

IN THE MATTER OF AN ARBITRATION UNDER SECTION 48 OF
THE LABOUR RELATIONS ACT, 1995 (as amended)

BETWEEN

Ontario Public Service Employees Union ("the union")

AND

Complex Services Inc. c.o.b. Casino Niagara
("the employer" or "the Casino")

And in the matter of the grievance of Rose Murrell, who contends that she has been discriminated against and denied certain work opportunities because of her trade union sympathies.

BEFORE:

R.O. MacDowell	(Chair)
Judith Rundle	(Employer Nominee)
Ed Seymour	(Union Nominee)

APPEARANCES:

For the Union:	Mitch Bevan	(Union Representative)
	Rose Murrell	

For the Employer:	Paul Pingue	(Counsel)
	Richard Paris	
	Ken Conhiser	

A hearing in this matter was held in Niagara Falls on April 13, 2006.

AWARD

I – What this case is about

This arbitration proceeding arises from the grievance of Rose Murrell, (“the grievor”) who claims that she has been “discriminated against” and penalized by her employer, because of her participation in the affairs of her union. The union asserts that the grievor has been improperly denied the opportunity to work as a “temporary shift supervisor” – a work assignment that has been routinely given to the grievor in the past, but was later withheld from her when the employer found out that she had attended a union convention, and was seen wearing a “union T-Shirt”. Ms. Murrell’s grievance was filed on May 1, 2005, and reads as follows:

I grieve that the employer has violated, but not limited to article 3.0 of the collective agreement and *any other relevant legislation* when I was discriminated against due to my association and involvement with my union.

As will be seen: the grievance invokes the protections of the collective agreement, as well as those that may be found in “any other relevant legislation”.

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The employer denies that it has acted improperly, and argues, variously, that the grievor’s claim is not “arbitrable”, and that, in any event, the conduct complained of does not constitute a breach of the collective agreement.

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The provisions of the collective agreement to which reference will be made are as follows (emphasis added):

ARTICLE 2 REGOGNITION

2.02 Shift Supervisors

(a) *With the employee's agreement, he or she may be asked to fill the role of Shift Supervisor on a temporary basis. The employee will not lose seniority while working outside the bargaining unit.*

(b) It is agreed that where an employee has agreed to act outside the bargaining unit as a Shift Supervisor the Employer will ensure that this person is identifiable as a Supervisor to employees in the bargaining unit.

LETTER OF UNDERSTANDING # 1

At negotiations the issue of the temporary Shift Supervisors imposing discipline on bargaining unit members was discussed. The Employer indicated that, while it could not limit its Supervisory role, it recognized the issues that could potentially arise if these individuals impose discipline.

ARTICLE 3 NO HARASSMENT / DISCRIMINATION

3.01 *The Employer, Union and employees agree that there will be no intimidation, harassment, discrimination, interference, restraint or coercion exercised or practiced by their representatives because of membership or non-membership in the Union, or because of activity or lack of activity in the Union.*

3.02 The Employer, Union and employees agree that they all have rights and obligations under the *Ontario Human Rights Code*.

ARTICLE 4 – MANAGEMENT RIGHTS

4.01 The Union recognizes and acknowledges that the management of the operation by the Employer and the direction of the working forces are fixed with the Employer and that all rights heretofore exercised by the Employer or inherent in the employer not expressly contracted away by a specific provision of

this Agreement are retained by the Employer. Without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Employer to:

- (a) maintain order, discipline and efficiency;
- (b) hire, assign, direct, promote, demote, classify, transfer, layoff, recall and to suspend, discharge or otherwise discipline employees for cause in accordance with this Agreement subject to the right of the employees to grieve to the extent and manner provided herein if the provisions of this Agreement are violated in the exercise of these rights;
- (c) discipline or discharge probationary employees, provided such action is not motivated solely by bad faith and recognizing that such discipline or discharge is not subject to the grievance/arbitration procedure set out in this Agreement, except where such bad faith can be proven;
- (d) determine the nature and kind of business conducted by the Employer, the methods and techniques of work, the schedules of work, to make a studies of and to institute changes in jobs and job assignments and job classifications, the extension, limitation curtailment or cessation of operations;
- (e) make enforce and alter from time to time reasonable policies, rules and regulations to be observed by the employees, which policies rules and regulations shall not be inconsistent with the provisions of this collective agreement. All changes in human resources and employment related policies, rules and regulations must first be provided to the Union prior to implementation;
- (f) have jurisdiction over all operations, buildings, facilities and equipment and all decisions related to same;
- (g) generally manage and operate the activities of the Employer.
[emphasis added]

For completeness, it may also be useful to record the following sections of the *Labour Relations Act*, which, we think, can be usefully read together with Article 3.01 of the collective agreement:

5. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities. 1995, c. 1, Sched. A, s. 5.

72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or *discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;*

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights any obligations under this Act. 1995, c. 1, Sched. A, s. 76. under this Act; or

(c) *shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.* 1995, c. 1, Sched. A, s. 72.

76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

In our view, we are entitled to refer to these statutory provisions because of section 48(12)(j) of *Labour Relations Act*, [as interpreted by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. Ontario Public Employees Union, Local 324* [2003] 2 S.C.R. 157]; and, in our opinion, they help to establish the “general legal context” for the case before us. So does section 56 of the Act, which makes it clear that a “collective agreement” is to be read “subject to and for the purposes of” the legislation.

These sections of the statute form part of the irreducible framework of statutory rights with which the collective agreement must be congruent; and, in our view, they also help to illuminate the way in which we should approach the application of Article 3 – a stand-alone clause which, as will be seen, largely parallels the employee protections that already exist, by virtue of the statute, and which makes those protections enforceable at arbitration.

II - Background

The union is the bargaining agent for a number of “security employees” who work at the employer’s casino, in Niagara Falls, Ontario. The grievor is a security officer and a member of the bargaining unit represented by the union. The grievor has been an employee of “Casino Niagara” for approximately 8 ½ years.

The grievor is one of a number of bargaining unit members who sometimes perform the role of “*temporary shift supervisor*” – a position that is outside the bargaining unit, but is mentioned in Article 2.02 of the collective agreement (see above), and is routinely filled by bargaining unit employees. As the job title suggests: the “temporary shift supervisors” are bargaining unit employees who take over, from time to time, on a temporary basis, when the regular shift supervisors are unavailable. Moreover, employees working as a “temporary shift supervisor” earn a premium over their regular wage rate; so that, from this perspective, this is a desirable work assignment.

The role of “temporary shift supervisor” is performed on an as-needed basis, by so-called “*duals*” (the parties’ own terminology): bargaining unit employees who have obtained an additional licence from the Alcohol and Gaming Commission, that entitles them to act as a “supervisor”. The extra licence - known as a “key licence” - is necessary to perform such supervisory functions, even on a temporary basis.

There is no dispute that the position of “temporary shift supervisor” is something of an anomaly in this work setting. It is outside the constellation of positions covered by the collective agreement, but it is nevertheless regularly filled by bargaining unit employees (“duals”), who are offered the job, from time to time, when regular supervisors are absent; moreover, when a bargaining unit employee is acting as a “temporary shift supervisor”, s/he continues to accumulate seniority, as if s/he were still in the bargaining unit. Bargaining unit employees face no “seniority penalty” if they accept these temporary supervisory assignments, and they retain their rights in respect of

their regular positions in the bargaining unit, even though they may work from time to time outside the bargaining unit. The ambiguity is also reflected in Letter of Understanding #1, reproduced above (although there is no evidence that the “issues” hinted at in Letter of Understanding #1 have ever actually materialized).

Be that as it may, it is evident that the employer’s practice has some advantages for both parties; and no one seems to have pressed for a definitive determination of the “status” of these individuals under the *Labour Relations Act* (see sections 1(3) and 114 of the *Act*). From the employer’s perspective, the “duals” form a pool of capable employees from which it can draw to fill in gaps when regular supervisory personnel are not available – allowing the employer to operate with a “leaner” complement of permanent supervisors, than might otherwise be the case. From the employees’ perspective, the position of “temporary shift supervisor” is a remunerative work assignment, as well as an opportunity to get some useful “supervisory” experience.

Both sides benefit, when these positions are offered to bargaining unit members - as has been the employer’s practice, and is expressly contemplated by Article 2.02 of the collective agreement.

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The grievor is a “dual”, who holds a “key licence”, and has worked as a temporary supervisor on a number of occasions in the past. There is no assertion that her performance as a “temporary shift supervisor” has been unsatisfactory in any way. Her problems only arose in early 2005, when the employer decided that her apparent union sympathies were inconsistent with the role of a temporary shift supervisor.

The grievor holds no union office. Nor is there any evidence that she has been particularly active in union affairs. However, in the spring of 2005 she attended an OPSEU convention, as an “observer”; and, on one occasion, on her day off, she was observed by management, wearing a T-Shirt with the union logo on it.

As a result of these observations, the grievor was called to a meeting with Ken Conhiser, the security manager. Mr. Conhiser expressed concern about the grievor’s union sympathies, and suggested that, in his opinion, such activities were inconsistent with her being a “dual”, or performing the role of temporary shift supervisor. Mr. Conhiser said that, in consequence, her “dualing” would be put “on the back burner”, until the grievor decided what she wanted to do.

Mr. Conhiser’s version of this meeting is found in his memo of May 9, 2005, wherein he wrote:

During the meeting I held with Officer Murrell on April 19, 2005 I informed her that I felt there was a potential conflict of interest in her serving as a Dual Shift Supervisor due to the recent increase in her Union involvement. I went on to suggest to her that if that was the direction she wished to pursue, then I encouraged it fully. *I indicated to her that I would not take steps to have her key license removed, but would simply refrain from scheduling her as a Dual Shift Supervisor for the time being.* Her response was that if I was going to do that she would prefer that I take her Dual status away completely. Officer Murrell subsequently submitted her formal resignation from the Dual Shift Supervisor role on April 22, 2005. [emphasis added]

The “union involvement” mentioned in the memo was the wearing of the T Shirt and attendance at the union convention - although it is not clear how the employer became aware of the latter. The reference to having her “key licence removed”, is a reference to the licence issued by the Alcohol & Gaming Commission.

The memo makes it clear that as a result of the grievor’s “union involvement”, she would no longer be scheduled to work as a temporary supervisor. The memo also raises the spectre that the employer would take steps to have the grievor’s “key licence” removed.

The grievor was upset by her employer’s reaction to what, (as the union describes it) was merely an effort to learn a little more about her union. The grievor saw no conflict between her interest in the union, and her performance as a temporary shift supervisor; yet she was being presented with a choice: if she did not abandon such activity she would not be scheduled to work in that temporary supervisory capacity, and the employer would take steps to have her key licence rescinded. The grievor felt that, in the circumstances, she had no alternative but to “resign” from being a “dual”; and on April 22 she wrote the following memo, explaining her position:

Due to the fact that my resignation from the dual rate supervisor position will be reflected in my personnel file, I thought it would be in my best interest to put in an official resignation. I want to make it clear that the decision to resign was not done so willingly (sic). Management believed that there was a "conflict of interest" due to the fact that I attended an OPSEU convention and, on my day off, wore an OPSEU shirt to complete my shift bid. It should be noted that as of this time and any time prior I have held no position in OPSEU other than a basic card-carrying member (as are all duals). However management thought it would be best to put my dualing position on the back burner until further notice. I advised the management that I disagreed with the decision and

would not be satisfied being put on the back burner as I felt it was punitive. I then offered my resignation as I felt there was no other alternative. Pro union should not and does not necessarily imply anti-management. I worked well with both.

III - The Position of the Parties

The employer emphasizes that the position of "temporary shift supervisor" is *outside the bargaining unit*. There are no provisions in the collective agreement regulating the allocation of these jobs (as there are for bargaining unit jobs via the job posting provisions), and bargaining unit employees have no negotiated "right" to such work assignments. Nor, the employer argues, does the collective agreement apply to the employees who hold these positions, when they hold them.

As the employer sees it, therefore, the right to make these work assignments remains the exclusive prerogative of the employer – an unreviewable *discretion*, preserved pursuant to Article 4 of the collective agreement, and mentioned, as well, (i.e. as a *discretion*) in Article 2.02. In the employer's submission, a board of arbitration has no "jurisdiction" with respect to this area of managerial decision-making, and, any disputes about the allocation of these non-bargaining unit positions are simply not "arbitrable".

The employer acknowledges (without conceding) that the Ontario Labour Relations Board *might* have the authority to scrutinize the situation under the unfair

labour practice provisions of the *Labour Relations Act*; but in the employer's submission, an arbitrator does not. The employer maintains that Article 3 does not prevent a differentiation between employees who are covered by the collective agreement and employees who are not -- which, the employer says, is what is happening here.

With respect to the facts, the employer submits that there has, in any event, been no concrete, adverse consequences for the grievor - who, in fact, pre-empted any employer action in this regard, by tendering her "resignation". Counsel submits that there was, at most, an employer expression of concern about an apparent "conflict of interest"; and that there were no actual steps taken to act on that concern. Instead, the grievor resigned. Moreover, in the employer's submission, there has been no interference with, or infringement of, any of the grievor's rights *as an employee in the bargaining unit*. Her rights under the collective agreement, or as a bargaining unit employee, are not impaired in any way by what has happened here – however, it is characterized; and in the employer's submission, she has no "rights" in respect of positions outside the bargaining unit, or beyond the scope of the collective agreement.

The employer submits that grievor's rights are defined and circumscribed by the collective agreement, and that, insofar as such rights are concerned, she remains in the same position as before. There has been no adverse affect to any actual "right" that the grievor has, by virtue of her membership in the union or the bargaining unit represented by the union. Nor has she been inappropriately penalized.

We were referred to the following arbitration awards, which were said to support the employer's position that the collective agreement could not be applied to positions outside the bargaining unit, or to the managerial discretion to appoint people to such positions: *Re Interlink Freight Services and Transportation Communications Union* (1996) 55 L.A.C. (4th) 289 (Picher); and *Re Ontario Lottery and Gaming Corporation and OPSEU* [2005] O.L.A.A. No. 370 (Knopf).

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The union's position can also be summarized quite simply.

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The union does not quarrel with the employer's *starting point*: that there is a *general discretion* to assign temporary supervisory positions to whomever the employer chooses, in accordance with whatever criteria the employer chooses. The union concedes that these jobs are not like those that are covered by the collective agreement and regulated by the job posting provisions of the collective agreement. Accordingly, the union concedes that the employer has a large degree of discretion with respect to these positions; and, that such discretion is recognized in Article 2 itself, which contemplates that an employee "*may* be asked to fill the role of Shift Supervisor on a temporary basis...".

However, in the union's submission, when *exercising* that discretion, the employer is not entitled to discriminate between bargaining unit members on the basis of their trade union sympathies, or take into account whether the employee does or does not support the union, or to disadvantage an employee because s/he has indicated his/her

support for the union. Nor is the employer entitled to “penalize” employees, or deny them advantageous work opportunities, because they have expressed an interest in their union. And in the union’s submission, that is what has happened here: “but for” the grievor’s expressed interest in the affairs of her union, she would have continued to be assigned to these remunerative work opportunities, as she had been in the past: the only reason she was denied these work opportunities, is her modest showing of interest in the union.

The union says that the message to employees is clear: “choose sides”; and if you *do* show any support for the union at all (even the rather modest showing of interest that the grievor has in this case), then you will not get the beneficial exercise of any employer discretions.

In the union’s submission, it is a clear message to employees: not to engage in the very activities that are purportedly protected by both the statute and Article 3 of the collective agreement.

The union points out that while the position under review is “outside” the bargaining unit, Article 2 of the collective agreement specifically contemplates that bargaining unit employees will be offered, and will occupy, such positions from time to time (as they have done, in practice); and also that employees in that position will continue to accumulate seniority and maintain their bargaining unit status. The employees in question do not sever their “connection” with the bargaining unit when they are working temporarily outside the bargaining unit; and, in fact, for some purposes, they are

treated as if they are still in the unit, in the expectation that they will return to the bargaining unit, after their temporary stint as a supervisor is over. Yet the grievor was told that such remunerative positions would not be open to her, so long as she evidenced an interest in her union. She was told that her assignment to such jobs would be put “on the back burner” while the employer considered whether to seek rescission of her key licence.

As the union sees it, the grievor was given a choice: she must abandon her interest in the union and forego her participation in the lawful activities of the union, or she would not have access to these desirable work opportunities; and in the union’s submission, Article 3 prevents the employer from penalizing an employee in this way, or from taking her union views into account.

Put simply: the union says that “management rights” (spelled out in Article 4 of the collective agreement and more generally), are constrained by the “no-discrimination” provisions in Article 3.01 and Article 3.02 of the collective agreement; and that the employer is no more entitled to take union sympathy into account, than race, creed, age, or sex etc. – the factors mentioned in Article 3.02, via a reference to the *Ontario Human Rights Code*. Accordingly, while the employer has a discretion under Article 4 and Article 2 to offer these plum positions to employees in the bargaining unit, it cannot exclude union supporters from consideration. It cannot apply Article 2.02 as if it read, in effect: “.....he or she may be asked to fill the role of Shift Supervisor on a

temporary basis provided that s/he has not expressed any interest in the union, or engaged in any lawful union activities.....”.

In the union’s submission the employer’s actions in the instant case are a breach of both the collective agreement and the *Labour Relations Act*. The union seeks a declaration that the employer has acted unlawfully, together with compensation for the grievor’s lost work opportunities.

In support of the union’s position we were referred to the following arbitration decisions, in which arbitrators considered whether employer conduct was tainted by “anti-union animus”, and was therefore unlawful or illegitimate: *Re Horizon Operations (Canada) Ltd. and CEP, Local 2000 (Jaeger Grievance)*, (2000) 93 L.A.C. (4th) 47 (Starkman); *Re Toronto Star & Toronto Newspaper Guild*, (1977), 15 L.C.C. (2nd) 326 (Beck); *Re Prince Foods Inc. and UFCW Local 175 (Brisbois Grievance)*, (2004) 131 L.C.C.(4th) 418 (Starkman); *Re Alberta Hospital Ponoka and A.U.P.E. Local 42* (1994) 46 L.C.C. (4th) 231 (Ponack); *Re Toronto Public Library Board and CUPE Local 1996* (1984), 17 L.A.C. (3rd) 22 (Kates); and *Re OPSEU and Crown in Right of Ontario (Lumley Grievance)* – a decision of the Ontario Grievance Settlement Board, released on August 24, 1992 (Gorsky).

Those decisions not only consider the impact of provisions such as Article 3, but they also typically examine the relationship between the collective agreement and the relevant statutory scheme (the *Labour Relations Act* or its equivalent). And they hold,

generally, that the framework of statutory rights, should inform the interpretation or application of similar provisions found in the collective agreement – a position that the union also advances in the instant case.

IV - Discussion and Disposition

In our view, there is no doubt that the grievor's claim is "arbitrable" – which is to say, that an arbitrator has "jurisdiction" to consider her grievance, and to grant her a remedy if the employer has acted illegally. The *Parry Sound* case (cited above) stands for proposition that an employer's broad "management rights" to run the business, must nevertheless be exercised in accordance with external employment law; and if they are not, then *an arbitrator may give an aggrieved employee a remedy* (arbitrator Knopf makes the same point, in *Ontario Lottery and Gaming Corporation*, at paragraph 18). Moreover, an arbitrator has that authority, even if (as was the case in *Parry Sound*) the complaint would not otherwise be "arbitrable", looking at the collective agreement alone.

On that basis alone, we think that grievor's case is "arbitrable" - even though it might also be something that could be raised as an "unfair labour practice" allegation, before the Ontario Labour Relations Board (see *Valdi Inc.* [1980] OLRB Rep. August 1254, where then Chairman George Adams confirms that unfair labour practice allegations can be dealt with *either* by an arbitrator, *or* by the Board itself).

However, quite apart from the decision in *Parry Sound*, (see also: *McLeod v. Egan* [1975] S.C.R. 517) it appears to us that Article 3 of the collective agreement provides an independent “contractual” foundation for challenging the employer’s actions. Because, as we have already noted, Article 3 largely parallels the unfair labour practice provisions of the *Labour Relations Act*. Moreover, it prohibits the employer, *inter alia*, from “discriminating” against employees because of their lawful trade union activity, or from “interfering” with such lawful union activity - or, in our view, from applying economic pressure with a view to inducing employees to forego their union activity.

Article 3, it will be recalled, is entitled “No Harassment/No Discrimination”, and reads as follows:

3.01 The Employer, Union and employees agree that there will be no intimidation, harassment, discrimination, interference, restraint or coercion exercised or practiced by their representatives because of membership or non-membership in the Union, or because of activity or lack of activity in the Union.

In our opinion, Article 3 is a “stand alone” contractual prohibition, that is not dependent upon the substantive rights spelled out elsewhere in the agreement or in any governing legislation; and in our view, the clause clearly supplements those other rights. It is neither derivative nor redundant; but rather provides an independent standard to which the named parties must adhere in their dealings with each other. Moreover, insofar as “management rights” are concerned, it is worth recalling that Article 4 not only contains a listing of those “management rights”, but also states that their exercise

(including the right to “promote”) must conform to the provisions of the collective agreement – one of which is Article 3.

Superficially, then, there is no obvious reason why Article 3 should not constrain the exercise of management rights under Article 4 or the exercise of discretion mentioned in Article 2.02(a); and linguistically, that is the way the two clauses “read”, when considered together.

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We do not think that there is any doubt that the employer’s conduct in this case is “discriminatory” in the ordinary sense of that word, or that such “discrimination” is based upon the kind of activity that is addressed, and ostensibly protected, by Article 3.

The employer is drawing an invidious distinction between those employees who support the union, and those employees who do not; and the employer is barring union sympathisers from remunerative work opportunities, that are openly offered to other employees who choose not to reveal or display their interest in the union.

It is plain, in other words, that the grievor is being overtly disadvantaged because she has showed a modest interest in the affairs of her union; and that she was being asked to choose between the remunerative work opportunities that she had enjoyed in the past, and any overt manifestation of “union support” – even away from the work place, and on her own time.

Indeed, it seems to us that the employer's conduct speaks for itself: it is overtly "discriminatory" on a prohibited ground, and it cannot but inhibit lawful union activity. It carries with it unavoidable consequences that the employer could not only foresee, but that it must be taken to have intended. And it is a 'message' that the other employees are unlikely to miss.

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It seems to us, therefore, that *prima facie*, the situation falls within both the language of Article 3, and the "mischief" to which that provision was directed.

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The employer's primary argument for this particular *form* of discrimination, is that the undertakings found in Article 3 cannot apply to the selection of "temporary supervisors", because such positions (and the persons who hold them) are outside the bargaining unit (at least when they hold them); and that to read Article 3 in the open-ended way in which it is written, would extend the reach of the collective agreement into areas, and to persons, where it was never intended to apply.

Or put differently: because the collective agreement may not apply to these bargaining unit employees, while they are in the role of "temporary supervisor", it cannot apply to the selection process (as between bargaining unit members) by which union members obtain such excluded positions.

Or put differently still: that the employer is entitled to "discriminate" etc. against bargaining unit employees, because of their trade union sympathies, provided that

the subject matter of the discrimination pertains to a position beyond the reach of the agreement.

However, in our opinion, such a narrow reading of Article 3 is inconsistent with both its content and its context -- as well as with the protections found in the *Labour Relations Act*, with which the collective agreement should be congruent.

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We might begin by observing that there is nothing in the language of Article 3 itself, that limits its application in any way; and its linguistic structure (it applies to the union, and to the employer, and to the employees) suggests a liberal rather than a narrow interpretation. It is a general undertaking by all parties affected by the collective agreement, that their behaviour will not be animated by this particular form of “discrimination”.

Article 3 says, clearly and simply, that "... there will be no... discrimination..." on any of the prohibited grounds; and in light of that undertaking, we do not think that we should lightly conclude that what the parties really meant, was that there can be some forms of discrimination after all.

Article 3 is a simple and specific prohibition on particular kinds of conduct, motivated by an identifiable and specified consideration (union activity) -- not unlike the prohibitions found in the *Human Rights Code*, which are echoed in Article 3.02 of the collective agreement. Such prohibition is not limited or conditional in any

way; and, if anything, the juxtaposition with the broad management rights clause, suggests that Article 3 is intended to limit these very rights (including, be it noted right to “promote” employees to whom the collective agreement applies). Because Article 4 itself, recognizes that the right to hire, assign, direct, promote, demote, classify, transfer, layoff,... etc., is vested in management then goes on to say that those rights must be exercised in a manner that does not collide with the other provisions of the agreement – one of which is Article 3.

Could the employer say, with impunity: "we will not promote black people to the position of temporary supervisor" ? Clearly not; and in our view, the undertakings found in Article 3 stand on the same foundation: the employer has undertaken that its behaviour in respect of employees in the bargaining unit, will not be influenced by their participation in union activities, which, as it happens, are also protected by the *Labour Relations Act*. Moreover, in our opinion, reading the clause in this way, is also more consistent with the general law (especially in light of the decision in *Parry Sound*), than the narrow and parsimonious interpretation urged upon us by the employer.

It is true that there is no "right" to be promoted to the position of temporary supervisor. There is no "right" to free parking either. But that does not mean that the employer could offer free parking to union opponents but not to union supporters; nor having offered such privileges to employees, generally, could the employer then remove them, selectively, if an employee demonstrates her “disloyalty” by supporting a

union: which, we repeat, is a legally protected statutory right, that is also protected by the agreement in Article 3.

We do not think that it is open to an employer to penalize or reward employees in this way; nor does the employer have a free hand to “discriminate” just because there is no collective agreement provision regulating the particular form in which such reward, or penalty, or discrimination may take. Because, the agreement says, quite simply, that there is to be no such discrimination.

In our opinion, therefore, Article 3 is clear on its face and means what it says: in its dealings with bargaining unit employees, the employer will not harass, intimidate, coerce or discriminate against those employees because of their activity or lack of activity in the union. The agreement neither defines nor restricts the means by which such harassment, discrimination, interference etc. may be accomplished. What it does say, is that the proscribed activities can be subject to grievance and remedy, however they arise.

In our view, it does not matter that the discriminatory policy or behaviour involves something that is not a negotiated ‘right’ under the collective agreement. It is sufficient if it is an established privilege which bargaining unit employees enjoy – and which in the instant case, of course, is specifically contemplated by Article 2.

It important to recognize that the distinction that the employer seeks to make in this case is not a general one, between bargaining unit employees and individuals excluded from the bargaining unit, (which was the situation before Arbitrator Knopf in the *Ontario Lottery and Gaming Corporation* case), but rather between bargaining unit members themselves: advantaging those who forsake their statutorily protected right to engage in lawful trade union activity, and disadvantaging those who, like the grievor, show some modest interest in the affairs of their trade union. Nor did the situation before arbitrator Knopf have the “statutory overlay” that the instant case has. And to this extent the case before us is distinguishable.

However, to the extent that paragraphs 18 and 22 of the *Ontario Lottery Corporations* decision might be read as limiting the reach of Article 3, to positions within the bargaining unit, we simply do not agree with such statements and decline to follow them; nor, interestingly was there any arbitral or other convincing support for this particular proposition – which, in any event, is not easy to square with either the language of Article 3 (which is not so restricted), or with the statutory foundation of arbitral authority confirmed in *Parry Sound*.

It may be that the employer need not treat bargaining unit employees in the same way as non-bargaining unit employees, in respect of positions outside the bargaining unit (the complaint before Arbitrator Knopf); however, we do not think that the employer is entitled to distinguish between bargaining unit employees, on the basis of their trade union sympathies.

Moreover, even the alleged “bright line distinction” between “bargaining unit employees” on the one hand, and “non-bargaining unit employees” on the other, is blurred in this case, because the position of temporary supervisor is routinely populated by bargaining unit members who retain their bargaining unit rights and their bargaining unit status while engaged in this temporary assignment, (i.e. they do not “quit” the bargaining unit or the company’s employ when they take a *temporary* position as a shift supervisor). These employees return to their former jobs in the bargaining unit when they are finished with their temporary assignments, and they even continue to accumulate seniority as if they were still in the bargaining unit. This is not, in any sense, a permanent position, where the operational considerations might be a little different.

To be clear: one can conceive of certain *types* of “union activity” which, while lawful and protected, would nevertheless demonstrably interfere with the performance of an employee’s assigned duties; and it is also *conceivable* (at least hypothetically) that, in some circumstances, union sympathies, *per se*, might have that effect (for example: if a misplaced sense of “union solidarity” prevented an employee from telling the truth about the misdeeds of his coworkers). Neither of these situations is “neutral” from the employer’s perspective; and in some circumstances, the application of Article 3 might well call for a “balancing exercise” of the kind described by Arbitrator Beck, in the *Toronto Star* case:

The basic principle is that laid down by Laskin in *A.V. Roe* that has been quoted above. Put simply, it is that the demands of a particular job, come ahead of authorized union activities. This is not for one moment to say that a company may arbitrarily - or

even artificially - conclude that an employee's job demands are incompatible with his union activities. The particular facts must clearly demonstrate the incompatibility and as the *Massey Ferguson* case makes clear, a company may certainly not leap to the a priori conclusion that the requirements of a particular job would be affected by the demands of union activity. It is unquestionably, perhaps unfortunately, true that there will always be some conflict between the demands of union activity and the demands of the particular job and there must be a legitimate attempt by both parties to balance of those demands. What the union may not do is insist that the demands of union activity come first and the demands of a particular job comes second. Just as clearly, a company may not under the guise of putting the demands of a job first, discriminate against an employee for union activity in a sense of making it difficult if not impossible for him to carry on legitimate union activity because he knows that certain jobs or promotional prospects will be foreclosed to him because of such activity. To repeat, there must be a reasonable balance between employer and employee.

What Arbitrator Beck is getting at, we think, is that the right to engage in lawful union activity may sometimes conflict with the legitimate interests of the employer, and thus may sometimes be legitimately taken into account by that employer, in the way that it conducts its affairs. The suggestion is that what might otherwise appear to be “invidious discrimination”, should not be so regarded, (or, what amounts to the same thing, would not occasion a remedy), when there is a bona fide and compelling business reason for limiting, or responding to, a purported exercise of protected employee rights. That proposition was endorsed by Courts and tribunals in cases such as *Canadian Broadcasting Corp. v. Canada Labour Relations Board* (1995) 121 D.L.R. (4th) 385 S.C.C.), affirming 92 D.L.R. (4th) 316 (F.C.C) [where the Courts determined that it was improper for an employer to require an employee to abandon his union office, because there was no compelling business reason to justify such requirement – suggesting that the situation might be different if there was]; and we think that, in appropriate circumstances,

it is an approach that arbitrators may adopt as well (both in respect of whether there is “discrimination”, and whether it warrants a remedy).

In other words, not all distinctions, or employer responses to employee union activity may result in invidious “discrimination” of the kind prohibited by Article 3, and/or the various statutes which recognize and protect the same interests. There may be circumstances where an employer is permitted to differentiate or to respond, even though that response may affect the exercise of a protected right.

However, where, as here, the employer's conduct is so obviously and overtly discriminatory, and on a prohibited ground, there is, at the very least, a significant onus on the employer to demonstrate why its actions are objectively necessary from a business point of view - which is to say, that in balancing competing concerns, there is a demonstrable and compelling business interest which must be given preference over the employee's statutorily *and contractually* protected right (rather like the “bona fide occupational qualification defence”, which can “justify” or “excuse” distinctions on a prohibited ground under the *Human Rights Code*).

And in the instant case, the evidence does not demonstrate that at all; nor is it a reasonable (let alone likely) inference from the modest union activities in which the grievor has been engaged.

*

For the foregoing reasons, we find that the employer has contravened Article 3 of the collective agreement. In our view, the employer was not, in this setting, entitled to take into account the grievor's trade union activities, or to put her access to these work assignments "on the back burner" because she engaged in those activities, or to threaten to have the grievor's key licence removed for going to a union convention, or wearing a union T Shirt.

In our opinion, the employer was prohibited from distinguishing between bargaining unit employees in this way, and from taking such union activity into account. It was obliged to exercise its discretion without reference to the employee's union activity, and it breached the collective agreement, when it improperly took those activities into account.

IV – Remedy

In the ordinary course, the purpose of a remedy is to put the aggrieved employee in the position that s/he would have been in, had there been no breach of the collective agreement (or a statute, as the case may be). However, that objective is complicated, in the instant case, by the grievor's purported "resignation" (i.e. the withdrawal of her standing request to be considered for the role of temporary shift supervisor), in response to (1) the employer's dictum that her union sympathies were incompatible with continued access to the position of temporary shift supervisor, and (2)

the equally clear indication that such position would be denied to her, if she persisted in such displays of union sympathy (attending union meetings, wearing a union T-shirt).

However, in our opinion, that “resignation” was not “voluntary” in any real sense (as the grievor’s memo demonstrates); nor, for the reasons outlined above, do we think that the employer was entitled to put the grievor to that choice. Moreover, there is nothing to suggest that the employer would have relented, and it did not in fact relent, in the face of Ms. Murrell’s grievance challenging its decision.. On the contrary, both the manager’s memo and the employer’s later actions, and the position advanced by the employer in this case, all suggest that the grievor’s behaviour, as seen by the employer, was going to preclude her from holding these positions – despite that fact that she had done so in the past. There was nothing hypothetical about it. And of course, the grievor’s response to the situation was entirely reasonable: she filed a grievance, putting the employer on notice of the challenge, and seeking an affirmative determination of her rights – both contractual, and, as she put it in her grievance “under any relevant legislation”.

In the circumstances, we think that the grievor was entitled to be put in the position that she would have been in, had there been no controversy about her union activity.

She is entitled to be compensated for the loss of work opportunities that would have come to her, but for the improper considerations, that were taken into account by her employer.

We do not know what that compensation might amount to, or how often the grievor would have been offered such assignments, “but for” the events described above. However, we think that the grievor is entitled to be compensated for the difference between what she earned in her regular position, and what she would likely have earned, if she had continued to be eligible for these auxiliary assignments – which is to say, if she had not been precluded contrary to Article 3.

No doubt that loss is somewhat speculative, but it is not, for that reason alone, unrecoverable; because there is no reason to believe that - but for the events described above - the grievor would not have been offered such positions at all, or that she would have been offered them less frequently than was the case in the past.

So in our view, the grievor has clearly sustained *some* financial loss, and the potential difficulty in calculating such loss, does not mean that there should be no compensation at all.

We decline to speculate at this point on how the grievor’s compensation might be structured or accomplished.. It suffices to day that this Board will simply remain

seized in the event that the parties are unable to agree upon the way in which the grievor's economic losses can be made good.

VI – Concluding Observations

We have had the opportunity to consider our colleague's dissent; and in view of the concerns expressed therein, we think that it may be useful to reiterate certain of the observations explored above.

First of all, as we have noted at page 8 of the Award: there has been no determination by the OLRB that temporary supervisors exercise “*managerial functions*” within the meaning of section 1(3) (b) of the *Labour Relations Act*, such that they cease to be “*employees*” within the meaning of the *Act*, and cease to be protected by the *Act*; moreover, since that determination depends upon the “*opinion of the Board*” [the OLRB], it is not one for us to make. Nor do we have any evidence at all about what the “temporary supervisors” actually “*do*” – and even the parties' Letter of Understanding is ambiguous in that regard (“...issues....could *potentially* arise...”).

Thus, while the employer may well regard the “temporary supervisors” as part of the “management team”, we do not know what that means, concretely; we cannot say that they are “*managerial*” within the meaning of *Labour Relations Act*; and, in the circumstances, it is our opinion that the *Barbara Jarvis* case has no application to the situation (the facts and argument) presented to us.

All that we are prepared to say therefore (and this is not in dispute), is that the individuals occupying the position of “temporary supervisor” are outside the bargaining unit, while they are in that position; and we have approached the case on that basis. We do not and cannot decide that they are also beyond the ambit of the statute.

Where we differ with our colleague is on whether the employer has an unfettered discretion to select among bargaining unit employees for these plum positions, and to reject from consideration any employee who has indicated sympathy or support for the union. And for the reasons outlined above, it is our view that the employer cannot disqualify employees on that basis; for to do so, contravenes Article 3 of the Agreement.

Dated at Toronto, this 15th day of June 2006.

R.O. MacDowell, for the majority

I agree

“Ed Seymour”

I dissent

“Judith Rundle”

[see dissent attached]