SIGNIFICANT DAMAGES AWARDED TO UNION FOR EMPLOYER'S FAILURE TO NOTIFY AND CONSULT PRIOR TO CONTRACTING OUT

Arbitrator Susan Stewart issued an award dated April 26, 2010 finding that the City of Toronto had violated its collective agreement with CUPE Local 79 by failing to notify and consult with the Union prior to contracting out certain work. The arbitrator also awarded damages which amounted to approximately $20,000.00.

The City of Toronto challenged the decision in Court. The Court has just released its decision dismissing the challenge.

Copies of both the arbitration decision and the Court decision are attached.

IN THE MATTER OF AN ARBITRATION

Between;

THE CITY OF TORONTO ("The City")

AND

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79

BEFORE: S.L. Stewart, Arbitrator

Policy Grievance – Contracting Out

APPEARANCES:

For the Union: M. Kronick
For the City: I. Solomon

The hearing in this matter was held in Toronto, Ontario on June 9, 2009, January 14 and March 9, 2010

AWARD

The grievance before me is a policy grievance, filed on January 24, 2006. The grievance claims that the City has contracted out bargaining unit work of the Inspector-Municipal Construction position. At issue between the parties was whether there has been a contracting out and, if so, the appropriate remedy. There was no objection to my jurisdiction to hear and determine the grievance.

The concern giving rise to the grievance was set out in a letter dated January 16, 2006, from Ms. A. Dembinski, President of CUPE 79, the relevant portion of which states:

> Local 79 has learned that the City of Toronto is contracting out work that is performed by our members working in the position of Inspector-Municipal Construction (formerly known as Contract Service Inspector).
>
> These Inspectors are involved in applications for service connection (i.e. water service or drains) for both Industrial Commercial Institutional (ICI) and residential construction projects. They meet onsite with applicants and/or contractors and review the construction plans to ensure that they conform to City of Toronto specifications and regulations. The Inspectors also monitor construction while it is underway to ensure that it is properly carried out.
>
> As previously stated, the Inspectors have always performed these duties for both commercial and residential projects. However, Local 79 has learned that the responsibilities for residential projects have recently been contracted out. Under the City's new process, construction contractors have assumed the responsibilities of ensuring that residential project plans meet City standards. This is explicitly stated in Contract No. 06TE-301WS, Schedule B, Section 3, Special Specifications.

> This is clearly a case of contracting out our members' work. It is a violation of our Collective Agreement, which requires the City to notify Local 79 before any work performed by our members is contracted out.
>
> ...

The provision of the Contract that Ms. Dembinski's letter refers to contains the following provision:

> For residential servicing applications, the Contractor will be responsible to contact the applicant directly to confirm on-site with his designee, the exact location, alignment and grade required at the street line before proceeding with the service installation(s)/connection(s).

The City manager, Ms. S. Hoy, responded to the Union's concern by letter dated May 3, 2006, the relevant portion of which reads as follows:

> You wrote to me indicating that you believe that the City is contracting out work that is performed by your members working in the position of Inspector – Municipal Construction (formerly known as Contract Service Inspector). The installation of new residential and Industrial, Commercial, Institutional (ICI) water and sewer connections have always been done by contractors. None of this work has ever been done by Local 79 members. The required designs, tendering, administration, management and inspection of the various works have always been done by City staff (Mangement, Local 416 and Local 79) and it has not in any way been contracted out.
>
> In the former City of Toronto a "pre-construction" meeting usually took place between the applicant/owner/builder for residential and ICI Services and the City (usually an inspector) to determine the location the applicant wanted the service connection installed by the City contractor. This information was then passed on to the City contractor for construction. The practice was not in place anywhere else in the City of Toronto.
>
> Therefore in 2006 the Toronto Water District Operations

Contracts/Processes were harmonized and, effective January 1, 2006, the following procedure was implemented.

i) Continue to have pre-construction meetings with the builder, applicants and/or owners and the City and the City Contractor for all ICI applications.

ii) Discontinue the pre-construction meeting for residential servicing (routine work, standard depth, sizes, etc.). The builder/owner/applicant is now requested to place a stake in the ground, at street line, indicating the location the new services are to be installed by the City contractor.

The role of the Inspector, Municipal Construction is to inspect and monitor construction and maintenance work of contractors engaged for municipal infrastructure contracts for comformance to specifications, contract agreements/drawings or safety standards on contracts and locations as determined by the Supervisor of Contract Services.

In conclusion, we have not contracted out any work now performed by your members.

The provision of the Collective Agreement that is directly in issue is Article 23, which states as follows:

Notice of Contracting Out

23.01 Prior to contracting out any work now performed by employees, the City shall, where practicable, provide eighty (80) calendar days written notice to Local 79 and, where Council approval is being sought, provide said notice prior to the Division concerned forwarding its final recommendations regarding the contracting out to the appropriate Committee of Council. Such notice shall be for the purpose of allowing Local 79 to make any representations it wishes to the Division involved and the appropriate Committee of Council. Any representations shall be made promptly and in any event within eighty (80) days of the giving of such notice. The written notice pursuant to the above shall contain an invitation from the Division involved to meet within ten (10) working days for the purpose of discussing the proposed contracting

> out. In addition the Division shall upon the request of Local 79 provide cost information, the reasons that have led to the decision to recommend the contracting out of the work and any other pertinent Divisional information with respect to the proposed contracting out to Local 79.

While initially concerns with respect to the ICI sector as well as the residential sector were raised, the Union advised that in this proceeding it sought only to advance a claim in relation to the residential sector. To a large extent, the relevant facts were not in dispute. As Ms. Hoy's letter acknowledges, in the former City of Toronto, a pre-construction meeting to determine the location of service connections was attended by a CUPE member in the position of Inspector-Municipal Construction.

Mr. S. Candelora testified on behalf of the Union. Mr. Candleora is an Inspector and he testified regarding his involvement in pre-construction meetings to deal with residential service installations prior to January, 2006. He testified that these duties were primarily performed by Mr. R. Zippolli, who is now an acting supervisor. Mr. Candelora performed these duties when Mr. Zippolli was on vacation or away from the workplace for another reason. On the work order issued by the City, an applicant for water or drain installation would be directed to contact Mr. Zippolli to arrange for a site inspection. Mr. Zippolli's name and contact information was preprinted on the form. Mr. Candelora testified that Mr. Zippolli was responsible for scheduling those

appointments, which would be held with the homeowner and the homeowner's contractor. The City's contractor would not be in attendance. According to his testimony, the meetings would take one to two hours each. In order to facilitate these duties, Mr. Zippolli was assigned only one crew, whereas other inspectors would have more crews. At the meetings the service would be located and a sketch prepared, showing where the connection would be and where the break in the sidewalk would be located. According to Mr. Candelora, locating was the time consuming aspect of the meeting. The information obtained by the Inspector at the meeting would be utilized to determine the cost of the service.

The job profile for the Inspector Municipal Construction position contains the following summary:

> To inspect and monitor construction and maintenance work of contractors engaged for municipal infrastructure contracts for conformance to specifications, contract agreements/drawings and safety standards.

Included in job functions is the following item:

> Attends pre-construction and job site meetings to discuss progress, resolve problems (e.g. completion dates, finalization, non-compliance). Liases with general public, contractors, consultants utilities, city staff and other agencies.

Mr. F. Trinchini, Manager, District Contract Services, testified on behalf of the City. Mr. Trinchini has held his current position since

January 1, 2005. He testified that upon assuming the position he looked at ways of harmonizing practices within the four districts, with a view to consistency and economy. Toronto/East York, unlike the other three districts of Etobicoke/York, North York and Scarborough, had an estimate process for site services. The other three districts dealt with site services on the basis of a flat rate. It was determined that a flat rate process would be implemented in Toronto/East York as well. Mr. Trinchini testified that with the adoption of the flat rate, there was no need for the mapping out of the location. The pre-construction meeting with the City Inspector was discontinued, with the City contractor meeting with the homeowner to deal with issues of service location, consistent with the practice in the other three areas. As previously indicated, prior to January 1, 2006, the City contractor would not be in attendance at the meeting. Mr. Trinchini estimated that when the Inspector attended the pre-construction meeting his time was about equally divided between the locating and mapping functions and that the entire meeting took about an hour. He estimated that approximately 275 of these meetings a year took place before they were abolished. Mr. Trinchini noted in his testimony that inspection of the final work of the City contractors by the Inspectors continues and that there has been an increase in the number of Inspector positions.

It was the Union's position that the evidence clearly established that there has been contracting out in this instance. Ms. Kronick referred to the provision of the Contract that is referred to in Ms. Dembinski's letter of January 15, 2006, and submitted this assignment to the contractors clearly falls within the ambit of "any work" as contemplated by Article 23.01. Accordingly, in her submission, notice and an opportunity for consultation must be provided in accordance with that provision. In addition to a declaration, the Union seeks a cease and desist order, a direction that the notice and consultation contemplated by Article 23.01 take place, and damages.

It was the Employer's position that there was no contracting out as contemplated by Article 23.01. In the alternative, Mr. Solomon argued that in the event that I find that a residential pre-construction meeting function, as he characterized it, still exists, it is only the locating function that continues to exist. That function, in his submission, is not work within the meaning of Article 23.01. Rather, in his submission, it is merely a task or duty, and in any event, it involves matters incidental to the core work of the Inspectors, which has been performed by contractors in the three districts other than Toronto/East York. Mr. Solomon further argued that in the event that I were to find a violation of the Collective Agreement, the appropriate remedial response is a declaration.

I will turn first to the issue of whether there has been a contracting out of "any work now performed by employees" within the meeting of Article 23.01. In the course of their submissions on this issue, counsel referred me to the following cases: City of Toronto and CUPE Local 79 (unreported decision of D.H.Kates dated June 13, 1994), Drug City and RWDSU Local 414 (1984), 15 L.A.C. (3d) 368 (Adams), York Federation of Students and CUPE, Local 1281 (2004), 132 L.A.C. (4th) 444 (Keller), Government of British Columbia and BCGEU (1990), 14 L.A.C. (4th) 309 (Chertkow), Via Rail Inc. and I.A.M. (1993), 35 L.A.C. 4th 267 (Frumkin), Ottawa-Carleton (Regional Municipality) and CUPE, Local 503 (1989), 9 L.A.C. 4th (Thorne), Monarch Fine Foods and Milk and Bread Drivers et al, Local 647 (unreported decision of S. Stewart dated September 8, 1989), Sunnybrook Health Sciences Centre & SEIU Local 777 (1997), 63 L.A.C. (4th) 227 (Goodfellow), Weyerhauser Canada Ltd. and CEP Local 1120 (unreported decision of W. Hood dated May 13, 1998), Veachvilime Ltd. and CEP, Local 3264 (19950, 39 C.L.A.S. 5 (Samuels), Cami Automotive Inc. and CAW, Local 88 (1998), 53 C.L.A.S. (Brent).

I agree with Mr. Solomon's submission that the elimination of the estimate system in Toronto/East York resulted in a situation where certain functions that had been carried out by Inspectors at pre-construction meetings were no longer performed. The City is, of course,

entitled to find efficiencies and streamline operations, which may include the elimination of certain functions. While the adoption of the estimate system did eliminate certain functions, the location function remains, and it is now performed by the contractors. In my view, this conclusion is clear and inescapable. Does this function constitute "any work" within the meaning of Article 23.01? Mr. Solomon pointed to the distinction that has been made between "work" and "duties" in cases such as Ottawa Carleton, supra, and Sunnybrook Health Science Centre, supra, and referred me to the Job Evaluation Appendix of the Collective Agreement which contains reference to "duties" and "tasks", thereby implying, in his submission, an interpretation of "work" in Article 23.01 that is something different than "duties" or tasks". It was Mr. Solomon's submission that the work of the Inspectors is inspection and that the reference to "any work" in Article 23.01 cannot be interpreted to include what he characterized as ancillary work associated with the preconstruction meetings that was performed prior to January 1, 2006.

While I found the analysis contained in the authorities to which I was referred to be of assistance, the issue in every case is the interpretation to be given to the particular language of the particular collective agreement. The reference to "any work" in Article 23.01 suggests on its plain wording that the parties have taken a broad view as

to what is protected. As Ms. Kronick emphasized, it is not simply core duties, or essential duties of a job that are protected, it is "any work". The reference in the Job Evaluation Appendix to "tasks" and "duties" does not, in my view, undermine the obvious force of that clear language. I agree with Ms. Kronick that the result in Veachville is distinguishable on the basis that the language here does not in any way suggest exclusivity and thus the fact that Inspectors only attended pre-construction meetings in Toronto/East York does not undermine the clear and obvious inclusion of the work that they performed in connection with those meetings within the ambit of "any work". Whatever the conclusion that other facts might compel, or whatever significance the de minimus principle might hold in other circumstances, the reference to "any work" in Article 23.01 must, in my view, be interpreted to include the identifiable location function and the associated booking function that was formerly carried out by the Inspector, and is now carried out by the City contractor. Accordingly, it is my conclusion that there has been a breach of Article 23.01.

As previously noted, it was the City's submission that in the event of a conclusion that there had been a violation of the Collective Agreement my remedial order should be limited to a declaration. The Union's submission was that a remedy should extend to a cease and

desist order, a direction to comply with the consultation provisions and an order for damages. On this issue I was referred to the following authorities: Burrard Yarrows Corporation, Vancouver Division, and International Brotherhood of Painters, Local 138 (1981), 30 L.A.C. (2d) 331 (Christie), Canada Post and CUPW (Halifax Franchise Grievance) (1988) 34 L.A.C. (3d) 28 (Christie), Canada Broadcasting Corp. and CEP [1997] C.L.A.D. No. 554 (Knopf) , Giant Yellowknife Mines Ltd. and C.A.S.A.W., Local 4 (1990), 15 L.A.C. (4th) 52 (Bird), Rothsay and CEP Local 39X [1999] O.L.A.A. No 764 (Rayner), Maple Leaf Consumer Foods Inc. and Schneider Employees' Association (2009), 185 L.A.C. (4th) 316 (Herlich), H.J. Heinz Co. of Canada Inc. and UFCW, Local 458 [2004] O.L.A.A, No. 609 (Brandt) and Canadian Airlines International Ltd. and I.A.M. (1999), 82 L.A.C. (4th) 81 (Ready).

The purpose of a remedy is, of course, to put the party whose rights have been violated in as close a position as possible to the position that the party would have been in had the violation not taken place. I agree with Ms. Kronick that it is important to commence a consideration of the remedy from the perspective of the interest at stake. The interest of the type at issue here is addressed in Canada Broadcasting Corporation, supra, at p. 32 as follows:

> The concept of notice and consultation should be taken very seriously. They are recognized as substantive rights. Unless substance is given to the requirement to consult, employers could act with impunity by either ignoring the requirement or engaging the mere pretence or façade of consultation. Therefore, consultations are often considered as a precondition of the employer being able to proceed, even if the employer has the unilateral right to make the final decision. Further, consultation implies, but goes far beyond the mere giving of information. It also implies the willingness to receive counsel and advice in return. It demands that the party with the obligation to consult remain open to suggestions and input before the final decision is made. But it does leave the right to make the final decision with the employer. The right to consult is not the right of veto power. The right to consult does not take away management's right to make a decision.

At issue in a case such as this is the loss of an opportunity. Clearly, the Union is entitled to a declaration of the violation and, accordingly, I declare that there has been a violation of Article 23.01. Ought the Union also to be entitled to a cease and desist order and to damages? I will deal first with the issue of damages. As is noted in Burrard Yarrows, supra, at paras 39-40, the leading case on this point continues to be the English Court of Appeal decision in Chaplin v. Hicks. [1911] 2K.B. 786, involving a breach of contract, in which the plaintiff was deprived of an opportunity to be a finalist in a contest. In that case it was determined that substantial, as opposed to nominal damages were appropriate. However, as noted in Waddams, The Law of Contracts, at p. 52, "where the breach of a contract deprives the plaintiff of an opportunity that might or might not have been profitable, his damages

are measured by the value of the chance". With respect to the quantification of such damages, Mr. Christie quotes from Chaplin v. Hicks at p. 796 as follows:

> I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and they cannot tell whether she would have ultimately proved to be the winner.

In his submissions, Mr. Solomon emphasized the repetitive violations in Canadian Airlines, supra, where damages were awarded, as well as what might be characterized as a cautionary approach to damages and cease and desist orders taken in decisions such as Rothsay, and H.J. Heinz, supra. Ms. Kronick noted that cease and desist orders have been issued in cases such as Canada Post, supra, and argued that a cease and desist order as well as an award of damages are necessary in order to remedy the breach that has taken place here.

Remedies must be crafted to provide practical and meaningful resolutions. As Mr. Solomon has emphasized, this is not a case involving repetitive breaches, or bad faith of any kind. There is, nevertheless, a violation of a provision of the Collective Agreement and the loss of an opportunity that must be remedied in a meaningful way. It is my conclusion, after considering and weighing the merits of the positions of

the parties that an award of damages is appropriate but that the City should not be required to immediately cease and desist from its present arrangement. The current arrangement may in fact continue after the consultation and an immediate and possibly temporary disruption of that arrangement may attract costs and inefficiencies that, aside from their inherent undesirability, could be prejudicial to the consultation process. Accordingly, I direct the City to meet with the Union prior to the expiry of the current Contract referred to in Ms. Dembinski's January 16, 2006 letter in order to fulfill its obligation to engage in meaningful consultation. I note, parenthetically, that some of the evidence that was adduced through Mr. Candelora related to a public interest associated with a City employee, as opposed to a contractor, attending a pre-construction meeting, a matter that will no doubt be raised in the course of the consultation. Pending that consultation, the Employer is to pay damages to the Union for the opportunity that it has lost. In accordance with the authorities, the damages should not be simply nominal, and should provide an incentive for compliance. The damages here arise from the loss of the location and scheduling time associated with the preconstruction meetings. Mr. Candelora's evidence was that the meetings lasted between 1 and 2 hours and I prefer his evidence to the evidence of Mr. Trinchini who estimated that the meetings lasted about an hour, given that Mr. Candelora actually did the job. Including the meeting time and considering Mr. Candelora's evidence that the location

function was more time consuming I have assessed the loss as one hour per meeting. Based on Mr. Trinchini's estimate of 275 meetings per year, and discounting the loss by half on the basis that damages arise from a loss of an opportunity, not a certainty that the work would be retained by a City employee, it is my conclusion that the appropriate calculation of damages is 137.5 multiplied by the Inspector hourly rate, to be paid to the Union on an annual basis, commencing January 1, 2006, until such time as the consultation process contemplated by Article 23.01 takes place. I so order. I remain seized to deal with any difficulties that the parties may experience in implementing this award.

Dated at Toronto, this 26th day of April, 2010

S.L. Stewart - Arbitrator

CITATION: City of Toronto v. Canadian Union of Public Employees, 2011 ONSC 2343
DIVISIONAL COURT FILE NO.: 261/10
DATE: 20110412

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

FERRIER, BALTMAN AND LEDERER JJ.

BETWEEN:	)	
	)	
CITY OF TORONTO	)	*Ian Solomon*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79 and ARBITRATOR SUSAN STEWART	)	*Douglas J. Wray*, for the Respondent, Canadian Union of Public Employees, Local 79
	)	
Respondent	)	
	)	
	)	
	)	**HEARD at Toronto:** April 12, 2011

BALTMAN J. (ORALLY)

[1] We reject the applicant's submission that the locating function does not constitute "work" within the meaning of Article 23.01. Whether one categorizes the locating function previously performed by the Inspector as ancillary or merely a "task", it was part of the Inspector's job duties. Moreover, it has not been eliminated, but rather transferred to the City contractors, suggesting it remains a legitimate and necessary function and therefore properly considered to be work.

[2] As for the question of remedy, the jurisprudence confirms that the standard of review is reasonableness, even where, as here, the Arbitrator under a Collective Agreement applied

common law principles (see *Community Nursing Home - Port Perry v. Ontario Nurses' Association et al.,* (2010) 193 L.A.C. (4th) 161 (Div. Ct.) and *Ontario (Ministry of Community & Social Services) v. Ontario (Grievance Settlement Board)*, (2005) 137 L.A.C. (4th) 1 (Div. Ct.)).

[3] On the issue of damages, the Arbitrator concluded that damages should act as an incentive for compliance. That determination is consistent with prevailing jurisprudence and cannot be said to be unreasonable.

[4] The only remaining issue is the quantum of the damages. While we might take issue with the methodology used, it is clear that the Arbitrator was trying to create an incentive for compliance. It was not unreasonable for her to do so by calculating a figure that bears some relationship to the value that the work represents.

[5] As a result, we would not interfere with the award. The application is dismissed.

FERRIER J.

COSTS

[6] The application is dismissed for oral reasons delivered this day. Costs to the respondent fixed at $4,000 all inclusive.

FERRIER J.

BALTMAN J.

LEDERER J.

Date of Reasons for Judgment: April 12, 2011

Date of Release: April 15, 2011

CITATION: City of Toronto v. Canadian Union of Public Employees, 2011 ONSC 2343
DIVISIONAL COURT FILE NO.: 261/10
DATE: 20110412

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

FERRIER, BALTMAN AND LEDERER JJ.

BETWEEN:

CITY OF TORONTO

Applicant

– and –

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79 and ARBITRATOR SUSAN STEWART

Respondent

ORAL REASONS FOR JUDGMENT

BALTMAN J.

Date of Reasons for Judgment: April 12, 2011

Date of Release: April 15, 2011