

**ONTARIO COURT OF APPEAL RULES THAT AN EMPLOYEE ON TEMPORARY LAYOFF
MAY BE ENTITLED TO STATUTORY TERMINATION PAY UNDER THE *EMPLOYMENT
STANDARDS ACT, 2000*, WHILE STILL ENJOYING RECALL RIGHTS UNDER THE
COLLECTIVE AGREEMENT**

National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW - Canada), Local No. 27 v. London Machinery Inc., [2006] O.J. No. 1087 (Ont. C.A.)

By Laura Karabulut

On March 23, 2006, the Ontario Court of Appeal ruled that a two-year recall and seniority rights clause in a collective agreement does not in all circumstances operate both to extend the term of a temporary layoff and to defer employee's entitlement to termination pay beyond the temporary layoff period of 35 weeks as set out in the *Employment Standards Act, 2000* ("ESA"). The Court also found that a standard of patent unreasonableness applied to a review of a labour arbitrator's award that was based on the interpretation of a collective agreement as well as outside legislation that was "intimately connected with the arbitrator's expertise and mandate" (i.e., the ESA and its regulations).

Under the ESA, an employee on layoff is entitled to notice of termination or pay in lieu thereof where he or she has been laid off from work for a period longer than 35 weeks in any consecutive 52-week period. An agreement between an employer and a union may operate to extend a temporary layoff period beyond 35 weeks, as long as the employee is recalled to work within the time fixed by the agreement. Furthermore, where the collective agreement provides an employee with a right to be recalled for employment and the employee is entitled to termination pay or severance pay, an employee may elect to be paid termination pay or severance pay or to retain the right to be recalled. An employee on temporary layoff who does not return to work within a reasonable period of time after having been requested to do so by his or her employer is not entitled to notice of termination or pay in lieu thereof.

The Employer in *London Machinery* laid off the grievor from his position due to a temporary shortage of work. At the time the grievance was filed, the grievor had been laid off for nearly 38 weeks. Under the collective agreement, an employee on layoff retained recall rights for a maximum of two years. The agreement also provided that a laid off employee who was recalled to work but failed to return to work within seven days of the recall offer, other than for a satisfactory reason, would lose his or her seniority rights. The Employer recalled the grievor to work on two separate occasions during the grievor's layoff. Both recalls took place after the expiry of 35 weeks and while the grievance was pending. The grievor refused to return to work on both occasions and instead, demanded that the Employer pay him termination pay. The Employer refused and maintained that the two-year recall and seniority rights clause of the collective agreement provided for an extended temporary layoff, thus avoiding the deemed termination of the grievor's employment under the ESA.

The arbitrator agreed with the Employer and found that by rejecting the Employer's recall offers, the grievor was a "prescribed employee" and was not entitled to termination pay or an election concerning his termination pay and recall rights under the *ESA* and dismissed the grievance.

Upon judicial review to the Ontario Superior Court of Justice, the Divisional Court, in its brief reasons, found that the standard of review of the arbitrator's decision was that of reasonableness. The Court also found that the arbitrator's analysis of the grievor's status as a "prescribed employee" for refusing to return to work after being recalled during the two-year period in the collective agreement was reasonable. Accordingly, the Divisional Court dismissed the Union's judicial review application.

The Union's appeal to the Ontario Court of Appeal was allowed both with respect to the arbitrator's finding and the Divisional Court's determination that the standard of review of an arbitrator's decision was reasonableness. The Court of Appeal found that an agreement between an employer and a union establishing a recall period for employees on layoff does not operate both to extend the term of a temporary layoff and to defer any entitlement of the employee to termination pay for the full duration of the contractual recall period in all circumstances. Rather, while the grievor could be recalled within two years of his layoff, his entitlement to termination pay and to an election under the *ESA* is triggered upon the expiry of the 35 weeks. Accordingly, the Court found that as the grievor was not recalled within the 35-week period, he should have been afforded the opportunity to elect to receive his termination pay and to formally abandon his unexpired contractual recall rights. As the election process was not followed at the expiry of 35 weeks, the grievor's rejection of the Employer's recall offers did not deprive him of termination pay to which he was otherwise entitled.

Based on these reasons, the Court of Appeal concluded that the arbitrator's decision was patently unreasonable as it undermined the purpose of the election process under the *ESA*. The Union's appeal was allowed.

April 27, 2006