues Raised on the Application

- [19] MPAC submitted that the 2016 Award was unreasonable for the following reasons:
- (a) The 2016 Award did not reflect the intention of the parties who negotiated LOU #1, which was to recognize an existing entitlement, not to create a new one. Further, where a monetary benefit is claimed, the language of an agreement must be sufficiently clear to support the intention of the parties to confer such a benefit;
 - (b) The 2016 Award was inconsistent with the 2001 Award;

- (c) The 2016 Award failed to deal with the evidence that in the years since the 2001 Award MPAC did not make any enhanced severance payments to employees who were temporary employees on December 31, 1998, even if those employees later became non-temporary employees. OPSEU did not contest MPAC's practice in this regard until after January 1, 2016; and
- (d) The 2016 Award failed to take into account the provisions of LOU #7, which addresses the rights of employees who were temporary employees on December 31, 1998. Nowhere does LOU #7 stipulate that such employees were entitled to the enhanced severance payment if they subsequently became non-temporary employees at MPAC.

Standard of Review

[20] The parties agree that the applicable standard of review is reasonableness.

Analysis

Intention of the Parties Argument

[21] MPAC submits that the focus of the Arbitrator's analysis should have been on the specific language and the intention of the parties who negotiated LOU #1. According to MPAC, the intention of LOU #1 is clear from the wording of the clause addressing the enhanced severance benefit. The intention of that clause was to ensure that classified employees who were being transferred to MPAC would not lose the severability entitlement they had while they were employees of the OPS. Further, the parties wanted to ensure that classified employees who had not reached the required five years of service, or who had not yet hit the 26-week maximum, could continue to accumulate service for the purposes of the "special compensation entitlement." In other words, the intention of LOU #1 was to preserve existing rights, not to create new rights for employees who did not already have them.

[22] In order to understand MPAC's argument on this point, it is necessary that I set out the full text of LOU #1, which reads:

This will confirm that full-time employees who accepted employment with [MPAC] at the time of the transfer, December 31, 1998, or who accepted positions with [MPAC] as a result of competitions for approximately "29 Corporate Services positions" posted on or before December 31, 1999 will receive a special compensation entitlement on termination or death equal to one week per year of combined service with OPS and [MPAC] to a maximum of 26 weeks less one week per year of OPS service for which termination or severance pay has been paid at the time of transfer, multiplied by the [MPAC] salary at the time of the employee's termination. This includes any severance pay under the Employment Standards Act.

This entitlement also applies to full-time Ministry of Finance employees who were on long-term disability prior to December 31, 1998 who have returned to work and commenced full-time employment with [MPAC] in the bargaining unit on or before December 31, 1999 under a medically-approved rehabilitation program which will lead to full-time employment thereafter.

- [23] As noted earlier in these reasons, in 2016 the first paragraph of LOU #1 was revised to provide for a payout of the entitlement on January 1, 2016. The revised text takes out the reference to “termination or death” as the trigger date for the payment, makes it clear that the entitlement cannot continue to accumulate after January 1, 2016, and adds the following two sentences to the end of the first paragraph:

The payment of this money shall satisfy MPAC’s obligations pursuant to LOU #1 notwithstanding the fact that the eligible employees have not died or been terminated. The money shall be paid out pursuant to the options in the Memorandum of Settlement dated June 17, 2016.

- [24] MPAC called no extrinsic evidence with respect to the intention of the parties. Instead it relied on the following language, which it says makes it clear that LOU #1 was only meant to apply to employees who were classified OPS employees as of December 31, 1998:

- (i) The use of a specific date, namely December 31, 1998, which indicates an intention that the entitlement be fixed as of that date;
- (ii) The reference to a deduction for OPS service, which would only apply to classified employees;
- (iii) The provision respecting full-time Ministry of Finance employees who were on long-term disability prior to December 31, 1998, which would only apply to classified employees; and
- (iv) The fact that there is nothing in the 2016 revision that would change this clear intention.

- [25] I agree that there is nothing in the 2016 revision that speaks to the original intention of the parties when LOU #1 was negotiated. I disagree with MPAC’s submission that the wording of LOU #1 makes it clear that only employees who were classified or non-temporary as of December 31, 1998 are entitled to the benefit.

- [26] First of all, to come to this conclusion requires construing the word “full-time” as meaning “classified” or “non-temporary.” However, this is not the word that the LOU uses. In other words, MPAC’s argument requires us to add words to the LOU. This is not appropriate unless there can be said to be an ambiguity in the agreement. The Arbitrator made no finding of ambiguity, nor was such a finding called for.

- [27] Second, the use of a specific date is a qualifier to the term “full-time,” not “classified” or “non-temporary.” This means that for there to be any entitlement, the employee in question must have been a “full-time” employee who accepted employment with MPAC on December 31, 1998. The three grievors in question fall into this category.
- [28] Third, the fact that the LOU makes reference to a deduction for OPS service or to an entitlement for employees on long-term disability says nothing about the entitlement of full-time employees where there would be no deduction and who were not on long-term disability.
- [29] Fourth, under the OPS agreement, non-classified employees had the right to “grow into” the entitlement to the enhanced severance payment once they became classified employees. The Arbitrator’s interpretation of LOU #1 continues the prior existing right to “grow into” the entitlement. MPAC’s interpretation does not.
- [30] The Arbitrator’s interpretation of LOU #1 is consistent with the express wording of the agreement. MPAC’s is not. There is nothing in the wording of LOU #1 that limits entitlement to the benefit at issue to employees who were classified or non-temporary employees as of December 31, 1998.

The 2016 Award is Inconsistent With the 2001 Award Argument

- [31] The basis for MPAC’s argument on this point is its assertion that in the 2001 Award the Arbitrator found that the word “full-time” equated to non-temporary employees. I disagree.
- [32] The basis for the 2001 Award is the Board’s finding that Clause 5.02 of the collective agreement made specific provision for temporary employees in lieu of benefits. Since the enhanced severance payment was a benefit, this excluded temporary employees from being entitled to that benefit. One of the principles of interpretation of collective agreements is that where two provisions appear to conflict, the arbitrator is to prefer a harmonious interpretation, rather than one which places them at odds: *Oshawa (City) and Oshawa Professional Firefighters’ Assn., Local 465 (Overtime on Recognition Pay)*, Re, [2016] 273 L.A.C. (4th) 57, at para. 69. This is what the Board did in the 2001 Award. It did not find that “full-time” meant “classified” or “non-temporary.”
- [33] Further, the 2001 Award said nothing about the entitlement of temporary full-time employees who became non-temporary full-time employees after December 31, 1998.

Failure to Deal with Past Practice Evidence

- [34] MPAC’s submission on this point is that “Where there is ambiguity in the language of a provision, arbitrators have recognized that the parties may rely on evidence of past practice.” Since the Arbitrator did not find any ambiguity, evidence of past practice was not relevant.
- [35] Evidence of past practice might have been relevant if MPAC had made an estoppel argument. However, it did not.


Failure to Deal With LOU #7

[36] As the Arbitrator noted elsewhere in his decision, LOU #7 only addresses seniority rights. It says nothing about the rights of employees to the enhanced severance payment. Reading the 2016 Award as a whole, it is clear that the Arbitrator rejected MPAC's argument that the language of LOU #7 served to inform the meaning of LOU #1.

Conclusion

[37] For these reasons, I find that the 2016 Award was reasonable and MPAC's application for judicial review is dismissed. As agreed, MPAC shall pay OPSEU its costs of the application, fixed in the amount of \$7500.00, all inclusive.

I agree



Sach's J.

I agree



Ducharme J.



Tzimas J.

Released: December 18, 2019

CITATION: MPAC v. Ontario Public Service Employees Union, 2019 ONSC 7340
DIVISIONAL COURT FILE NO.: 143/19
DATE: 2019/12/

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, Ducharme and Tzimas JJ.

BETWEEN:

MUNICIPAL PROPERTY ASSESSMENT
CORPORATION

Applicant

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Respondent

REASONS FOR DECISION

Released: December , 2019