In the Matter of an Arbitration

Between:

The Toronto District School Board

(The “Employer”)

-and-

Canadian Union of Public Employees, Local 4400

(The “Union”)

Re: Group Grievance –General Interest Instructors-Notice of Termination and Severance Pay

Addendum Award

Arbitrator: Brian Sheehan

Appearances:

For the Employer: Amanda Hunter – Counsel

For the Union: Kelly Doctor – Counsel

Hearing conducted in Toronto on May 8, 2017

By an Award issued July 12, 2016, it was determined that the General Interest Instructors (GIIs) employed by the Employer were potentially entitled to notice of termination/termination pay in lieu, as well as severance pay, pursuant to the relevant provisions of the Employment Standards Act, 2000 (ESA). The remedial issues flowing from the Award were remitted back to the parties, and I remain seized with respect to any outstanding implementation issue.

The parties resolved all of the implementation matters in relation to severance pay, but an issue remains in dispute regarding the application of the notice of termination/termination pay provisions of the ESA to the circumstances of the relevant GIIs.

The Nature of the Dispute

Generally, pursuant to the termination provisions of the ESA, employees continuously employed for more than three months are entitled to notice of termination or termination pay in lieu of notice. The amount of notice/termination pay that an employee may be entitled to is based on the length of the employee's "period of employment".

Section 59 (1) of the ESA stipulates that "time spent by an employee on leave or other inactive employment" is to be included for calculating an employee's "period of employment". That provision is qualified, however, by the exception set out at Section 59 (2) which provides if an employee is "terminated as a result of a lay-off, no part of the lay-off after the deemed termination date shall be included in determining his or her period of employment".

With respect to the relevant provisions of the ESA addressing the issue of the status of an employee on lay-off, Section 56 (1)(c) stipulates that a lay-off for a period longer than a "temporary lay-off" constitutes a termination of employment for the purposes of the notice of termination/termination pay provisions of the ESA. Section 56 (2) defines the circumstances constituting a "temporary lay-off" in that it stipulates that a lay-off of less than 35 weeks in any period of 52 consecutive weeks will be deemed to be a temporary lay-off if the employee receives certain enumerated payments or

benefits from the employer. Of particular relevance to this dispute, Section 56 (2)(c) provides that for a unionized employee, a lay-off that exceeds 35 weeks will still be viewed as a "temporary lay-off" "when the employer recalls the employee within the time set out in an agreement between the employer and the trade union". In the case at hand, the parties are in agreement that the provisions of the collective agreement relating to the rights of surplus employees constitutes a "Section 56 (2)(c) agreement". Accordingly, a GII who is laid off (or who does not have a work assignment) for a period in excess of 35 weeks could be viewed as being on a "temporary lay-off" for up to 24 months of lay-off or not actively working.

The particular point in dispute that will be addressed in this Award pertains to the circumstances of GIIs who may have, on more than one occasion, been recalled to employment after a lay-off (or not actively working) in excess of 35 weeks; and whose employment is subsequently terminated at some later point. The Employer takes the position that it is only the final "period of employment", after the employee was recalled, that is relevant for the purposes of the calculation of that employee's "period of employment". Specifically, the Employer asserts that termination pay for such employees should be calculated in the following manner:

> The employee's "Termination Pay Period of Employment" shall include all time worked with the Board up to the employee's last day of active employment except where there are periods of inactive employment in excess of 35 weeks. If there is a period of inactive employment in excess of 35 weeks, the employee's start date for the purposes determining service will be the first day worked following the most recent period of inactive service in excess of 35 weeks.

Conversely, the Union's position is that termination pay should, in fact, be calculated as follows:

> The employee's "Termination Pay Period of Employment" shall include all time worked with the Board between the first and last day worked by the employee, whether the employee was actively at work or not, less any periods of 35 consecutive weeks or more where the employee did not work.

Relevant Provisions of the Employment Standards Act, 2000 and Regulations

No termination without notice

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 61.2000, c. 41, s. 54.

What constitutes termination

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

….

(c) the employer lays the employee off for a period longer than the period of a temporary lay-off. 2000, c. 41, s. 56 (1).

Temporary lay-off

(2) For the purpose of clause (1) (c), a temporary lay-off is,

(a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;

(b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and;

i. the employee continues to receive substantial payments from the employer,

ii. the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group of employee insurance plan,

iii. the employee receives supplementary unemployment benefits,

iv. the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,

v. the employer recalls the employee within the time approved by the Director, or

vi. in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or

(c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union. 2000, c. 41, s.56 (2); 2001, c. 9, Sched. I, s. 1 (12).

Lay-off, regular work week

(3.1) For the purpose of subsection (2), an employee who has a regular work week is laid off for a week if,

(a) in that week, the employee earns less than one-half the amount he or she would earn at his or her regular rate in a regular work week; and

(b) the week is not an excluded week. 2002, c. 18, Sched. J, s. 3 (23).

Temporary lay-off not termination

(4) An employer who lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the lay-off exceeds that of a temporary lay-off. 2000, c. 41, s. 56 (4).

Deemed termination date

(5) If an employer terminates the employment of an employee under clause (1) (c), the employment shall be deemed to be terminated on the first day of the lay-off. 2000, c. 41, s. 56 (5).

Employer notice period

57. The notice of termination under section 54 shall be given,

(a) at least one week before the termination, if the employee's period of employment is less than one year;

(b) at least two weeks before the termination, if the employee's period of employment is one year or more and fewer than three years;

(c) at least three weeks before the termination, if the employee's period of employment is three years or more and fewer than four years;

(d) at least four weeks before the termination, if the employee's period of employment is four years or more and fewer than five years;

(e) at least five weeks before the termination, if the employee's period of employment is five years or more and fewer than six years;

(f) at least six weeks before the termination, if the employee's period of employment is six years or more and fewer than seven years;

(g) at least seven weeks before the termination, if the employee's period of employment is seven years or more and fewer than eight years; or

(h) at least eight weeks before the termination, if the employee's period of employment is eight years or more. 2000, c. 41, s. 57.

Period of employment: included, excluded time

59. (1) Time spent by an employee on leave or other inactive employment is included in determining his or her period of employment. 2000, c. 41, s. 59 (1).

Exception

(2) Despite subsection (1), if an employee's employment was terminated as a result of a lay-off, no part of the lay-off period after the deemed termination date shall be included in determining his or her period of employment. 2000, c. 41, s. 59 (2).

SEVERANCE OF EMPLOYMENT

Calculating severance pay

65. (1) Severance pay under this section shall be calculated by multiplying the employee's regular wages for a regular work week by the sum of,

(a) the number of years of employment the employee has completed; and

(b) the number of months of employment not included in clause (a) that the employee has completed, divided by 12. 2000, c. 41, s. 65 (1).

Non-continuous employment

(2) 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). 2000, c. 41, s. 65 (2).

ELECTION RE RECALL RIGHTS

Where election may be made

67. (1) This section applies if an employee who has a right to be recalled for employment under his or her employment contract is entitled to,

(a) termination pay under section 61 because of a lay-off of 35 weeks or more; or

(b) severance pay. 2000, c. 41, s. 67 (1).

Nature of election

(3) The employee may elect to be paid the termination pay or severance pay forthwith or to retain the right to be recalled. 2000, c. 41, s. 67 (3).

Consistency

(4) An employee who is entitled to both termination pay and severance pay shall make the same election in respect of each. 2000, c. 41, s. 67 (4).

Deemed abandonment

(5) An employee who elects to be paid shall be deemed to have abandoned the right to be recalled. 2000, c. 41, s. 67 (5).

Termination and Severance of Employment, O Reg 288/01

TERMINATION OF EMPLOYMENT

Period of Employment

8. (1) For the purposes of this Regulation and sections 54 to 62 of the Act, an employee's period of employment is the period beginning on the day he or she most recently commenced employment and ending on,

(a) if notice of termination is given in accordance with Part XV of the Act, the day it is given; and

(b) if notice of termination is not given in accordance with Part XV of the Act, the day the employee's employment is terminated. O. Reg. 288/01, s. 8 (1).

(2) For the purposes of subsection (1), two successive periods of employment that are not more than 13 weeks apart shall be added together and treated as one period of employment. O. Reg. 288/01, s.8 (2).

The Submissions of the Parties

For the Employer, the severance and notice of termination provisions of the ESA represent related but distinctive statutory initiatives. From a purposive point of view, severance pay is associated with compensating the employee for his/her service with an employer; while, the purpose of the notice of termination provisions of the ESA is to ensure that the employee has sufficient notice of his/her pending termination to assist the employee in transitioning to alternative employment options, with termination pay acting as a buffer when the required notice of termination is not provided by the employer.

This variance in the underlying purpose, Ms. Hunter asserted, on behalf of the Employer, led the Legislature to treat an employee's service with an employer differently under the respective severance pay and the notice of termination provisions. Specifically, in relation to severance pay, Section 65 (2) (Non-Continuous Employment) expressly provides that all time spent by an employee "in the employer's employ, whether or not continuous and whether or not active" shall be included for the purpose of the employee's severance pay entitlements. Significantly, it was submitted that there is no such similar all-encompassing provision expressly including all time spent in the employ of the employer with respect to the notice of termination provisions; rather those provisions speak to the employee's "period of employment" with the employer.

Turning to the relevant provisions relating to an employee's "period of employment", Ms. Hunter asserted that Section 59 (2) creates an important exception to

the general rule stated at Section 59 (1), which speaks to an employee's "period of employment" including periods of inactive employment. Specifically, Section 59 (2) provides that if an employee is terminated as a result of a lay-off, no part of the lay-off after the employee's "deemed termination date" shall be included for the calculation of the employee's "period of employment".

As to the "deemed termination date", the Employer submits that Section 56 (1) (c) provides that an employee who is laid off is deemed terminated if the lay-off is for a longer period than the period of a temporary lay-off. That provision, it was submitted, has to be read in conjunction with Section 56 (5) which states that the employment shall be deemed to be terminated on the first day of the lay-off if the termination results from the lay-off of the employee exceeding the period of a "temporary lay-off" as per Section 56 (1)(c). Accordingly, from the perspective of the Employer, any period of time that was spent on lay-off that postdates the "deemed termination date" as contemplated under Section 56 (5) ceases to be relevant in terms of the employee's "period of employment".

Taking that argument a step further, the Employer asserted that consideration must also be given to the definition of the "period of employment" under Section 8 (1) of the Ontario Regulation 288/01 Termination and Severance of Employment, which provides that an employee's period of employment "is the period beginning on the day he or she most recently commenced employment…". Accordingly, for the Employer, the starting point of a deemed terminated employee's relevant "period of employment" is the most recent date the employee recommenced employment. Specifically, if an employee is deemed terminated for the purposes of the ESA (i.e. the lay-off of the employee ceases to be a "temporary lay-off") and that employee subsequently returns to active employment, the employee's start date for the calculation of the employee's "period of employment" is the most recent date the employee recommenced active employment. Therefore, once a period of lay-off, or non-active period of employment exceeds 35 weeks, the employee is "deemed terminated" for the purposes of the ESA;

with the starting point of the employee's "period of employment" resetting to the date that the employee recommenced actively working.

Ms. Hunter postulated that this view of the start date of an employee's period of employment resetting to the date the employee returns to actively working after a lay-off exceeding 35 weeks, is consistent with the manner in which arbitrators and the Courts have interpreted the relevant provisions of the ESA. On this point, particular reliance was placed on the reasoning of the Court of Appeal in National Automobile, Aerospace Transportation and General Workers Union of Canada (C.A.W.-Canada), Local 27 v. London Machinery Inc. [2006] 79 O.R. (3d) 444 (ONCA). Specifically, it was asserted that this case stands for the proposition that, notwithstanding the recall rights under the collective agreement may extend beyond 35 weeks, an employee, upon the lay-off exceeding 35 weeks has a right, in light of Section 67 of the ESA, to elect to receive his/her severance pay and termination pay in lieu of notice and forego his/her recall rights under the collective agreement. Therefore, for the Employer, once a lay-off extends beyond 35 weeks, the employee is "deemed terminated" for the purposes of the calculation of the employee's "period of employment"; and if the employee is subsequently recalled, his/her period of employment commences on the date of the return to active work.

In support of its submissions, the Employer relied on the following additional authorities: TI Automotive Canada Inc. and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 1285 2009 CanLII 85856 (ON LA); Hershey Canada Inc. and CAW, Local 462 [2007] O.L.A.A. No. 187 (Saltman); National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 222 and Johnson Controls Inc. [2010] ONCA 131 (CanLII); National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 222 and Johnson Controls Inc. [2009] ON SCDC 10993 (CANLII); National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 222 and Johnson Controls Inc. (July 31, 2008) unreported (McLean).

The starting point of the Union's submissions is the claim that the Courts have consistently asserted, as affirmed in the decision of the Supreme Court of Canada in Rizzo & Rizzo Shoes Ltd. [1998] 1 R.C.S. 27, that the ESA is a benefit-conferring legislation intended to ensure that employees enjoy certain minimum benefits and standards in relation to their employment; accordingly, "it ought to be interpreted in a broad and generous manner". Therefore, any doubt associated with interpreting the relevant language of the ESA, should be resolved in the relevant employee's favour.

As to the relevant provisions of the ESA, it was submitted that the fundamental determination that drives the result in this matter is that an employee's employment is not automatically terminated, simply on account of the employee being laid off for a period that exceeds 35 weeks. An employee, such as a GII in the case at hand, who has recall rights that extend beyond 35 weeks of a lay-off has a right, pursuant to Section 67 of the Act ("Section 67 election rights"), to elect to receive termination or severance pay and forego their recall rights under the collective agreement after being laid off for 35 weeks. The employee, at that point, is therefore afforded the right to elect to end the employment relationship and receive any severance pay and termination pay owing. Specifically, such an employee does not have to wait until the end of the expiry of his/her recall rights under the collective agreement to be potentially entitled to claim severance pay or termination pay. The Union submits, however, if the employee elects not to exercise his/her "Section 67 election rights" (foregoing the right to elect to receive the severance pay and termination pay owing) and is subsequently recalled to employment, in accordance with the provisions of the collective agreement, there is no basis, whatsoever, to suggest that the employee has been in some manner deemed terminated for the purposes of the ESA. Further to this point, it is submitted that it would be contrary to the purposes of Act to suggest that a unionized employee should be penalized with respect to the length of his/her "period of employment", if the employee decides not to elect to receive severance pay and termination pay that may be owing, and chooses instead to maintain the employment relationship; and thus, continues to enjoy the benefits under the collective agreement.

For the Union — if the employee who has been laid off for more than 35 weeks decides not to exercise his/her "Section 67 election rights and elects to retain his/her recall rights then one of two things should happen: If that employee is subsequently recalled within the pertinent time period under the collective agreement, then the entire period of the lay-off is deemed to be a "temporary lay-off" and for the purposes of the ESA, there is no termination of the employee's employment. If, on the other hand, the employee is not recalled and his/her recall rights become exhausted, then the employee's employment is, in fact, terminated and pursuant to the wording of Section 56 (5) of the ESA, the first date of the termination for the purposes of the notice of termination provisions of the ESA is deemed to be the first day of the lay-off.

The Union further asserts that the Employer's argument is predicated on a misinterpretation of the reasoning of the Court of Appeal in the London Machinery, *supra,* case. For the Union, it would be erroneous to claim that the decision stands for the proposition that based on the fact that an employee acquires the right, pursuant to Section 67 (1), to elect to receive his/her entitlement to severance or termination pay, upon being laid off for more than 35 weeks, somehow leads to the conclusion that any lay-off of an employee that exceeds 35 weeks necessarily results in the employee being deemed terminated; such that, if the employee is ultimately recalled to employment in accord with the provisions of the collective agreement, that the employee's "period of employment" is deemed reset and starts entirely anew. It is asserted that the Court in London Machinery, *supra,* in fact, expressly determined that under Section 56 (2)(c), a lay-off would still be deemed temporary even after 35 weeks, if the employer recalls the employee within the time set out in an agreement between the employer and the trade union.

Ms. Doctor additionally submitted that the Employer's position is also predicated on a flawed interpretation of Section 8 (1) of Regulation 288/01-Termination and Severance of Employment. It was submitted that the wording of that provision referencing that the employee's "period of employment" begins on the day the employee most recently commenced employment, was intended to address the scenario of an

employee whose employment was in fact terminated (which could include an employee electing to receive his termination pay after a lay-off exceeding 35 weeks and foregoing his/her recall rights), and who is subsequently rehired by the same employer. Section 8 (1) of the Regulation is designed to ensure that the employee cannot "double dip" and receive credit twice for the same period of time, for the purposes of the notice of termination/termination pay provisions of the ESA.

Finally, the Union suggested the Employer's interpretation also should not be accepted since it could lead to clearly absurd and unintended results. In support of its submissions, the Union relied on the following additional authorities: Machtinger v. HOJ industries Ltd. [1992] 1 S.C.R. (986); United Steel Workers, Local 7135 v. National Steel Car Limited [2012] O.J. No. 6575; United Steel Workers, Local 7135 and National Steel Car Limited 2013 ONCA 401 (CanLII); Elsegood v. Cambridge Spring Service (2001) Ltd. 2011 ONCA 831 (CanLII); Chandler v. Alberta Association of Architects [1989] S.C.R. 848.

Disposition

After reviewing the submissions of the parties and the authorities submitted, it is my view, that the position of the Union should be upheld.

Analysis

The relevant starting point, and arguably the end point, of the analysis is that, pursuant to the provisions of the collective agreement, a GII who is laid off (no active assignment) for a period in excess of 35 weeks and then returns to active duty before the expiry of the two-year "recall" period under the collective agreement remains an employee of the Employer. That employee is neither terminated; nor rehired upon returning to active employment. That fact, in large part, drives the analysis and dictates the result in this matter.

Prior to reviewing the position of the Employer in detail, it is appropriate to outline the perspective that the Courts have generally adopted, with respect to the task of

interpreting the relevant provisions of the ESA. On this point, specific reference is made to the decision of the Supreme Court of Canada in Rizzo & Rizzo Shoes Ltd., *supra.* The issue in that case was whether the termination of employment caused by a bankruptcy of an employer gave rise to a claim for entitlement under the severance and notice of termination provisions of the ESA. In the course of concluding that the claimants did have a claim for severance and termination pay, the Court observed that the interpretation adopted by the Court of Appeal would limit the entitlement to protections and benefits associated with the severance and termination provisions of the ESA:

> If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way, the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.
>
> (emphasis added)

The Court then proceeded to set out the manner in which the provisions of the ESA should be generally interpreted:

> Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada,* [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General),* [1988] 1 S.C.R. 513, at p. 537).
>
> (emphasis added)

No issue is taken with the point raised by Ms. Hunter that the above interpretive viewpoint should not be used to confer rights or benefits to employees when no such entitlement exists. That is, the presumption in favour "of a broad and generous interpretation" should not be utilized in a manner to override the application and/or the

implication of the specific legislative wording. That point is acknowledged, however, when interpreting the relevant statutory language, it is important to consider the objective of the notice of termination/termination pay provisions of the ESA and any doubt as to the meaning of the provisions should be found in favour of the interpretation that extends, rather than limits, entitlements and protection for employees.

There are three primary components to the Employer's argument. The first such component places reliance on Section 56 (5) (Deemed Termination Date) which dictates that if an employee is terminated in the context of a lay-off that was initially a "temporary lay-off", then the employee's employment shall have been deemed to have been terminated on the first day of that lay-off. Reading that provision in conjunction with Section 59 (2) which provides that no part of a lay-off after the "deemed termination date" shall be included in the employee's "period of employment", the Employer suggests any period of lay-off that is subsequent to a "deemed termination date" (a lay-off exceeding 35 weeks) is not to be included for the calculation of that employee's "period of employment". In my view, the Employer's characterization of the term "deemed termination date", conflates the significance of the term and attributes a meaning to it that is not supported by the relevant wording of the statute. As outlined by Arbitrator Surdykowski in TI Automotive Canada Inc., *supra*, the "temporary lay-off" provisions of Section 56 of the Act, were designed to allow an employer to delay or defer the termination of the employee. Upon the lay-off ceasing to be temporary (no longer being deferred) and the employee's employment actually being terminated, Section 56 (5) simply provides that the effective date of the termination is deemed to be the first day of the lay-off. Consistent with the termination being effective as of the first day of the lay-off, Section 59 (2) affirms that any part of a lay-off after the "deemed termination date" shall not be included in the employees "period of employment". That is the extent of the significance of the term "deemed termination date" to this dispute.

Specifically, as affirmed by the following reasoning in Elsegood v. Cambridge Spring Service, *supra,* Section 56 (5) standing on its own or read in conjunction with Section 59 (2), does not create a "deemed termination" provision suggesting that each

time an employee is temporarily laid off for in excess of 35 weeks, that the employee is necessarily deemed terminated for the relevant provisions of the ESA.

> At the outset, I note that although the employer refers to a termination under s. 56(1) as a "deemed termination", s. 56(1) does not use the word "deemed". The word "deemed" appears in s. 56(5), which provides that employment terminated under s. 56(1)(c) "shall be deemed to be terminated on the first day of the lay-off". The word "deemed" refers to the date of the termination and not the termination itself.

In summation on this point, it is accepted that in certain circumstances the combined effect of Section 56 (5) and 59 (2), may impact upon the calculation of an employee's "period of employment". Specifically, those provisions provide for the non-inclusion of the period of lay-off (non-active employment), if that particular lay-off ceases to be "temporary" in nature pursuant to Section 56 (1); and as such, the employee's employment is in fact terminated. Where the Employer's argument goes off the rails is to suggest that the reference to a "deemed termination date" in those provisions leads to the result of an employee automatically being "deemed terminated", for the purposes of the notice of termination provisions of the ESA, if he/she has been laid off in excess of 35 weeks, notwithstanding the fact that the employee may have ongoing recall rights under the collective agreement; and as such, would retain the status of an employee.

The second component of the Employer's argument relied on the decision in London Machinery, *supra.* The decision in that case, in my view, has little, if any, relevance to the facts that are germane in the case at hand. The issue decided in London Machinery, *supra,* related to an entirely different issue as to whether an employee could exercise his "Section 67 (1) rights" and elect to receive his severance and termination pay owing after being laid off in excess of 35 weeks, notwithstanding the fact the employee had ongoing recall rights for a two-year period under a collective agreement. The arbitrator in the London Machinery, *supra,* case determined that the employee could not exercise his "Section 67 (1) rights" to elect to receive his severance and termination pay, given the existence of the two-year recall period under the collective agreement. The Court of Appeal rejected that interpretation and ruled that upon the lay-off exceeding 35 weeks, the employee had a right to exercise his "Section

67 (1) rights" and receive the severance and termination pay owing to him at that point in time. The issue in dispute in this case does not relate to the entitlement of a relevant GII to exercise his/her "Section 67 (1) rights"; rather, the dispute relates to a totally different issue pertaining to the calculation of a GII's "period of employment", in the context of the GII recommencing active employment (after maintaining his/her rights as a "surplus" employee rather than exercising his/her "Section 67 (1) rights"), after a period of non-active employment exceeding 35 weeks.

Expanding further on this question of the status of a GII who is not actively employed for a period in excess of 35 weeks, and consistent with the reasoning in London Machinery, *supra,* an employee has a right to elect to exercise his/her "Section 67 (1) rights". The bestowment of that right upon an employee to no longer view his/her lay-off as temporary and to receive his/her severance and termination paying owing does not, in any manner, lead to the conclusion that that employee is in fact "deemed terminated" either for the purposes of the collective agreement or the relevant provisions of the ESA. It is the employee's utilization of his/her "Section 67 (1) rights" that results in the employee being deemed terminated. Furthermore, if the employee chooses to forgo the exercise of those rights and is subsequently recalled to employment in a timely manner under the collective agreement, the entire period of the lay-off is considered a "temporary lay-off" pursuant to Section 56 (2) (c); and as affirmed through Section 56 (4), there is no termination of the employment relationship. This point was expounded upon by Arbitrator Surdykowski in TI Automotive Canada Inc., *supra,* in the following manner:

> If the layoff of an employee represented by union extends beyond 34 weeks (i.e. last for "35 weeks or more") and the employer and the union have an agreement which provides a recall period which by definition be longer than a layoff period described in s, 56 (2) (b), s. 67 applies. Section 67 applies only to an employee who has been laid off for 35 weeks or more and continues to have a recall rights connection to employment. It permits such an employee to elect to take termination pay he is entitled to under s.61 or retain his remaining recall rights. The employee cannot both take his termination pay and retain recall rights. The employee has a right to elect to take the termination pay due him "or" retain the right to be recalled. He must make the same election for both termination pay and severance pay entitlement's (s. 67 (4)). An employee who has s.67 rights retains

> employment status by virtue of his remaining recall rights. The employee retains that status (i.e. employment is not deemed terminated) until he either renounces his recall rights or his recall rights expire. In the former case, the employee chooses to give up his right to be recalled to work (and it is the employee's choice – not the employer's). In the latter case, the employee is deemed terminated by operation of both the collective agreement and the ESA. In either case, the employee must be paid his s. 61 termination pay.

The above discussion and analysis provides the answer to the final component of the Employer's argument placing reliance on Section 8 (1) Regulation 288/01-Termination and Severance of Employment, which provides that an employee's "period of employment" shall begin on the date on which "he or she most recently commenced employment…". A straightforward reading of that provision suggests it was intended to deal with circumstances where there is a termination and/or cessation of employment and the employee is subsequently rehired at a later date. The provision ensures that the "clock" for the calculation of the "period of employment" of the rehired employee commences as of the date he/she was rehired (unless the two successive periods of employment were not separated by a period of 13 weeks - Section 8 (2)); thus, avoiding the possibility of the rehired employee receiving credit twice for the same period of service. There is no factual basis in the case at hand to suggest that a GII upon returning to active employment after a lay-off in excess of 35 weeks, is deemed "rehired" or that the employee's employment commences anew upon returning to active employment. Further to this point, Section 8 (1) does not read "the day he or she most recently commenced active employment.

Finally, as noted in Rizzo & Rizzo Shoes Ltd., *supra,* it is a well-established principle of statutory interpretation that, if possible, an interpretation that leads to absurd results should be avoided. Specifically, the Court noted:

> It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra,* an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment. (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render

some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra,* at p. 88).

The acceptance of the Employer's interpretation of the relevant provisions of the ESA would, in my view, potentially lead to, arguably, manifestly unfair and unintended results. For example, consider the scenario of an employee who has more than 25 years of employment with an employer and is, for the first time, laid off from that employment. If that lay-off extended beyond 35 weeks and the employee did not trigger his/her "Section 67 rights" thereby maintaining his/her recall rights under the collective agreement; and then, that employee was subsequently recalled in a timely fashion under the collective agreement, the Employer's interpretation would result in that employee effectively becoming a "new hire" in terms of his/her entitlement to notice of termination/termination pay under the ESA. Such a result would seem to be fundamentally at odds with an intended goal of the notice of termination/termination pay provisions, whereby the amount of notice of termination/termination pay an employee is entitled to increases with the employee's years of service.

In conclusion, therefore, the Employer's position that a GII who has a period of lay-off (non-active employment) in excess of 35 weeks is "deemed terminated" for the purposes of the relevant provisions of the ESA such that the employee's start date for his/her "period of employment" for the purposes of Section 57 of the Act is reset to zero is not accepted.

This Award is issued in Mississauga this 29th day of June 2017.

Brian Sheehan