

THE ONTARIO COURT OF APPEAL HAS THE FINAL WORD ON PROHIBITION OF SIDE DEALS BETWEEN EMPLOYERS AND EMPLOYEES UNDER A COLLECTIVE BARGAINING REGIME

The Board of Governors of Loyalist College of Applied Arts and Technology v. Ontario Public Service Employees Union (2003), 63 O.R. (3d) 641 (C.A.); SCC denied leave to appeal on November 17, 2003

The Supreme Court of Canada has denied leave to appeal the Ontario Court of Appeal's decision on whether a collective bargaining regime precludes individual bargaining of the terms and conditions of employment.

Sherri Bergman applied for a job as a full-time teacher at Loyalist College (the "College"). The College offered her the job on the condition that she pursue a graduate program in her field of study. She agreed to the condition and was given the job. However, ten months into her one-year probationary period, Bergman had still not enrolled in a graduate program. As a result, the College fired her. Bergman grieved her discharge.

A majority of the Board of Arbitration allowed the grievance and reinstated Bergman. The Board found that the condition of employment was invalid because it conflicted with the collective agreement and had not been negotiated with the union. After the Divisional Court dismissed the College's application for judicial review, the College appealed to the Ontario Court of Appeal.

Before the Court of Appeal, the College argued that it was free to negotiate directly with individual employees with respect to pre-employment conditions not covered by the collective agreement. The College further argued that the imposition of the requirement that Bergman continue her studies before the expiry of her probationary term was within the ambit of the College's management rights. Finally, the College argued that the Board did not have jurisdiction to entertain the grievance of a probationary employee.

The Court of Appeal rejected all of the College's arguments. With respect to the College's management rights argument, Laskin J.A. stated:

I accept that the College's right to manage gives it authority to impose its will on a myriad of matters not expressly dealt with in the collective agreement. But on a matter as important as a condition of employment, the breach of which can result in dismissal, the College cannot rely on its management rights. In Ms. Bergman's case, it either had to negotiate the condition of her hiring with the union or, as the Board pointed out, to require graduate study as a qualification for being hired in the first place...

[S]anctioning the validity of a condition as important as that of Ms. Bergman's hiring risks opening a Pandora's box of side deals between employers and employees that could undermine the collective bargaining regime.

The bottom-line is that employers should not assume that they can negotiate directly with employees about terms falling outside of the scope of the agreement. Even if a matter is not specifically addressed in the collective agreement, it may be considered to be "bargainable" and properly the subject of negotiations with the union, not individual employees.