

**ARBITRATOR FINDS THAT EMPLOYEES WHO REFUSE TO EXERCISE BUMPING RIGHTS
ARE NOT ENTITLED TO TERMINATION AND SEVERANCE PAY**

In a recent arbitration award, *Fenwick Automotive/City Wide Automatic Transmission Services and United Steelworkers*, an unreported decision of Arbitrator Kaplan dated July 27, 2010, the Arbitrator dismissed grievances alleging that Fenwick Automotive/City Wide Automatic Transmission (collectively the "Employer") owed six grievors termination and severance pay following a sale of business.

The six grievors worked for the City Wide Automatic Transmission ("City Wide") part of the Employer's operation. When City Wide was sold to another entity, the grievors declined to exercise their rights under the collective agreement to bump into alternative positions with the Fenwick Automotive part of the Employer's operation. Instead, they wished to receive termination and severance pay.

The Arbitrator noted that four of the six grievors accepted employment with the buyer of the City Wide business and continued to perform the same jobs they performed at City Wide. Accordingly, they were not entitled to termination and severance pay due to section 9(1) of the *Employment Standards Act, 2000* (the "ESA"), which deemed their employment not to have been terminated or severed for the purposes of the *ESA*.

The remaining two grievors were not offered employment with the buyer. However, their grievances were also dismissed. The Arbitrator noted that subsection 9(1) of *ESA Regulation 288/01*, precluded an employee from receiving severance pay if the employee refused an offer of reasonable alternative employment, or if the employee refused reasonable alternative employment made available through a seniority system. The Arbitrator found that the collective agreement's bumping provisions that had been negotiated by the parties, in combination with *Regulation 288/01, s. 9(1)*, disentitled the two grievors from receiving termination and severance pay. The Arbitrator made the following comments:

The union negotiated these seniority protection provisions to allow employees to bump and it would be entirely inconsistent with these provisions if an employee could claim he was being severed instead when the exact opposite was, in fact, the case... The fact is that there was work available for these grievors. Absent a provision in the collective agreement providing otherwise, it would not be normative, where there is work available for an employee, where the employee can be trained to perform that job, and where the parties have negotiated extensive seniority protection for senior employees, to allow those employees to reject that work and request termination and severance payments instead. This conclusion, of course, reflects the terms of the applicable regulation.

The Arbitrator found that the positions that the two grievors would have secured through the collective agreement's bumping procedure must be considered "reasonable employment" since the parties negotiated the bumping procedure on behalf of bargaining unit employees. Furthermore, since the collective agreement provided for up to seven days of training for bumping employees, the parties must have understood that such employees would be performing a different job, involving different skills, duties and responsibilities.

The Arbitrator acknowledged that there was a significant wage discrepancy between the grievors' original positions and the positions to which they would bump (approximately 30%). However, the Arbitrator determined that such a discrepancy alone was not sufficient to conclude that the job offer was not reasonable.

In light of this award, where parties to a collective agreement have negotiated bumping provisions, it will generally be unreasonable for employees to seek termination and severance pay instead of exercising their seniority rights, even where the wage differential is extremely high.

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