

* ARBITRATOR CAN CORRECT MISTAKE IN COLLECTIVE
AGREEMENT, COURT RULES

The Ontario Court of Appeal has ruled that a labour arbitrator did not err in "rectifying" a collective agreement to correct an employer's unilateral mistake, since the stringent pre-conditions to granting such a remedy had been met.

In 1999, Nav Canada and the Public Service Alliance of Canada signed a collective agreement, having agreed that the weekly hours of work of employees would be reduced from 40 to 37.5 hours a week, from the date of signing, without reducing the employees' overall level of compensation. While the parties did not specify a formula to implement this agreement, the employer prepared a pay scale with specific dollar amounts and this document was appended to the collective agreement.

When the union alleged that the wrong hourly wage had been used to calculate employees' retroactive pay, given the appended pay scale, the employer contended that the appended pay scale was not in accordance with the terms agreed to in negotiations. The union grieved, and proceeded to arbitration, but the employer asked the arbitrator to rectify the collective agreement by substituting the pay scale it had used to calculate the payments.

Arbitrator Richard Brown dismissed the union's grievance and granted the employer's request for rectification. Brown held that the explicit understanding – regarding the reduction of hours of work without reduction of overall compensation – meant that each hourly rate of pay should have been multiplied by 40 over 37.5, to be paid retroactively from the signing of the collective agreement. In Brown's opinion, any other formula would be inconsistent with the agreement reached by the parties. While Brown noted that, in *Metropolitan Toronto Board of Commissioners of Police*, [1972] 2 O.R. 793, the Ontario Court of Appeal had held that labour arbitrators lacked the authority to rectify collective agreements, he concluded that the Supreme Court of Canada had since enlarged the scope of adjudicators' remedial powers. Brown ruled that rectification of the collective agreement, by changing the pay scale appended to the collective agreement to reflect the terms of the parties' oral agreement, was the only appropriate solution.

On application for judicial review, the Ontario Divisional Court set aside the arbitrator's decision, concluding that the arbitrator had exceeded his jurisdiction by rectifying the collective agreement. The Divisional Court based its decision on the *Metro Police* case. The employer appealed this decision. The union cross-appealed, arguing that even if the arbitrator acted within his jurisdiction, he had erred in doing so.

Writing for the Ontario Court of Appeal, Judge Marvin Catzman allowed the employer's appeal and dismissed the union's cross-appeal, concluding that the arbitrator had not exceeded his jurisdiction and that, given the circumstances of the case, rectification was an appropriate remedy. Catzman observed that subsequent jurisprudence had undermined the decision in *Metro Police*. In particular, the Supreme Court of Canada had taken an increasingly broad approach to an arbitrator's remedial powers.

Judge Catzman pointed out that stringent preconditions must be met before the remedy of rectification will be granted. Thus, a party seeking rectification must:

- (1) show the existence and content of the inconsistent prior oral agreement;
- (2) show that the written document does not correspond with the prior oral agreement and that permitting the other party to take advantage of the mistake in the written document would be fraud or equivalent to fraud;
- (3) show the precise form in which the written instrument can be made to express the prior intention; and
- (4) establish all of these requirements on a standard of convincing proof.

In this case, Judge Catzman concluded, the factual findings of the arbitrator confirmed that all four requirements had been satisfied.

Public Service Alliance of Canada v. Nav Canada
Ontario Court of Appeal
Judges Marvin Catzman, Roy McMurtry and Eileen Gillese
April 19, 2002