IN THE MATTER OF AN ARBITRATION
BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 175

(the "union")

and

MIDTOWN MEATS

(the "employer")

And in the matter of grievances for termination and severance pay.

Brian McLean Arbitrator/Mediator

Appearances:

Michael Failes et al for the employer

Natalie Wiley et al for the union

The hearing in this matter was held in Trenton, Ontario on October 2, 2009

December 6, 2009

1) These are grievances in which the Grievors claim *Employment Standards Act* (the "Act") termination and severance pay as a result of the fact that they can no longer work for the employer following workplace injuries and the exhaustion of accommodation efforts. The grievances raise two issues: 1) whether termination and/or severance pay is owing when it is the employee who initiates the termination process; and 2) if the answer to issue one is "yes", what is the date at which the termination of employment occurred. The second issue is important because it not only affects the amount of money employees might receive, but in the case of severance pay, whether employees meet the five year service requirement for entitlement to severance pay at all.

2) The arbitration hearing proceeded by way of agreed facts. Those facts are as follows.

3) The Grievors all suffered workplace injuries. They all filed grievances alleging a failure to accommodate but the parties now agree that all of the Grievors have sustained a workplace injury which resulted in a permanent disability preventing them from performing their jobs or any modified work at Midtown Meats. All six employees remain on the seniority list, but the union acknowledges that their claim to termination/severance pay effectively ends their employment with the employer.

4) Jeannie Todd was hired April 9, 2001 and her last day of work was July 18, 2006. On that date she was injured at work and went on WSIB benefits. She was referred to a Labour Market Reentry ("LMR") program on October 3, 2007. She completed the program on October 3, 2008. She is permanently disabled.

5) Barb Bradshaw started work April 10, 2003 and her last day of work was September 28, 2007 when she was injured at work. She received WSIB benefits and was referred to an LMR program.

6) Cathy Barsley was hired May 16, 2000 and her last day of work was April 17, 2006.

7) Chris Mcdonald was hired June 6, 2003 and his last day of work was July 25, 2006. He completed an LMR July 31, 2008.

8) Katie Plante was hired in August 2001 and her last day of work was March 30, 2006.

9) Tammy Zantingh was hired May 12, 2003 and it is not clear when her last day of work was.

10) The union agrees that the employer is unable to accommodate all of the Grievors in the workplace.

11) The employer has a $2.5 million annual payroll.

12) There was discussion at the hearing about when an LMR program would be instituted by the Workplace Safety and Insurance Board ("WSIB"). In this regard WSIB policy 19-03-02 states in part:

> **Policy**
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> The WSIB conducts a labour market re-entry (LMR) assessment to determine whether a worker needs assistance to re-enter the labour market.
>
> **Guidelines**
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> **Assessment provided**
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> The WSIB provides a worker with an LMR assessment if
> - it is unlikely the worker will be re-employed by the accident employer due to the nature of the injury
> - the employer has been unable to arrange suitable and available work for the worker that restores the pre-injury earnings, or
> - the employer is not co-operating in the early and safe return to work (ESRTW) process.

Information gathered

LMR assessments are used to determine whether a worker requires an LMR plan to

- re-enter the labour market in suitable and available employment or business (SEB), or
- facilitate a return to work with the accident employer, and
- restore pre-injury earnings.

Has There Been a Termination/Severance of Employment?

13) This case turns entirely on an interpretation of the *Employment Standards Act* (the "Act"). Therefore, a useful starting point for this decision is a reminder that the *Act* is benefits conferring legislation for the protection of employees and as such it and its Regulations must be interpreted with a large and liberal construction as will best ensure the attainment of the objectives of the Act (see s.64 *Legislation Act*, 2006 and *Rizzo and Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27).

14) The relevant sections in the Act and its Regulations respecting termination provide:

The Act

54. No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,
(a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or
(b) has complied with section 61.

55. Prescribed employees are not entitled to notice of termination or termination pay under this Part.

56. (1) An employer terminates the employment of an employee for purposes of section 54 if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;

(b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or

(c) the employer lays the employee off for a period longer than the period of a temporary lay-off.

Regulation 288/01

2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

4. An employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.

(3) Paragraph 4 of subsection (1) does not apply if the impossibility or frustration is the result of an illness or injury suffered by the employee.

15) The relevant provisions respecting severance are as follows:

The Act

63.(1) An employer severs the employment of an employee if

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;

Regulation 288/01

9(1) The following employees are prescribed for the purposes of subsection 64(3) of the Act as employees who are not entitled to severance pay under section 64 of the Act;

. . .

2. Subject to subsection (2), an employee whose contract of employment has become impossible to perform or has been frustrated.

. . .

(2) Paragraph 2 of subsection (1) does not apply if,

. . .

b) the impossibility or frustration is the result of an illness or injury suffered by the employee.

16) The union argues that the Grievors are entitled to termination and severance pay even though the employer has done nothing to terminate their employment. The union asserts that the Grievors' employment has become frustrated, the employer is unable to employ them and their right to termination and severance pay crystallizes as a result. In such circumstances the employer is "unable" to continue employing the employee and s.56(1)(a) and s.63(1)(a) of the Act deem a termination/severance of employment.

17) The union relies on *St. Joseph's General Hospital and Ontario Nurses' Association* 2006 148 L.A.C. (4th) 326 (Randall) in support of its interpretation. That case involved a severance pay claim made by a permanently disabled employee who had no prospect of working for the employer ever again. The claim was made even though the employer had taken no positive steps to terminate the grievor's employment. In finding that severance pay was owing Arbitrator Randall held:

> Relying on Mr. Luborsky's analysis, the issue becomes "whether I have the authority to declare the employment relationship 'deemed terminated' or otherwise at an end because of impossibility of performance of the employment obligations due to illness or injury". For me, the answer has to be yes.
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> The analysis commences with the statute. The Act, while informed by the terms of the collective agreement, has primacy over the latter. By operation of ss. 5(1), the Act can render the provisions of the collective agreement void. In this case, such a contest does not arise. The Act is clear and the collective agreement of only marginal effect. Subsection 63.(1) of the ESA clearly calls for a determination as to whether a contract of employment has been frustrated. An active dismissal by the employer is not a condition precedent to that determination. Moreover, pursuant to section 9 of Regulation 288/01, such frustration, when due to injury, gives rise to severance entitlement. That, it seems to me, is the end of the matter. The well-established policy supports for finding severance entitlement for Ms. Glynn are also present in spades and easily trump any collective agreement counter-indices relied upon by the Hospital.
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> I will briefly elaborate these reasons and, hopefully, in their course, account for the apparent novelty of the issue.
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> VI
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> For ease of reference, I set out section 63.(1) again:
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> 63(1) What constitutes severance - An employer severs the employment of an employee if
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> (a) the employer dismisses the employee or *otherwise* refuses *or is unable* to continue employing the employee; (italics added)
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> Several things are noteworthy. The provision was amended in 2002 by adding the words in italics. The amendment clearly broadened the meaning to be given to "what constitutes severance". Formerly, a severance required one of two actions by the employer: dismissing the employee or refusing her employment. Now, finding an employer action is no longer a condition precedent to severance; severance also occurs when "the employer...is unable to continue employing the employee." The inquiry under this arm of entitlement is simply whether an objective state of affairs exists.
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> There can be no doubt that, on the facts before me, the Hospital is unable to continue to employ the Grievor, because of her workplace injuries. This is that simple state of affairs. The contract of employment has been frustrated and thus terminated by her injuries. (This is hardly a novel point. The Supreme Court of Canada in 1904 - see *Dartmouth Ferry Commission v. Marks Estate* (1904), 34 S.C.R. 366 - held (from the

headnote) "illness of the employee by which he is permanently incapacitated from performing his services would itself terminate the contract").

Prior to the current ESA having come into effect in 2001, however, the issue of severance entitlement and frustration of the employment contract due to illness or injury did not arise. Even in circumstances where an employee was dismissed for innocent absenteeism, severance was not payable by operation of old ss. 58(5)(c). That section excused an employer from paying severance if the employee's contract had been frustrated by illness or injury.

However, that limitation was struck down by the Divisional Court in *ONA v. Mount Sinai Hospital* 2004 CanLII 15351 (ON S.C.D.C.), (2004), 69 O.R. (3d) 267 (upheld by Ont. C.A. May 24, 2005). Maybe anticipating that, the Legislature repealed 58(5)(c) in 2001 and replaced it, with modification, with section 9 of O. Reg. 288/01, the relevant portions of which I set out at the beginning of this Award. Unlike the repealed ss. 58(5)(c), 9(2)(b) explicitly provides for an employer's obligation to pay severance where the impossibility of performance "is the result of an illness or injury suffered by the employee, and the *Human Rights Code* prohibits severing the employment".

The statutory language is clear; its intent sharpened by its recent legislative history. As importantly, all of the well-established policy rationales for severance entitlement also prevail. Ms. Glynn is incapacitated; has no employment income and is presently in receipt of no disability income. (As a part-timer, she had no access to LTD benefits). It is unlikely that she will ever work again. She had 26 years of unblemished service with the Hospital; her employment came to an end as a result of no culpable conduct on her part.

In reviewing the legislative history of severance pay in Ontario, Epstein J., writing for the Divisional Court in Mount Sinai *supra,* concluded as follows at pp. 273-4:

> This legislative history, together with relevant jurisprudence, make it clear that severance pay (in contrast to termination pay in lieu of notice) is an earned benefit that compensates employees for their past services and for their investment in the employer's business. It is properly payable for any non-culpable cessation of employment. See: *Re Telegram Publishing Co. Ltd. And Zwelling (*1972), I L.A.C. (2d) 1, (Employment Standards Determination, Ontario), affd (1976), 11 O.R. (2d) 740, 67 D.L.R. (3d) 404 (C.A.); and *Re Rizzo Shoes Ltd.,* 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193.

Several pages later, Epstein J. concludes: "to deprive a person of a benefit of employment relating to their investment in the business for which they have worked, based on severe disability, goes to the very core of the values contemplated in s. 15(1) of the Charter".

There is nothing in the collective agreement which requires a contrary conclusion to be drawn. The absence of a "deemed termination" provision does not advance the Hospital's case. Such provisions have been found to violate the Code because of their automatic or mechanical application. However, termination can still result where an employee is totally incapacitated and/or there is no possibility of accommodated employment, as the *Re Mitchell's Gourmet Foods Inc.* decision *supra* confirms.

Nor does article 10.05 assist the Hospital. While that article expressly continues the accrual of seniority for part-time nurses who are absent for more than 30 consecutive days "due to a disability resulting in WSIB benefits", in my view that provision cannot be determinative of the issue before me. While the inference to be drawn from it is that the parties intend the employment relation to continue for some unstated duration, the

> provision cannot be read as occupying the entire field. It certainly does not trump the statute. It cannot prevent the Grievor from asserting that her employment has come to an end, that her seniority rights no longer have any value, and that she would like, therefore, to be paid her statutory minimum, and I so find. A contrary finding - that the Grievor must continue to live in a state of limbo, until the Employer acts - makes little sense. It raises issues of potential mischief in the statutory interpretation and may well breach the Employer's duty, set out in article B-3 of the Local Agreement, to "exercise its rights and administer the Collective Agreement reasonably and fairly".

18) The union also relies on *Tembec Industries* [2008] O.L.A.A.. No. 105. In that case the employee suffered a work related injury and was referred to an LMR when the employer could not provide the employee with an accommodated position. The union requested severance pay after the employee obtained a job with a different employer. Arbitrator Harris found:

> 39 The Act supports my conclusion that the grievor's employment is deemed to be terminated. Section 63(1) defines "severance" broadly enough to capture the grievor's circumstances. The Company here was "unable to continue employing" Mr. Blanchette. That is a category of "severance"
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> 40 The grievor's employment was severed because his employer was unable to continue employing him. I find that by operation of O. Reg 288/01, amended by O.Reg 549/05, Mr. Blanchette is not prescribed as an employee who is not entitled to notice of termination or termination pay because his contract of employment had become impossible to perform. I also find, pursuant to the Act and Regulations that Mr. Blanchette is not prescribed as an employee who is not entitled to severance pay under s.64 of the Act because his contract of employment had become impossible to perform. In both categories, the grievor falls into the saving provisions of the regulation because the "impossibility or frustration is the result of an illness or injury suffered by the employee".
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> 41 Finally, it is well understood that the Act is remedial legislation that is to be given such fair, large and liberal interpretation as best ensures the attainment of its objects. In my view, to deny this grievance would be to defeat that stricture.

19) However, the award was overturned on judicial review (2009 CanLII 30451) because the issue decided in paragraphs 39-41 of the arbitration decision had not been argued by the parties. I therefore find it inappropriate to rely on the arbitrator's reasons on this point. However, the Divisional Court did make comment on the issue in passages which are relevant to the issues before me. It stated in part:

> [37] The arbitrator was of the view that "severance of employment occurs when it is properly concluded that an employee can no longer have her or his medical restrictions accommodated without undue hardship" (at para. 34). He concluded that the employer was unable to continue employing the grievor and communicated that fact to him in August 26, 2006 (Reasons at para. 36), and, therefore, pursuant to s. 63(1)(a) of the Act, the Employer severed the employment of the grievor.

[38] Section 63(1) of the ESA reads:

An employer severs the employment of an employee if

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee ...

Section 56(1) uses similar language in describing what constitutes termination.

[39] Sections 2(1) and 9(1) of O. Reg. 288/01 provide that certain employees are not entitled to notice of termination or to termination pay or to severance pay, including "[a]n employee whose contract of employment has become impossible to perform or has been frustrated". These provisions do not apply to an employee whose contract of employment has become impossible to perform or frustrated as a result of an illness or injury suffered by the employee (ss. 2(3) and 9(2)(b)).

[40] The arbitrator held the grievor fell within the provisions of the regulation protecting an employee where his contract of employment has become impossible of performance or frustrated because of illness (Reasons, para. 40). Thus, the arbitrator decided this case on the basis of the regulations under the Act. He found the contract of employment impossible to perform – in other words, he found frustration because of illness or injury (at para. 40). Yet the Union had expressly stated that it was not arguing frustration of the employment contract (para. 22 of the Reasons).

[41] There is a line of arbitral jurisprudence which has found that there can be deemed termination of employment where the employment relationship is frustrated or impossible of performance because of illness. In those cases, the arbitrators have relied on the termination and severance provisions of the ESA, including the protection for employees unable to work because of illness or injury. In each case, the onus is on the union to prove frustration of the employment relationship and deemed termination or severance. This requires the union to lead evidence of the employee's medical condition, the present incapacity to work, and the likelihood that incapacity will continue into the foreseeable future, notwithstanding reasonable accommodation (*St. Joseph's General Hospital and O.N.A.* (2004), 134 L.A.C. (4th) 86 (Luborsky) at paras. 32-34); *St. Joseph's General Hospital and O.N.A.* (2006), 148 L.A.C. (4th) 325 (Randall) at pp. 333-34; *H.E. Vannatter Ltd. and UAW-CLC Local 251* (2008), 169 L.A.C. (4th) (Reilly) at pp. 408-09).

[42] In two of these cases, the grievor had been enrolled in an LMR programme with the WSIB. That fact alone was not determinative of the frustration issue. Moreover, one of the indications that an employment relationship continued was the continued participation of the grievor in company benefit plans.

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[47] The arbitrator held that the grievor was entitled to both termination pay and severance pay. However, he never determined a date at which employment was terminated. For an employee to be entitled to termination pay, employment must be terminated without proper notice. Therefore, in order to calculate the termination pay to which the grievor is entitled, there must be a determination of the date of termination.

[48] One might infer the arbitrator concluded that referral to the LMR programme is a deemed termination, given the statement that severance of employment occurs when the grievor can no longer have his medical restrictions accommodated without undue hardship. However, if this was his conclusion, it is inconsistent with the Union submission that it relied on the WSIB mediator's comment that severance was not payable until the end of the LMR (paras. 20 and 21) - although to be fair to the arbitrator, the Union seems to have taken a different position during the

Employer's reply submissions, stating that the referral to the LMR was a deemed termination (para. 22).

[49] Whether there was severance or termination requires a determination on the basis of all the evidence as to whether the employment relationship had come to an end. The arbitrator appears to have assumed that a continuing employment relationship coincided with active employment. However, the fact that an employee is absent from work due to workers' compensation has been considered by arbitrators as a leave of absence (*Community Social Services Employers' Assn. and B.C.G.E.U.*, 2002 C.L.A.S.J. 5631 (Foley) at para. 22)

[50] In the present case, there was evidence of a continued employment relationship during and after the LMR programme that was not addressed by the arbitrator. In particular, the grievor continued his participation in employee benefit plans, and he remained on the seniority list through much of 2007. When he asked for his accrued vacation pay in September 2006, he acknowledged his recall rights. He explicitly told the Employer in February 2007 that he did not seek his severance pay when he was informed that he could no longer participate in the benefit plans if he did so.

[51] Moreover, there is no evidence that the Employer intended to terminate the grievor's employment at the time of the referral to the LMR programme. In August 2006, the Employer asked the grievor whether there were other production jobs he could perform. The ROE stated that the reason for leaving employment was the referral to the LMR programme, not termination.

[52] In August 2006, the evidence showed that the grievor could not be accommodated. There is no mention in the award of evidence that he could not be accommodated in the future. As well, there was no evidence that the LMR programme was only to train for employment elsewhere, as the award states.

[53] The arbitrator failed to address the evidence suggesting there was continuing employment relationship up until the time the grievor accepted employment at Janveaux. While the standard of review of reasonableness requires deference to the arbitrator, this is a case where the decision is unreasonable, both because of the failure of the arbitrator to determine precisely when termination and severance occurred and, more importantly, because of the failure to consider important evidence of a continued employment relationship until the time the grievor accepted employment with Janveaux.

20) The employer argues that the *St. Joseph's Hospital* decision is wrong and in any event does not stand for the proposition that termination pay is owing. The employer also argues that neither *Tembec* decision is of any assistance to the union.

21) On the first point the employer notes that the "employer unable" language was put into the Act as a result of the *Rizzo Shoes* decision which determined that a bankruptcy of the employer was a termination within the meaning of the Act. Other than that, the entire scheme of the termination/severance provisions is that the employer must take some action in order for a termination to occur (even a bankruptcy is an employer action-see *Rizzo*). In this regard, the scheme of the Act is that the employer must (and is entitled to) give notice of termination and failing that pay money and provide

benefits. The concept of a "deemed termination" is completely inconsistent with that scheme.

22) In my view aspects of the decision in *St. Joseph's Hospital* should be read with caution. The decision appears to have failed to give effect to the Regulation then in effect. In this regard, the decision states that s.9(2)(b) of the Regulation provides the exemption to the requirement to pay severance pay does not apply if "the impossibility or frustration is the result of an illness or injury suffered by the employee, and the Human Rights Code prohibit severing the employment". The arbitrator did not discuss the meaning of the words "and the Human Rights Code prohibits severing the employment", but they would appear to preclude the awarding of severance pay where the Human Rights Code did not prohibit the employer from terminating employment. Since the union took the position in the case that the employee was permanently disabled and could not be accommodated it is difficult to see how the Code would prohibit termination.

23) Critically the Regulation has been amended since the case. The words "and the Human Rights Code prohibits severing the employment" have been removed from the Regulation.

24) Given the amendment to the Regulation, I fully endorse the decision of Arbitrator Randall in *St. Joseph's Hospital* with respect to the interpretation of s. 63 of the Act. It is clear to me that the purpose behind the amendment which brought the words "is unable to continue employing the employee" into the Act is to confirm there are circumstances in which a termination and/or severance occurs despite the fact that the employer took no positive action to bring a termination about. I also note that this interpretation is consistent with the Court of Appeal's finding in *Mount Sinai* that one of the purposes of severance pay is to "compensate employees for past contributions to the employer's business" (at para. 32). The position advanced by the employer would permit it to retain totally disabled employees, like the Grievors, on its employment rolls in perpetuity in a state of employment limbo thereby denying them the right to this

compensation. I note that this conclusion is stronger if one accepts the Divisional Court's characterization, not directly analyzed by the Court of Appeal (paragraph 15 of the decision identifies the issue but does not resolve it), that severance pay is an "earned benefit".

25) Finally, the amendment to the Regulation, would not affect the result. As noted, the Regulation was amended in a way that conforms to the *St. Joseph's* decision.

26) For all of these reasons I conclude that severance occurs, without positive action by the employer, where the employer is "unable to continue employing the employee" as a result of a disability suffered by the employee.

27) The cases are clear that such circumstances can result in an award of severance pay under the Act. But given that under the Act a "termination" is defined the same as a "severance", does that also mean that termination pay is also owing? As the employer argues such a result would seem incongruous since termination pay is owed when an employer fails to provide appropriate notice of termination. However, a disabling injury or the conclusion of accommodation efforts, are by their nature, events which the employer cannot give notice of. Moreover, there is something problematic about the obligation to give notice when the employee is not earning any wages and is in receipt of WSIB benefits.

28) Nevertheless the Act and its Regulations appear not to recognize this distinction. Under the Act a "termination" for notice Termination Pay purposes is defined the same as a "severance" for Severance Pay purposes. Regulation 288/01 also treats the situation the same. I do not see that in these circumstances I can find a different interpretation to statutory provisions that are worded identically.

The Date of Termination/Severance

29) I next turn to the date on which the termination occurs. The first thing to note is that the statute appears to contemplate an objective test. This conclusion is in accord with the caselaw provided at and after the hearing. In particular, the Divisional Court's decision in *Tembec* suggests (at para. 49) that I must determine a termination date taking into account all of the evidence.

30) I admit that I have some concerns about the Divisional Court's decision. The decision focuses on the date of termination of employment. However, it does not specifically focus on the apparently applicable definition of "termination" in the Act, that being the circumstance where the employer is "unable to continue employing" the employee. It appears the Court's focus was on establishing the date at which it could objectively be said termination had occurred rather than on the date at which the employer was unable to continue to employ the employee. Nevertheless, although the Court's discussion about this issue is likely *obiter*, the reasoning in the decision is quite extensive and it would be unwise to disregard it.

31) The union argues that the date of termination is the date at which the employee makes his/her claim by filing a grievance. It is that date when the employee acknowledges that no further accommodation efforts can be made by the employer and the employee's employment with the employer is effectively at an end.

32) The union relies on s.65(2) of the Act which states:

> All time spent by the employee in the employer's employ, whether or not continuous and whether or not active, shall be included in determining whether he or she is eligible for severance pay under subsection 64 (1) and in calculating his or her severance pay under subsection (1).

33) The union submits that s.65(2) is of great importance with regard to the case before me as it considers all time spent by employee, whether continuous or non continuous, active or non active in the employer's employ to determine eligibility for

severance and calculating severance pay. The union submits the six Grievor's continued to accumulate seniority while they were injured/disabled and remained on the seniority list.

34) Further, the union submits that the language in the *Act* considers that all of the grievor's seniority should be included in the determination of eligibility and the calculation of severance pay. Therefore, the union argues to "back date" the date of frustration, to the last date worked as decided in *Macotta* ESB#2277 October 14, 1987 *and 243821 Garage Limited o/a Fix it Yourself Garage* ESB#522, June 8 1978, would be contrary to the language in the *Act*.

35) The union's position has a certain attractiveness to it. It puts the employee in the same position as the employer *vis a vis* control over the employment relationship. The employee is essentially resigning as a result of a deemed termination and the termination date is the date of resignation.

36) The difficulty is that the union's position does not fit within the statutory language. Section 56(1) defines what constitutes a termination and s. 63(1) defines what constitutes a severance. Each definition provides that a termination (or severance) occurs when the employer is unable to continue to employing the employee. It is difficult to see how an employee's decision to file a grievance claiming termination/severance pay has much if anything to say about whether the employer is unable to continue to employ the employee. In my view the employee's views are, at most, just one factor that must be taken into consideration. Similarly, s. 65(2) of the Act does not affect the determination of the date at which the employer is unable to employ, it simply says that until that date, the employee's service, whether active or not, counts for the purposes of determining eligibility to and quantum of Severance Pay.

37) The employer relies on *Dartmouth Ferry and Marks (1903)*, 34 S.C.R. 366 at 374-75 and other cases which stand for the proposition that the date at which a contract

is said to be frustrated is the date of the frustrating event even if at the time of the frustrating event it was not clear that the contract had come to an end. In *Dartmouth* a ferry captain became ill was forced to go off work. Seven months later he died. His estate claimed wages from the date of illness to the date of death on the theory that his contract of employment entitled him to be paid when he was off work. The Court ruled against the estate. Davies J. relied on evidence of the employee's condition discovered after he left work to conclude that the contract was frustrated on the date the employee left work. He stated, at p. 374:

> It is quite true that the deceased and his medical adviser both hoped and believed, at first, that his illness was only temporary, but their belief or hope cannot alter the truth subsequently disclosed. That truth is now admitted and is beyond controversy that on and after the 15th of December, when Captain Marks ceased working, he was permanently disabled from doing his work he had contracted to do. In law, this disablement is termed the act of God. It not only, in my opinion, justified the Commission in formally determining the contract, if they had chosen to take that course, but by rendering it impossible that he could ever afterwards discharge his duties under his contract, the permanent disablement determined and ended the contract.

38) Subsequent to the hearing I drew the parties' attention to two cases decided by referees under the Act which are of similar effect and sought the parties' submissions with respect to the cases. Submissions were provided.

39) In *Fix-It-Yourself Garage,supra,* Referee Brent determined that a contract of employment had become frustrated within the meaning of the Act as it then read as a result of the disability of the employee. The Referee held:

> It would appear that the contract of employment here became impossible to perform or frustrated within the meaning of section 40(3)(d) of the Act. The evidence is clear that the respondent became disabled in December, 1976 and the conclusion reached that his disability began as of December 18, 1976. Even though neither the respondent nor the applicant was aware of the disability as of that date, that does not alter the fact that the contract of employment had became impossible to perform as of that date. Impossibility of performance or frustration is in each case a question of fact and, as such, the knowledge of the parties that a particular stare of affairs exists is irrelevant. Regardless of what the respondent and applicant knew on December 22nd, their contract of employment had been frustrated on December 18th when the respondent became unable to work.

40) In *Macotta Company of Canada, supra,* Referee Baum came to a similar conclusion with respect to a similar issue. Referee Baum referred to the *Fix it Yourself Garage* decision and stated:

> Referee Brent correctly stated the common law relating to frustration of contract: The central issue for our purposes is whether in fact Mr. Grimaldi was unable to substantially fulfill his employment contract with the Employer. The answer is that he was totally incapacitated to fulfill his work function with the Employer from the date of the accident on November 5, 1985 onward, including the present time.
>
> The question is not whether the Employer knew to a medical certainty that Mr. Grimaldi would be unable to fulfill his job function. The Employer acted at its own risk when it terminated Mr. Grimaldi in January 1986. It was always possible that the Employer was wrong. If the facts proved the Employer to have been wrong, if Mr. Grimaldi had been able to return to work, then the defence of frustration of contract would not have been available to the Employer, and there would have been liability for termination pay within the meaning of section 40 of the Act.

41) The employer's position that the termination/severance occurs on the last day of work of the employee also has a certain attractiveness, but also is problematic. It is problematic because in many cases it will simply be a fact that an individual continues to be an employee for some time after his/her last day of work. That may be so because the collective agreement or workers compensation legislation requires it or because the employer is required to engage in accommodation efforts even if those efforts do not ultimately result in the employee returning to work. I note that *Dartmouth Ferry* and the two Referee cases were decided in relation to non union workplaces and, particularly with respect to *Dartmouth Ferry,* long before the concept of duty to accommodate or the WSIB's two year reemployment obligation existed. In addition, the Divisional Court's *Tembec* decision (paras 48-53), where the Court examined all of the circumstances to determine whether a termination had occurred, suggests that the employer's argument is wrong and that reasoning, while perhaps not binding, is persuasive.

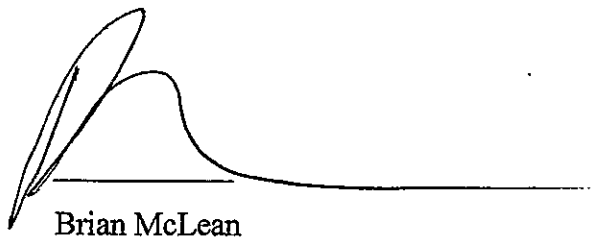
42) The appropriate question, having regard to s.63(1) of the Act, is when did the employer become "unable to continue employing the employee". In my view, contrary to the position advanced by both parties, this is not a determination that can be made in the abstract. As the Court Said in *Tembec*, supra: "Whether there was severance or

termination requires a determination on the basis of all the evidence as to whether the employment relationship had come to an end." In my view, the termination date must be established by examining the specific circumstances of each employee. After that examination it may be that the termination date is the last day of employment, the date of the LMR assessment (keeping in mind that two of the criteria for making an LMR assessment are: when it is unlikely the worker will be re-employed by the accident employer due to the nature of the injury; or the employer has been unable to arrange suitable and available work for the worker that restores the pre-injury earnings, both of which would suggest that the employer is , by that point, unable to employ the employee) or some other date.

43) Given that the parties argued this matter as if there was a definite termination date which could be determined in the abstract it appears there may be a requirement for additional evidence and argument. I see at least four options for proceeding

1) the parties could settle these grievances based on what has already been decided;
2) the parties could agree on the facts and permit me to make a decision based on those facts;
3) the parties could, despite my conclusions, agree that I make a decision based on the facts I have before me; or
4) we could reconvene the hearing for further evidence and argument.

I remain seized.



Brian McLean

Toronto-December 6, 2009