2-24-1995

Re Maritime Telegraph and Telephone Co and AC & TWU

Innis Christie

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Re Maritime Telegraph & Telephone Co. and Atlantic Communication & Technical Workers' Union

[Indexed as: Maritime Telegraph and Telephone Co. and A.C. & T.W.U., Re]

Canada, I. Christie, Q.C. *February 24, 1995.*

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h PRELIMINARY AWARD concerning arbitrability. Preliminary objection upheld in part.

R.A. Pink and others, for the union.
T. Roane and others, for the employer.

PRELIMINARY AWARD

Union grievance alleging breach of the collective agreement between the parties for the periods November 1 (plant workers), November 15 (operator services) and December 27 (clerical workers), 1992 to October 28, 1995, which counsel agreed was to govern this matter, in that the employer's voluntary separation offer effective May 31, 1994, was unfair and unreasonable and discriminated on the basis of sex, contrary to arts. 2.1 and 4.3. Counsel for the employer made a preliminary objection to my jurisdiction to deal with the voluntary separation offer on either of those grounds.

Counsel for the parties agreed that, subject to the preliminary objection, I am properly seised of this matter, that I should deal first with the employer's preliminary objection and, if it were to fail, that I remain seised after the issue of this award to deal with the grievance on its merits and, following any award on the merits, to deal with matters arising from its application. Counsel agreed that all time-limits, either pre- or post-hearing, are waived.

This union grievance challenges the employer's voluntary separation offer made effective May 31, 1994, on the grounds that by excluding certain groups of employees, which are predominantly female, the employer breached its implied obligation to exercise its management rights under art. 2.1 fairly and reasonably and its obligation under art. 4.3 not to "unlawfully discriminate against an employee for reasons of that employee's ... sex ...". The employer made a preliminary objection that these are not arbitrable issues and the parties agreed that I should deal in this preliminary award with these issues of arbitrability before hearing evidence and argument on the merits of the grievance.

I have not allowed the preliminary objection to the arbitrability of the grievance before me in so far as it alleges discrimination contrary to art. 4.3, but I have allowed the preliminary objection to arbitrability in so far as the grievance alleges breach of any implied obligation of fairness and reasonableness arising under art. 2.1 which bears on the issues raised by this grievance.

I now turn to the facts as I find them at this stage, the legal issues raised by this preliminary objection and my reasons for deciding as I have.

The facts

On March 22, 1994, the employer's board of directors resolved to make a new voluntary separation offer effective May 31, 1994. The details need not be spelled out here, beyond saying that it was very attractive to many employees and it was the same as an offer

made in 1993, except that the separation date was flexible at the employer's option, the offer extended all the way down to a employees with a minimum of two years' service, it offered an actuarially reduced immediate pension to employees within five years of eligibility to receive an unreduced early retirement pension *and* it excluded groups of employees which it was not in the employer's business interest to downsize. In those groups any b employee who voluntarily separated would in any event, according to the employer, have had to be immediately replaced. It is this last element of difference that gave rise to the grievance before me.

Under date of March 25, 1994, Ivan Duvar, chairman of the c board and president of the employer, wrote "to fellow employees", making the voluntary separation offer in the following terms, relevant to the issue here:

> Over the past several year, MT&T has offered voluntary retirement and voluntary separation programs to employees as a way of adjusting our workforce to the requirements of the job. The need to adjust our workforce d to reducing job requirements is continuing. We are, therefore, announcing a Voluntary Separation Offer, effective May 31, 1994.
>
> The offer is unique in two important ways: (1) it is directed to more employees than previously — regular full and part-time employees with two or more years' service are eligible — and (2) the offer is available only where reductions are required. It is essential that we maintain customer service e and operate in an effective manner. There are some areas in the Company that we can do this with a reduced workforce. However, there are also some areas where it is necessary to continue with our existing staff levels. *To meet this need, the following groups of employees are not eligible for this offer*:
>
> - Operators
> f - Senior Assistants in Operator groups
> - Senior C.O. Clerks — Traffic
> - Directory Assistance Administration Clerks
> - Service Representatives
> - Tel Sell Representatives
> g - PhoneCentre Service Representatives
> - PhoneCentre Senior Clerks
> - Customer and Dealer Service Representatives of MT&T Mobility
>
> ... We estimate approximately 150 employees will accept this offer. If it appears that the results will exceed this estimate, it may be necessary to h limit the number of acceptances to avoid adverse impacts on our operations. Should this action be necessary, acceptances will be based on when acceptance arrived in the Benefits group. The final date for acceptance of the offer is April 29, 1994.
>
> Employees accepting this offer will leave the Company on May 31, 1994. In some cases, in order to ensure a smooth transition and minimize the impact

on operations, departments may require an extension of this date. The latest exit date for this program will be November 30, 1994.

(Emphasis added.) a

The nine listed groups fall into three categories: the first four are operators; the next four are clerical, in customer contact positions, and those in the ninth group are also in customer contact positions, but with MT&T Mobility, a separate company to which the collective agreement applies by agreement of the parties. The b employer did not dispute that many of the employees to whom voluntary separation offers were made were in customer contact positions, such as telephone repair people.

In respect of this preliminary objection, Ms Roane, counsel for the employer, called one witness, Raye Billard, formerly manager c pensions and benefits who himself took the voluntary severance offer. He was to give what she referred to as "landscape" testimony. Counsel for the union, Mr. Pink, cross-examined Mr. Billard but no other witness testified. Mr. Billard's testimony is part of the record for purposes of the continuation of this matter to d deal with the merits of the grievance in so far as it alleges breach of art. 4.3.

Mr. Billard verified the following statistics with respect to the exclusion of the operators and some clerical groups from the 1994 voluntary separation offer:

345 employees, or 33%, of the clerical unit excluded from the e offer.

271 employees, or 100%, of the operators unit excluded from the offer.

The clerical unit totalled 1,050 employees, 998, or 95% of them, f female.

The operators unit totalled 271 employees, 257, or 95% of them, female.

The plant (craft) unit totalled 1,192 employees, 38, or 3% of them female.

Females eligible to take the offer:	plant workers unit	38	g
	operators unit	0	
	clerical unit	637	
	managers	405	
		1,080	
Females employed by the employer:	plant workers unit	38	h
	operators unit	257	
	clerical unit	998	
	managers	405	
		1,698	

That is (1,080/1,698), 64% of females employed by the employer were eligible to take the 1994 voluntary separation offer.

a I note that if these calculations are confined to the unionized employees (675/1,293), 52% of females employed by the employer in the bargaining units were eligible to take the 1994 voluntary separation offer.

How does this compare with the percentage of males employed
b by the employer who were eligible to take the offer? There was no testimony on this point and because I do not have the total number of management people, or of males in the management group, I cannot make the first of these same percentage calculations for males employed by the employer. Also I realize that not all of the
c males in the plant unit would have been eligible for the 1994 voluntary separation offer. Moreover, the numbers for the clerical unit as testified to by Mr. Billard do not add up. That is, if there were 1,050 people in the clerical unit and 998 were women, obviously there were 52 men. If there were 637 women in the
d clerical unit eligible then there were 361 women excluded, yet the employer's evidence was that there were only 345 excluded in all! For present purposes I will assume that the 637 number is somewhat overstated and that, as with the women, about two-thirds of the men in the clerical unit were eligible for the 1994 voluntary separation offer. On these assumptions, my calculations
e are:

Males eligible to take the offer:	plant workers unit	1,154
	operators unit	0
	clerical unit (assume two-thirds)	35
		1,189
Males employed by the employer:	plant workers unit	1,154
	operators unit	0
	clerical unit	52
		1,206

f

g That is (1,189/1,206), 98.6% of males employed by the employer in the bargaining units were eligible to take the 1994 voluntary separation offer.

Mr. Billard reviewed the history of voluntary separation offers
h by the employer, in the context of recent technological development. Effective August 1, 1991, the employer made a voluntary separation offer to management personnel only: 75 of 134 persons eligible, or 56%, accepted. Effective November 1, 1991, the employer made such an offer to the craft, or plant workers, bargaining unit only: 33 of 75 eligible, or 44%, accepted. Effective

April 1, 1992, and again May 1, 1993, the employer made voluntary separation offers to all employees with 15 or more years' seniority.

On these four occasions the union was bargaining agent, as it is now, for all three units, plant workers, operators and clerical workers. There were no complaints made or grievances such as this one filed. Mr. Billard testified that, when he came to design the voluntary separation offer which is the subject of this grievance, he was not aware that the union took the view that if such an offer was made to one employee it had to be made to all, so he took no account of that view. However, in cross-examination he agreed that he had no knowledge of the union giving any positive indication that it thought it appropriate or acceptable that the employer had made the November 1, 1991 voluntary separation offers only to members of the plant workers' bargaining unit. He was not a member of management who would have been involved in deciding how to proceed with subsequent voluntary separation offers, including the one at issue here.

Mr. Billard testified that department heads were asked to forecast their personnel needs. The product of this process is contained in a table entitled "Resource Analysis" at the end of Tab 11 of ex. 2, the employer's book of exhibits. On the basis of this and other information, the exclusion of various groups from the voluntary separation offer was discussed at the senior management level. The employee benefit committee of the board of directors formally adopted the exclusions, which were the approved by the board on March 22, 1994.

With respect to the offer which is the subject of this grievance, Mr. Billard testified that he was not aware of any union complaint or grievance against the fact that it allowed the employer to require employees who accepted it to separate at different times, depending on whether the employer needed them to stay on over the transition period, or against the "first come first served" proviso in the offer. He testified that the offer was not made to employees with less than two years' seniority because almost all of them were "skill" hires whom the employer did not want to lose. He was not aware of any union complaint or grievance against the fact that the offer was not made to them.

Similarly, Mr. Billard was not aware of any union complaint or grievance against the fact that the offer categorized employees by years of service, in five-year blocks, in setting the cash payment offer, although these differentiations had been made solely by the employer.

Mr. Billard testified that the employer's pension plan is regulated under the *Pension Benefits Standards Act*, R.S.C. 1985,

c. P-7, by the office of the Superintendent of Financial Institutions and by Revenue Canada Taxation. Copies of the amendments to the employer's pension plan providing for the voluntary separation offer which is the subject of this grievance and accompanying correspondence and forms are in evidence. Not unusually, those agencies are long delayed in replying, but Mr. Billard pointed out that at least neither of them can be said to have found any defect in the amendments. In cross-examination he acknowledged that, of course, not having heard from these agencies at all, he had heard nothing positive about the employer's amendments which preceded this voluntary separation offer.

Mr. Billard made the point that in the fall of 1993 the employer was audited by office of the Superintendent of Financial Institutions. He thought that if there had been anything wrong with the preceding voluntary separation offers the shortcomings would have been brought to the employer's attention.

Finally, Mr. Billard testified that before he left the employer he had been involved in work on the 1995 voluntary severance offer, announced in early December of 1994 to be effective February 28, 1995. He explained that the 1995 offer was virtually the same as the 1994 offer except that, because business needs have changed and new employees have become more experienced, employees with more than two years' seniority in all groups, including operators, are included in the 1995 offer. He was unaware of any person excluded from the 1994 offer who had retired in the interval and thereby lost the opportunity to take advantage of the 1995 offer.

Mr. Billard acknowledged in cross-examination that the cash separation allowance in the 1995 offer was effectively reduced by 10% from the 1994 offer for any employee with less than 30½ years' seniority.

Nowhere does the collective agreement explicitly address voluntary severance offers, and the employer's pension plan, which is entirely employer funded and administered, is not mentioned anywhere in the collective agreement.

I note that included in the booklet containing the collective agreement is a letter to the union from the employer's vice-president finance, dated July 5, 1993, advising that the "Company agrees to change the employee's component of the pension plan survivor option". It appears as the last of the white pages at the start of the booklet all the rest of which white pages are covered by the opening paragraph of the collective agreement, as follows:

> The following eighteen (18) articles and seven (7) appendices of this document are common to and apply to each of the three bargaining units:

Plant Workers, Clerical and Operator Services. [Which are dealt with separately in three sets of coloured pages.]

The effect of this, in my opinion, is that the letter, which is not one of the seven appendices, is there for information and is not part of the collective agreement.

Under date of April 8, 1994, counsel for the union wrote to Donald Farmer, vice-president of the employer, the letter which, the parties have agreed, constitutes *the grievance* in this matter. The relevant parts of that letter state:

> Early Retirement Program — 1994 — Atlantic
> Communication & Technical Workers Union
>
> ... The fact that you have failed to offer this early retirement package to all bargaining unit employees is the aspect which troubles the union. The company, by excluding some nine or so classifications including, but not limited to, operators, Tel-sell representatives, S.R. representatives, etc. has carved out positions which are filled to a large degree by women.
>
> The hiring practice of MT&T in the past has seen that women largely fill the positions which you have decided to prevent from gaining access to the early retirement plan.
>
> Historically, for example, most of your operators have been women. The refusal by MT&T to permit these women to partake in the early retirement package is improper. Furthermore, although we have not yet done all the calculations, it appears the largest majority of the persons holding the classifications which are excluded from the operation of the early retirement package are women. This is clearly discriminatory. Although you never intended to discriminate, the effect of your actions discriminates against these employees because of their sex. This is a violation of the *Canadian Human Rights Act* and of Article 4.3 of the collective agreement ...
>
> In addition, we are of the view that as owners and administrators of the pension plan, you have the obligation to deal fairly and even-handedly with all your beneficiaries. We are of the opinion that you do not have the authority to carve out distinct classifications from the bargaining unit to provide enhanced benefits ... it seems inherently unfair and unreasonable to create distinction at this stage in the relationship.

Under date of April 26th, Mr. Farmer replied:

> ... The current Voluntary Separation Offer is a means of reducing the size of the organization in areas that require such reductions ...
>
> ... the decision to exclude specific groups to whom the offer would be directed was made after a detailed analysis of staffing requirements in all departments. This entailed evaluating the estimated impact on corporate operations in light of projected rates of acceptance of the Offer by various groups of employees.
>
> As with previous offers, the Company has made it available to groups of employees where resulting downsizing is required [and] can be appropriately absorbed. Obviously, it is neither economical nor operationally appropriate to make the offer to specific groups where we know in advance that the result would be a need to hire new employees, incur substantial training costs and adversely affect customer service. Within the clerical group, we estimate

that 90% are eligible for the offer. Indeed the majority of women employed at MT&T have received the Offer ...

I note that in his testimony Mr. Billard pointed out that the 90% figure was erroneous, and should have been 67%. Mr. Farmer's reply continued:

> ... you suggest that we have violated the provisions of the *Canadian Human Rights Act* and Article 4.5 of the Collective Agreement. We categorically reject this suggestion. The offer has been made to both males and females within identified groups with absolutely no discrimination whatsoever on the basis of sex. We similarly reject you [*sic*] allegation ... that there has been "effective discrimination".

Two weeks later, on May 5, 1994, counsel for the employer wrote to counsel for the union giving early notice of the substance of this preliminary objection:

> ... we regard this matter as non-arbitrable and that there is no specific provision of the Collective Agreement that is in fact alleged to have been breached, and it will be our position before any arbitrator who may be appointed that the matter should be dismissed at the preliminary stage of the proceedings.

The final element in the pre-hearing exchanges between the parties which is in evidence and can usefully be set out here flows from the employer's demand for particulars, dated October 6, 1994, which asked:

1. Under which Collective Agreement(s) and under which Articles of those Agreement(s) is the "grievance" being advanced?
2. As you are aware, systemic discrimination occurs when a policy or practice disproportionately disadvantages a person or persons because of their membership in a protected group. Please provide particulars respecting what policy and/or practice you suggest is at the root of "systemic discrimination" of MT&T. Provide particulars respecting *when* those policies or practices were applied and particulars respecting to *whom* and *with what result* those policies/practices were applied.

This was responded to on January 16, 1995. Counsel for the union wrote, confirming the statement in the letter of April 8, 1994, to Donald Farmer, that the grievance against discrimination alleged breach of art. 4.3 of the collective agreement, and advising that the union also alleged violation of "Article 2.1, and in particular the reasonable exercise of the management rights contained therein ...".

Union counsel's letter of January 16th also contains the following:

> ... as you are aware, systemic discrimination does not require any element of intent. With regard to the policies or practices of MT&T which we suggest are at the root of systemic discrimination, we include recruitment, hiring and promotion policies in the so-called non-traditional occupations at MT&T, namely occupations in the Craft Bargaining Unit.

> These policies and practices were long-standing over decades and resulted in significantly lower numbers of women in the Craft Bargaining Unit than in the Operator or Clerical Bargaining Units.
>
> The Voluntary Separation Offer indicated that certain groups of employees [listing those named above] were not eligible for it ... We would formally request that the Company provide the Union with [a breakdown of the percentage of male and female employees in each of the three bargaining units and excluded groups, showing part-time and full-time status and seniority].

The employer's counsel responded on January 23rd asking, among other things, for particulars of the policies referred to "If (as I understand it), it is your contention that systemic discrimination prevented women from obtaining jobs in the Craft Unit [or men from obtaining jobs in the excluded classifications] ...".

The issues

At the hearing I asked Mr. Pink, counsel for the union, directly and explicitly, if it was any part of the union's case in this matter that the employer was, or historically had been, in breach of art. 4.3 in its hiring practices. His answer was "no". The employer's hiring practices, he said, were simply background; the basis upon which the gender mix of the various employee groups and bargaining units had been created. He confirmed my understanding that the union's allegation of discrimination is based on the differential impact which, it alleges, the voluntary separation offer of 1994 had on women in those groups and bargaining units, taking the employee population as it was, for whatever reason, when the offer was made.

If this matter had proceeded directly to the merits, the issues would have been whether (on the facts as found on all of the evidence, much of which, presumably, is not yet before me) the employer's voluntary separation offer of 1994 was in violation of either or both: (i) "Article 2.1, and in particular the reasonable exercise of the management rights contained therein ..." and (ii) art. 4.3, although the employer never intended to discriminate, because the effect of its actions discriminated because of their sex against female employees in the groups excluded from the offer.

If it were found that the 1994 offer violated the collective agreement, there would be an issue of damages, which the union submits can easily be measured by determining what those who took the 1995 voluntary separation offer lost by not having been able to take advantage of the 1994 offer.

There would also be an issue of whether, because it failed to grieve or object to the employer's earlier voluntary separation

offers, the union is estopped from relying on the breaches to the collective agreement which it alleges in this grievance.

a The employer's preliminary objection is that neither of the first two issues is arbitrable. *The issues here and now, therefore, are*:

(i) whether art. 2.1, properly interpreted, provides a basis upon which the employer's voluntary separation offer of 1994 could be held to be in violation of an implied obligation on the b employer to exercise its rights and powers under that article reasonably;

(ii) whether discrimination of the kind alleged here could constitute a violation of art. 4.3.

c *Decision*

(i) *Article 2.1; implied obligation on the employer to exercise its rights and powers reasonably*

The structure of this collective agreement is unusual in that it d consists of four parts; white pages that apply to all three of the bargaining units on behalf of which the union bargains with the employer and blue, orange and green pages that apply only to each of the respective bargaining units. Only the white pages are relevant here because that is where both arts. 2.1 and 4.3 appear, e as does art. 17. Article 2.1 of the collective agreement provides:

> MANAGEMENT RIGHTS — 2
>
> 2.1 The Union recognizes and agrees that the Company has the right and authority to operate and manage its assets and business, and direct the working forces of the Company, and to hire, suspend, demote, transfer, lay-f off or discharge employees for proper and sufficient cause, and these rights and authority are abridged or limited only by the express provisions of this agreement.

Counsel for the union submitted that there is an implied obligation on the employer to exercise these management rights g and powers "reasonably" and that it includes a duty to act "equitably" between members of the bargaining unit, or bargaining units, with respect to the pension plan; and that one of the principal equitable duties of the trustee of a pension plan is to be even-handed between the beneficiaries of the plan.

h Counsel for the employer submitted that there is no such "floating" duty to act fairly or reasonably, which attaches to the management rights clause in a collective agreement and gives an arbitrator jurisdiction to deal with matters not addressed by the collective agreement, such as the pension plan here.

Counsel for the employer also invoked arts. 17.1 and 17.4:

> ARBITRATION — 17
>
> 17.1 Whenever a difference relating to the interpretation, application, administration, or alleged violation of this agreement arises between the Company and Union either party may, after complying with the provisions as set forth in the grievance procedure, submit the matter to arbitration.
>
> . . . . .
>
> 17.4 The arbitrator shall not have any power to alter or change any of the provisions of this Agreement, or to substitute any new provisions for any existing provisions thereof, and in reaching his [*sic*] decision it [or *sic*] shall be bound by the terms and provisions of the Agreement.

I agree with counsel for the employer that the pension plan is not part of the collective agreement between these parties. As I pointed out above, even the letter with respect to the "survivor option", which contains the only mention in the collective agreement booklet of the pension plan, is not, in fact, part of the collective agreement. Indeed, counsel for the union did not argue that the pension plan is part of the collective agreement. His submission was, rather, that the administration of the pension plan and the voluntary separation offers are part of the employer's operation and management of its assets and business under art. 2.1. In any event, my finding is that the pension plan is not part of the collective agreement.

The first questions are whether there is a duty on the employer under art. 2.1 to exercise its management rights reasonably and, if there is, whether that duty includes a duty to act even-handedly between beneficiaries under the pension plan here. Only on the basis of positive answers to both of those questions can I reach the question on the merits; whether the employer's voluntary separation offer of 1994 was in violation of that article because it treated the excluded groups of beneficiaries differently.

As submitted by counsel for the employer, my jurisdiction as arbitrator is limited by art. 17.1. I have no authority under this collective agreement or any legislation, except s. 60 of the *Canada Labour Code*, R.S.C. 1985, c. L-2, which is not relevant to this issue, to do more than rule on a difference relating to "the interpretation, application, administration, or alleged violation of this agreement". I do not think art. 17.4 adds anything, because I have not been asked by counsel for the union to alter or change any of the provisions of this agreement, or to substitute any new provisions, but simply to interpret it. Of course, interpretation may well involve giving effect to implications arising from the language used by the parties.

Along with a number of arbitration awards, counsel for the employer cited three decisions of the Ontario Court of Appeal and two of the Divisional Court of the Ontario General Division, which, in her submission, establish that there cannot be said to be a general implied duty on the employer under art. 2.1 to exercise its management rights reasonably. Without accepting that view of the law in Ontario, relying on two recent decisions of the Nova Scotia Court of Appeal, counsel for the union submitted that the law in Nova Scotia is that there is such a general implied duty and, specifically, that it arises under art. 2.1 of this collective agreement. I turn now to a consideration of those authorities.

In para. 4:2320 of *Canadian Labour Arbitration*, 3rd ed., looseleaf, Brown and Beatty state that "arbitrators have insisted that management act fairly, reasonably and in good faith in making decisions about . . ." 22 different subject-matters, each of them amply footnoted. "However", the learned authors state, "this obligation does not extend to matters not covered by the collective agreement", citing, first, the award of arbitrator M.G. Picher in *Re Canadian Broadcasting Corp. and N.A.B.E.T.* (1992), 28 L.A.C. (4th) 75, a matter, like this one, involving issues arising in connection with retirement incentives which were not part of the collective agreement.

The award of arbitrator Swan in *Re Ontario Hydro and C.U.P.E., Loc. 1000* (1994), 40 L.A.C. (4th) 135, which also deals with an offer of separation incentives, is also very persuasive authority, at pp. 150-56, for Brown and Beatty's exception to the general proposition.

The grievor in the *C.B.C.* arbitration had elected to take early retirement and filed two grievances to the effect that he had been arbitrarily and discriminatorily denied the opportunity to participate in an incentive plan offered to employees of the corporation shortly thereafter. In dealing with the grievance most relevant here, which had been filed while the grievor was still an employee, arbitrator Picher states, at p. 85:

> It is well established that grievances relating to the application of benefit plans are arbitrable only to the extent that the plan can be said to be part of the collective agreement.

While arbitrator Picher does not at that point deal explicitly with the issue of an implied obligation on the employer to act reasonably, this amounts to saying that there was no implied obligation not to act arbitrarily or discriminatorily in the administration of the retirement incentive plan, and the result of this

conclusion was that the arbitrator had no jurisdiction to deal with those questions. This would apply even more strongly to an implied obligation to administer the retirement incentive plan reasonably, because implied limitations not to act arbitrarily or discriminatorily are more readily implied than are reasonableness limitations. I note, too, that on p. 82 arbitrator Picher recites the fact that the union had submitted that the employer's decisions were subject to an implied requirement of reasonableness, and had referred the arbitrator to *Re Council of Printing Industries of Canada and Toronto Printing Pressmen & Assistants' Union, No. 10* (1983), 149 D.L.R. (3d) 53 83 C.L.L.C. ¶14,050, 42 O.R. (3d) 404 (C.A.) (leave to appeal to S.C.C. refused [1983] 2 S.C.R. vii, 52 N.R. 308*n*).

Council of Printing Industries is the second of the three Ontario Court of Appeal decisions cited to me by counsel for the employer. The first, upon which she principally relied, was *Re Metropolitan Toronto Board of Com'rs of Police and Metropolitan Toronto Police Assn.* (1981), 124 D.L.R. (3d) 684, 81 C.L.L.C. ¶14,116, 33 O.R. (2d) 476 (leave to appeal to S.C.C. refused D.L.R. and O.R. *loc. cit.*, 39 N.R. 449*n*). There, in an oral judgment for the court, Houlden J.A. held that the arbitrator whose award was under review had erred in concluding that a grievance could be founded on a failure of the employer to exercise fairly and without discrimination the rights conferred on it by the management rights clause. His Lordship stated, at p. 688:

> When the arbitrator determined that there was no provision in the collective agreement that governed the taking of inventory and the distribution of overtime, she should have ruled that she had no jurisdiction to deal with the dispute because of an alleged improper exercise of management rights.

A year later in the *Council of Printing Industries* case, cited above, a differently constituted Ontario Court of Appeal reached what some consider to be an irreconcilable decision. The arbitrator there had dealt with a grievance against a management decision classifying certain employees [25 L.A.C. (2d) 88 (Adams)]. He had concluded that the exercise of that function seriously affected seniority rights and that although management's decision-making powers in respect of classification were not expressly limited by the collective agreement, impliedly they had to be exercised in good faith, without discrimination and in a reasonable non-arbitrary way. Relying on *Metropolitan Toronto Board of Com'rs of Police*, the Divisional Court had quashed the award [unreported], but the Court of Appeal restored it, MacKinnon A.C.J.O. stating at p. 59, simply:

> The majority [of the arbitration board] concluded, although many words were used, that the mandatory obligation to permanently classify must be done in *bona fide* fashion ... We are, of course, not called on to review that conclusion, if we conclude that [it was] a reasonable interpretation of the governing article ...

In the third case cited by counsel for the employer, *Metropolitan Toronto (Municipality) v. C.U.P.E.* (1990), 69 D.L.R. (4th) 268, 74 O.R. (2d) 239, 39 O.A.C. 82 [leave to appeal to S.C.C. refused 72 D.L.R. (4th) vii, 41 O.A.C. 268*n*, 120 N.R. 192*n*] (the *Sirens* case), the Ontario Court of Appeal, yet again differently constituted, restored the award of an arbitrator who had allowed a grievance to the effect that an employer rule was not reasonable. Both the award and the decision of Tarnopolsky J.A., for the court, attached great significance to the fact that the rule grieved against had disciplinary consequences and could not have been breached without calling into play the "work now grieve later" principle.

Counsel for the employer also put before me two relatively recent decisions of the Ontario Divisional Court, in both of which the majority appears to favour what might be called a strict *Metropolitan Toronto Board of Com'rs of Police* approach: *Sisters of St. Joseph of Diocese of London v. Service Employees Union, Loc. 210* (1992), 89 D.L.R. (4th) 189, 52 O.A.C. 353, 31 A.C.W.S. (3d) 991, and *Stelco Inc. v. U.S.W.A., Loc. 1005* (1994), 111 D.L.R. (4th) 662, 94 C.L.L.C. ¶14,026, 17 O.R. (3d) 218.

I do not consider it necessary to set out here a detailed consideration of these cases, but I must say, with respect that I disagree with the analysis of Moldaver J. in the *Stelco* case, at pp. 672-3. Merely because management has exercised a right, whether it arises under the management rights clause or elsewhere, *bona fide*, in the sense of "honestly", does not necessarily mean that it will legitimately override other rights under the collective agreement. In interpreting a collective agreement to determine which rights were intended to prevail the arbitrator is not "effectively [taking] over the management of the company". He or she is assessing the employer's interpretation, application and administration of the collective agreement as is the arbitrator's function.

Referring principally to *Metropolitan Toronto Board of Com'rs of Police* and *Council of Printing Industries*, Brown and Beatty say in para. 4:2320, at p. 4-40 (April, 1995), footnote 26:

> Some arbitrators have attempted to reconcile the conflicting arbitral and judicial authority in this area by holding that there is no implied requirement

that discretion pursuant to a management rights clause must be exercised fairly or reasonably, but that where a substantive clause in the agreement endows management with discretion over a particular matter, the obligation arises to administer its duties in this area in a fair and reasonable manner.

In my view this does reconcile what the various panels of Ontario Court of Appeal have said, but, as according to the learned authors other arbitrators have concluded, I think it states an approach that fails to take adequately into account the importance of the words of the particular collective agreement under consideration.

What then of the decisions of the Nova Scotia Court of Appeal, which, according to counsel for the union, are authority for the proposition that in Nova Scotia there is a very specific state of the law, which requires management to act reasonably in the exercise of powers under a management rights provision in any collective agreement?

In the first case, *Nova Scotia (Civil Service Commission) v. N.S.G.E.U.* (1993), 123 N.S.R. (2d) 217, 40 A.C.W.S. (3d) 896 (C.A.) [*Wexler*], the court considered an appeal against dismissal of an application for judicial review. The adjudicator had held that the commission had unreasonably denied the grievor's request for a one-year leave of absence without pay. Speaking for the court, Freeman J.A. stated, at p. 221:

[16] Article 26.01 gives the right to grieve to "an employee who feels that he has been treated unjustly or considers himself aggrieved by any action of lack of action by the employer."

[17] Thus an employee has the right to grieve the refusal of special leave under article 19.01. The employee would have no basis for feeling unjustly treated or aggrieved if the employer's right to refuse leave under article 19.01 were absolute and arbitrary. Therefore it is necessary to infer, from reading the collective agreement as a whole, that article 19.01 must include an implied term that the employer's right to refuse leave must be exercised reasonably, or justly, and not arbitrarily ...

. . . . . .

[19] The union cited the following Ontario cases in support of the right of arbitrators to imply a duty of reasonableness in the exercise of rights under a collective agreement ... [*Council of Printing Industries* and the *Sirens* case, cited above, and *Wardair Canada Inc. v. C.A.L.F.A.A.* (1988), 47 D.L.R. (4th) 663, 63 O.R. (2d) 471, 25 O.A.C. 52 (Div. Ct.) [leave to appeal to C.A. granted March 28, 1988]].

[20] I would therefore find against the employer on the first ground of appeal; the adjudicator met the standard of correctness in determining, in effect, that there was an implied term in article 19.01 that the employer must act reasonably; such a finding interprets the collective agreement but does not amend it.

Clearly, this amounts, simply, to a finding that an implied requirement of reasonableness is part of the collective agreement provision at issue there.

In the second, a case between these same parties, *Maritime Telegraph and Telephone Co. v. A.C. & T.W.U.* (November 15, 1994, C.A. No. 102043, unreported [since reported 119 D.L.R. (4th) 634, 51 A.C.W.S. (3d) 660 (N.S.C.A.)]), the court, similarly constituted, again considered an appeal against dismissal of an application for judicial review. The arbitrator had allowed a grievance against work assignment allegedly across bargaining unit lines. The issue was whether in doing so management had exceeded any limitation on its right to assign work under the management rights clauses in the parties' craft or clerical collective agreements, predecessors to the collective agreement before me, which had precisely the same words as art. 2.1. The arbitrator had ruled that there were limitations, throughout both collective agreements, on management's right to assign what had been craft bargaining unit work across bargaining unit lines.

Freeman J.A., again speaking for the court, ruled that the arbitrator had exceeded his jurisdiction by imposing an implied limitation on the employer's management right to assign work in the face of art. 5.1, the predecessor to art. 2.1, which concluded, as art. 2.1 now does: "... these rights and authority are abridged or limited only by the express provisions of this Agreement".

His Lordship stated al p. 30 [p. 655], "An inference drawn from an agreement as a whole is not an express provision, although it may be an implied term", and at p. 32 [p. 656]: "By purporting to amend the agreement contrary to art. 25.4 [art. 17.4 in the collective agreement before me here] he exceeded the jurisdiction defined by the collective agreement."

Then, in the final paragraph of his reasons, at pp. 32-3 [p. 656], Freeman J.A. wrote the words upon which counsel for the union relies here with the tenacity of a drowning man clinging to a life preserver:

> ... any proprietary rights of the craft bargaining unit ... must be subject to the rights of management to manage the undertaking and assign work pursuant to art. 5.1. In making any reassignment of work management is bound to do so in good faith, for valid business purposes, and in a manner which was neither discriminatory nor arbitrary. *In addition, there is an implied term in every collective agreement that an employer must act reasonably: Nova Scotia (Civil Service Commission) v. N.S.G.E.U. (1993), 123 N.S.R. (2d) 217, 40 A.C.W.S. (3d) 896 (C.A.).*

(Emphasis added.)

In the context of this arbitration, all I need say is that the management rights clause, like every other provision of the collective agreement, must be interpreted in the context of the document as a whole, in an attempt to give effect to what the parties must be taken by their words to have intended.

Broadly stated powers in management rights clauses must be interpreted in light of both provisions establishing union and employee rights and more specific provisions granting decision-making powers to management, which may carry implied requirements of reasonableness, fairness and the like. In the absence of clear words to the contrary, it is also legitimate to infer that the parties intended to limit general management rights, certainly by the requirement that they be exercised in good faith and without illegal discrimination, and possibly by the more restrictive requirements that they not be exercised arbitrarily, or even that they be exercised reasonably or fairly. Whether the grant of a specific power in a management rights clause itself carries implied limitations is also a matter of interpretation of the particular words.

Mr. Justice Freeman's statement that there is an implied term in every collective agreement that an employer must act reasonably, citing the *Wexler* case, cannot be taken, as counsel for the union would have it as establishing some supervening principle peculiar to Nova Scotia law, or as a limitation on art. 2.1 of this collective agreement specifically. His Lordship had just held that on the words of art. 2.1, the employer's right to reassign work could not be limited by an implied obligation to respect the integrity of the bargaining unit; and what the court had recognized in *Wexler* was a not unusual implied limitation of reasonableness on a specific management decision-making power. Undoubtedly, there are such implied terms in every collective agreement.

In my opinion, the whole of His Lordship's statement as I have quoted it above, while it is *dicta*, is supportive of the approach to the interpretation of management rights that I have just articulated.

However, what is in issue here is a management decision on a matter apparently intentionally not addressed by the collective agreement, and which does not impact on union or employee rights under the collective agreement. It is, therefore, consistent with that approach to find that I have no jurisdiction over this matter on the basis of art. 2.1. I am unable to agree that, in principle or on authority, it is within the jurisdiction of a grievance arbitrator under the collective agreement to assess the reasonableness or fairness of such a management decision. That is the point made by

arbitrator Picher in *Re Canadian Broadcasting Corp. and N.A.B.E.T.*, cited above, and that is what determines this issue.

The parties here are well aware of the pension scheme and familiar with amendments to it in the context of voluntary separation offers, but they chose not to include any of those matters in the collective agreement. They chose, in effect, not to bring those matters generally within the jurisdiction of a grievance arbitrator. I echo the words of arbitrator Picher on pp. 86-7, where he said:

> The parties to the instant collective agreement are sophisticated in the ways of collective bargaining ... They have ... experienced a number of substantial work-force reductions [and] ... gained ... familiarity with the concept of rationalizing the work-force by a number of means, including early retirement incentives ...
>
> ... there can be little doubt that the union bargained at all times in the knowledge that the benefits plan was outside the terms of the agreement. If it was the union's desire to make the plan, or any part of it, enforceable through the grievance procedure, it remained open to it to negotiate such a term.

For this reason, I sustain the employer's preliminary objection to my jurisdiction to deal with the grievance on the first ground put forward. I agree that the employer had no implied obligation under art. 2.1 to be "reasonable" in making its voluntary separation offer effective May 1, 1994, because that offer was not made under the collective agreement. I need not consider whether an implied obligation to be reasonable would include an obligation to act in accordance with the principles of equity or to make the same offer to all beneficiaries of the employer's pension plan.

(ii) *Could discrimination of the kind alleged here constitute a violation of art. 4.3?*

Article 4.3 of the collective agreement provides:

> 4.3 The Company and the Union agree that they will not threaten, intimidate, or unlawfully discriminate against an employee for reasons of that employee's pregnancy, age, marital status, disability, sex, sexual orientation, race, creed, colour, national origin, political affiliation with a legitimate political party of [*sic*] for exercising any rights under this Collective Agreement. The parties also agree that no employee should be subjected to harassment.

The discrimination alleged here is that, although the employer never intended to discriminate, the effect of its actions discriminated, because of their sex, against female employees in the groups excluded from the voluntary separation offer effective May 31, 1994. It must be borne in mind that in dealing with this

preliminary objection, the question is not whether the employer breached art. 4.1, but whether that issue is arbitrable.

This question cannot be answered, as the first one was, by saying that the voluntary separation offer was not under the collective agreement. The employer has agreed with the union in art. 4.1 that it will not "unlawfully discriminate against an employee for reasons of that employee's ... sex ...". On the face of it that commitment is not limited to activities otherwise covered by the collective agreement, nor is there any reason to think that the parties intended it to be so limited. As counsel for the union said, parking is not covered by this collective agreement, but if the employer made employee parking available to men and not to women a grievance would surely lie under art. 4.1.

In this context, counsel for the employer cited the awards of arbitrator Swan in *Re Ontario Hydro and C.U.P.E., Loc. 1000, supra*, and arbitrator Bendel in *Re Blue Line Taxi Co. and R.W.D.S.U., Ontario Taxi Union, Loc. 1688* (1992), 28 L.A.C. (4th) 280. In my view, neither award suggests any different conclusion on this point.

Like this case, *Ontario Hydro* involved special retirement incentives in the context of downsizing. The allegation of discrimination there was that union members had been given less information than other employees and were thereby disadvantaged in making their the severance incentive program. Counsel for the employer drew my attention to arbitrator Swan's comments at pp. 145-6 where he says:

> ... the few arbitrators who have dealt with claims that a "no discrimination because of union membership" clause prohibits an employer from establishing different (in the sense of "better") terms and conditions of employment for persons not covered by a collective agreement ... have rejected that argument ...
>
> . . . . .
>
> The very essence of collective bargaining is that such differences will be the subject of negotiation separately in respect of each bargaining unit, and of corporate policy in respect of non-represented employees.

Whether this would be so in the case of sex discrimination is not addressed, but in any event the point being made by arbitrator Swan seems to me to be one that goes to the merits here, not to the issue on this aspect of the employer's preliminary objection.

Blue Line Taxi is about the first ground of the grievance here, the implication of limitations on management rights, not this one; although one of the limitations the union there sought to have the arbitrator imply was that there could be no discrimination. Here, of course, the parties have deliberately, expressly and clearly

prohibited unlawful discrimination, thereby making it a matter of collective agreement administration as well as public law.

In other words, the answer to this second question, "Could discrimination of the kind alleged here constitute a violation of art. 4.3?", lies in the words of the collective agreement itself. On their plain meaning, in this context, there is no basis to conclude that the parties could not have intended the words "unlawfully discriminate" to include any actions that could constitute unlawful discrimination. Exactly what those words mean here, indeed whether or not they include unintentional adverse effect or systemic discrimination, are matters that need to be determined in dealing with the merits of this grievance; but it is clearly within my jurisdiction as arbitrator under this collective agreement to make those determinations.

Whether, on all of the facts, the employer's voluntary separation offer of May 31, 1994, constituted "lawful discrimination", whatever that means in this collective agreement is also to be determined in dealing with the merits, and is clearly within my jurisdiction.

Whether or not, and in what ways, a collective agreement arbitrator within federal labour jurisdiction can apply the *Canadian Human Rights Act* is also a matter for the merits, if it is relevant at all. The situation here is quite different from that which faced arbitrator Jackson in *Re Haldimand-Norfolk Police Services Board and Haldimand-Norfolk Police Assn.* (1993), 36 L.A.C. (4th) 246, where the collective agreement contained no express prohibition of unlawful discrimination.

In concluding that this is a matter within my jurisdiction, and in therefore denying the employer's preliminary objection on this ground, I am not, of course, expressing any opinion on the likely success of the grievance. This may seem obvious, but I make it explicit because it seemed to me that the submissions by counsel for the employer on this ground of objection to my jurisdiction were largely to the effect that there could not be said to be unlawful discrimination here. I have simply not addressed that question, and could not do so without hearing all the evidence and full argument.

Estoppel

Counsel for the employer also submitted that the union is estopped from objecting to the 1994 voluntary separation offer because it did not file a grievance or otherwise object to the employer's earlier voluntary separation offers, although they too

made distinctions between different categories of employees and impacted on them differently.

I have set out the evidence relevant to that point in Mr. Billard's testimony, but I do not think this submission by the employer goes to jurisdiction. It is not really part of this preliminary objection and should not be disposed of here.

Conclusion and order

For these reasons, as I stated at the outset, I allow the preliminary objection to arbitrability in so far as it alleges breach of any implied obligation of reasonableness arising under art. 2.1 which bears on the issues raised by this grievance, but I dismiss the preliminary objection to the arbitrability of the grievance before me in so far as it alleges discrimination contrary to art. 4.3.

I will reconvene the hearing in this matter at the request of either of the parties, to hear evidence and argument relevant to the allegation in the grievance that the employer's voluntary separation offer effective May 31, 1994, breached art. 4.1 of the collective agreement.