

**COURT RULES NO JURISDICTION EXISTS UNDER ONTARIO'S *LABOUR RELATIONS ACT*
GRANTING ARBITRATORS THE POWER TO ORDER INTERIM RELIEF IN THE FORM OF
EX GRATIA PAYMENTS**

Ontario Power Generation and Society of Energy Professionals, (unreported), January 5, 2007
(Ont. Sup. Ct. J. - Divisional Court)

By Jeremy D. Schwartz

On October 20, 2005, Arbitrator Owen Shime Q.C. (the "Arbitrator") issued an interim award in which he ordered Ontario Power Generation ("OPG") to make "*ex gratia*" payments to an employee (the "Grievor") who grieved the termination of his sick leave benefits. OPG applied for judicial review of that decision on the basis that the Arbitrator was without jurisdiction under the Ontario *Labour Relations Act* (the "*Act*"), or the Collective Agreement, to grant interim relief. The Divisional Court ("Court") dismissed OPG's application and affirmed the Arbitrator's order.

The Grievor, a 30 year employee, suffered from a cognitive disorder for which he received sick leave benefits while away from work. The Grievor, the Society, and OPG disagreed as to whether the Grievor was capable of returning to work to perform modified duties. Believing that the Grievor was malingering, OPG terminated his sick leave benefits. The Society grieved that decision.

At arbitration, the Society sought an interim order from the Arbitrator that OPG be required to reinstate the Grievor's sick leave benefits pending the outcome of the arbitration. The Arbitrator granted the request and ordered OPG to make weekly "*ex gratia*" payments to the Grievor in the amount he would have received in sick leave benefits had OPG not terminated them. The payments were to be made on the condition that OPG could deduct those payments, or any deemed overpayments, from the Grievor's future remuneration depending on the outcome of the arbitration.

The Arbitrator found that he had jurisdiction to grant the interim equitable relief on the basis of clause 48 (12) (i) of the *Act*, and Article 16.7 (i) of the Collective Agreement.

Clause 48 (12) (i) of the *Act* provides as follows:

48. (12) An arbitrator or chair of an arbitration, as the case may be, has power,
...
(i) to make interim orders concerning procedural matters;

Article 16.7 (i) of the Collective Agreement provided as follows:

The arbitrator shall have the power to settle or decide such matters as are referred to him/her in a fair and equitable manner, and the arbitrator's decision shall be final and binding. An arbitrator shall not have the power to amend or terminate this Agreement, policies, or procedures save only any policies or procedures which may conflict with the terms of this Agreement. [Emphasis added]

With respect to the Arbitrator's interpretation of the *Act*, the Court found that the applicable standard of review was "reasonableness *simpliciter*", meaning that the Arbitrator's decision could be overturned if it was in any way unreasonable. The Court found that the Arbitrator's interpretation of clause 48 (12) (i) of the *Act* was unreasonable on its face, and was inconsistent with the historical development of the clause.

With respect to the Arbitrator's interpretation of the Collective Agreement and his determination of the appropriate remedy, the Court found that the applicable standard of review was "patent unreasonableness", meaning that those aspects of the Arbitrator's decision could only be overturned if his conclusions were "clearly irrational". The Court found that the language in the Collective Agreement supported a finding that the Arbitrator had the power to grant interim equitable relief. As a result, the Court held that the Arbitrator's findings were not clearly irrational, and the award was upheld.

This decision reaffirms that an arbitrator's power flows from the common law, the Collective Agreement and related statutes. As the law currently stands, arbitrators do not have the jurisdiction under the *Act* to award interim relief in the form of *ex gratia* payments unless the Collective Agreement specifically provides for such jurisdiction.

May 18, 2007