

Case Name:

Joseph v. Alberta Union of Provincial Employees

Between

David Frederick Joseph, respondent (plaintiff),

and

**The Alberta Union of Provincial Employees,
applicant (defendant)**

[2004] A.J. No. 1560

2004 ABQB 977

136 A.C.W.S. (3d) 573

Docket No. 0103 12602

Alberta Court of Queen's Bench
Judicial District of Edmonton

Veit J.

Heard: September 10, 2004.

Judgment: December 23, 2004.

(109 paras.)

Labour law -- Unions -- Duties -- Representation of members -- Fair representation.

Application by the defendant, the Alberta Union of Public Service Employees, for summary judgment dismissing Joseph's claim against it for damages for breach of the duty of fair representation and breach of fiduciary duty. Motion by Joseph for an order requiring the Union to produce undertakings given on examination for discovery. Joseph was employed as a casual employee with the employer, Alberta Justice. He applied for a full-time position, but was unsuccessful. The employer subsequently terminated his employment. HE argued that he had a right to a permanent job and the Union failed to advance his rights. Following negotiations with the Union on his behalf, the employer had made an offer to settle with Joseph on the basis that he be reinstated to his previous position. Joseph rejected the offer. The Union and the employer had

entered into a Letter of Understanding in which the employer agreed to continue to fill permanent positions by way of the competition process. Joseph alleged that the Union failed to take his group grievance to arbitration on the basis that the employer failed to adhere to the Letter of Understanding. The Union argued that Joseph did not have a right under the collective agreement to a permanent job.

HELD: Application allowed. Motion dismissed. There was no genuine issue for trial. The Union did not owe a duty of fair representation in the circumstances. The Letter of Understanding had not become part of the collective agreement and could not be enforced by grievance and arbitration. It clearly stated that it was not to form part of the collective agreement. Joseph was unable to rely on the Letter of Understanding as he ceased to be an employee prior to its execution. The Letter of Understanding did not purport to give any right to permanent employment. There was no statutory duty of fair representation. The claim for breach of fiduciary duty was duplicitous of the claim for breach of representation.

Statutes, Regulations and Rules Cited:

Alberta Labour Relations Code, ss. 151, 153, 209.

Alberta Rules of Court, Rule 159.

Limitations Act, R.S.A. 2000, c. L-12, s. 2.

Public Service Act, R.S.A. 2000, c. P-42, ss. 15, 15(3)(a), 16, 16(3)(a), 17, 18, 19, 26.

Public Service Employee Relations Act, R.S.A. 2000, c. P-43, s. 30.

Counsel:

Simon Renouf, Q.C., Simon Renouf Professional Corporation, for the Applicant

Shirish Chotalia, Pundit & Chotalia, for the Respondent

REASONS FOR JUDGMENT

VEIT J.:--

Summary

1 Pursuant to R. 159, AUPE, the Alberta Union of Public Service Employees, asks the court for summary judgment against Mr. Joseph, who has sued his union for breach of the duty of fair

representation and breach of fiduciary duty.

2 Mr. Joseph used to be employed by Alberta Justice as a Corrections Officer 1 - casual wage employee. In 1996, Mr. Joseph became a "2850" wage employee, that is he had put in 2,850 hours over a two year period and thus became entitled to benefits equivalent to those provided to temporary employees. When, as a result of discussions with AUPE, the government decided to make full-time positions out of some of its many part-time positions, it created some full-time positions at Alberta Justice. Mr. Joseph applied for one of those positions, but was not successful in the competition. Mr. Joseph wants permanent employment in Alberta Justice.

3 The core of Mr. Joseph's complaint against his union is that he had a right to a permanent job with the Government of Alberta, and that AUPE failed to advance those rights. Specifically, Mr. Joseph claims that his union breached its duty of fair representation towards him by: failing to take his group grievance of May 29, 1998 regarding his wrongful dismissal to arbitration on the basis that the employer did not adhere to a June 1997 Letter of Understanding; withholding the Letter of Intent of March 31, 1998; continuing to withhold documents and evidence confirming the intent and spirit of the June 1997 LOU; subrogating Mr. Joseph's rights to the wishes of the larger pool of wage employees who sought access to permanent positions; failing to appoint independent legal representation for Mr. Joseph with respect to his group grievance; acting in bad faith and in an arbitrary and discriminatory manner; abusing the group grievance/arbitration process to act in the interests of general wage employees rather than 2850 wage employees; placing itself in a conflict of interest position between 2850 employees and other wage employees; failing to ensure that the terms of the June 1997 LOU and the March 1998 Letter of Intent were followed, including the failure to ensure that a wage/joint staffing committee was appointed and carried out its duties.

4 AUPE responds that Mr. Joseph never had a right under the collective agreement to a permanent job, and that whatever rights, if any, were created by the Letter of Intent on which Mr. Joseph relies could not be enforced through the grievance procedure; therefore, AUPE owed Mr. Joseph no duty of fair representation.

5 AUPE's application for summary judgment is allowed: there is no genuine issue for trial. AUPE owed Mr. Joseph no duty of fair representation in the circumstances here. The Letter of Intent did not become part of the collective agreement and could not be enforced by grievance and arbitration. Therefore, AUPE did not have the exclusive right to represent workers relative to the interpretation of that Letter of Intent; Mr. Joseph did not lose the right to take his own measures to enforce that Letter of Intent. The exclusive right to represent workers is the necessary prerequisite to, or the sine qua non, of the duty to fair representation. In the circumstances here, AUPE owed Mr. Joseph no such duty. The fact that AUPE had, contrary to its clear right and the clear terms of the Letter of Intent, brought certain grievances on Mr. Joseph's behalf did not oblige AUPE to persist in advancing improper claims. Indeed, a review of AUPE's actions on behalf of Mr. Joseph indicates that AUPE not only satisfied its duty to Mr. Joseph, it went far beyond its obligation in attempting to represent Mr. Joseph's interests. Mr. Joseph's claim of breach of fiduciary duty is merely

duplicitous of his claim of breach of duty of fair representation: it should also be dismissed.

6 Mr. Joseph brings a motion for an order requiring AUPE to produce certain undertakings given when Mr. Joseph was examined in May 2002 and citing AUPE in contempt for its failure to provide those undertakings. AUPE asks the court to strike out Mr. Joseph's notice of motion on the grounds that it constitutes an abuse of process.

7 Mr. Joseph's application is denied: Mr. Joseph cannot prevent or delay summary judgment by objecting in 2004 to the quality or completeness of AUPE's answers in 2002 to undertakings when Mr. Joseph could have conducted further examinations or brought an application on a timely basis. In any event, the documents that Mr. Joseph wishes to have produced could not, in the circumstances here, be of assistance to him in his claim against his union.

Cases and authority cited:

8 By AUPE: Public Service Act, R.S.A. 2000, c. P-42, ss. 15-19; Alberta Rules of Court, r. 159; Prefontaine v. Veale, [2003] A.J. No. 1536 (C.A.); Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423; Franche v. Craig, [1998] A.J. No. 27 (C.A.); Limitations Act, R.S.A. 2000, c. L-12, s. 2; Radhakrishnan v. University of Calgary Faculty Assn. (c.o.b. TUCFA), [1999] A.J. No. 1088 (Q.B.), aff'd [2002] A.J. No. 961 (C.A.); Canadian Merchant Service Guild v. Gagnon et al, [1984] 1 S.C.R. 509; Alberta Labour Relations Board Information Bulletin #18 The Duty of Fair Representation; Gendron v. Supply Services Union of the Public Service Alliance of Canada, Local 50057, [1990] 1 S.C.R. 1298; Noel v. Societe d'energie de la Baie James, [2001] 2 S.C.R. 207; Baugh v. Faculty Association of Red Deer College et al (21 March 2003), Red Deer 9810-01328 March 21, 2003 29 (Q.B.), aff'd [2004] A.J. No. 670 (C.A.); Sawchuk (Re), [2004] A.L.R.B.D. No. 2, [2004] Alta. L.R.B.R. LD-002 (Alta. Labour Relations Board). Grant (Re), [1999] A.L.R.B.D. No. 34 (Alta. Labour Relations Board); Hauck (Re), [1999] A.L.R.B.D. No. 100 (Alta. Labour Relations Board); Lien (Re), [2001] S.L.R.B.D. No. 39 (Sask. Labour Relations Board); Thompson (Re), [2002] S.L.R.B.D. No. 17 (Sask. Labour Relations Board); Chubb Security Systems, [2001] O.L.R.D. No. 2210 (Ont. Labour Relations Board); Kohut and C.A.W., Local 303 (Re), [1991] O.L.R.B. Rep. January 35 (Ont. Labour Relations Board); Bruce-Grey Catholic District School Board, [2003] O.L.R.D. No. 3081 (Ont. Labour Relations Board); Palasz (Re) [2002] A.L.R.B.D. No. 80 (Alta. Labour Relations Board); Morgan and Registered Psychiatric Nurses Ass'n of British Columbia (Re), [1980] 1 Can. L.R.B.R. 441 (B.C. Labour Relations Board); Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; Goudie v. Ottawa, [2003] 1 S.C.R. 141; Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General), [2004] 2 S.C.R. 185; Radhakrishnan v. University of Calgary Faculty Assn., [1995] A.J. No. 1187 (C.A.); British Columbia Public School Employers' Association and British Columbia Teachers' Federation (2004), 124 L.A.C. (4th) 97; Allen v. Alberta, [2003] 1 S.C.R. 128; Public Service Employee Relations Act, R.S.A. 2000, c. P-43, s. 30; Vancouver (City) v. Vancouver (Registrar Land Registration District), [1955] 2 D.L.R. 709 (B.C.C.A.); Osborne v. Amalgamated Society of Railway Servants, [1909] 1 Ch. 163 (C.A.), aff'd [1910] A.C. 87 (H.L.); D.P. Jones, Q.C. & A.S. de

Villars, Q.C., *Principles of Administrative Law*, 3d ed. (Toronto: Carswell, 1999); Reid (Re), [2000] A.L.R.B.D. No. 114 (Alta. Labour Relations Board); Loutan v. Alberta Union of Provincial Employees, [2002] A.J. No. 336 (Q.B.); Leung v. Alberta Union of Provincial Employees, [1992] A.J. No. 707 (Q.B.), aff'd [1994] A.J. No. 160 (C.A.), leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 94; Rayonier Canada (B.C.) Ltd. v. International Woodworkers of America, Local 1-217, [1975] B.C.L.R.B.D. No. 40/75 (B.C. Labour Relations Board); James (Re), [2003] Alta. L.R.B.R. LD-001 (Alta. Labour Relations Board); Davison v. Nova Scotia Government Employees Union, [2004] N.S.J. No. 36 (S.C.); Penney (Re), [2003] A.L.R.B.D. No. 79, [2003] Alta. L.R.B.R. LD-057 (Alta. Labour Relations Board); Tremblay v. Syndicat des employees et employes professionnels-les et de bureau, section locale 57, [2002] 2 S.C.R. 627; CUPE v. Deveau (1976), 19 N.S.R. (2d) 44 (S.C. (T.D.)) var'd on other grounds (1977), 19 N.S.R. (2d) 24 (S.C. (A.D.)); United Food and Commercial Workers, Local 1252 v. Cashin, [1996] N.J. No. 343 (S.C.(T.D.)), aff'd [2002] N.J. No. 223 (C.A.); Boivard v. Washburn, [1997] N.B.J. No. 219 (Q.B. (T.D.)); Singh v. Manitoba Government Employees Ass'n, [1994] M.J. No. 566 (Q.B.) aff'd [1995] M.J. No. 614 (C.A.); Britton v. Alberta Union of Provincial Employees, [2000] A.J. No. 759 (Prov. Ct.)

9 By Mr. Joseph: W. A. Stevenson, J.E. Côté, *Alberta Civil Procedure Handbook 2004* (Edmonton: Juriliber, 2004) pp. 99, 142, 143, 144; Arrotta v. Komonoski (AVVA) (1995), 178 A.R. 100 (C.A.); J. Sack, *Labour Law Terms: A Dictionary of Canadian Labour Law* (Toronto: Lancaster House, 1984); Southern Alberta Institute of Technology v. Alberta (Public Service Employee Relations Board), [1992] 134 A.R. 263 (Q.B.); AUPE v. Board of Governors of Olds College, [1982] 1 S.C.R. 923; Medicine Hat College v. PSERB & AUPE (1987), 80 A.R. 358 (Q.B.); Re University of Alta. Gov & Alta PSERB (1984), 55 A.R. 355 (Q.B.); Lethbridge Community College v. P.S.E.R.B. (1989), 95 A.R. 363 (Q.B.), aff'd at (1990), 108 A.R. 260 (C.A.); Noel v. Societe d'energie de la Baie James, [2001] 2 S.C.R. 207; Canadian Merchant Service Guild v. Gagnon, [1984] 1 S.C.R. 509; Dezentje v. Bendfeld (1999), 99 C.L.L.C. 220-063 (Alta L.R.B.); Gendron v. Supply & Services Union of the Public Service Alliance of Canada, [1990] 1 S.C.R. 1298; Knight v. C.B.R.T. & G.W., [1988] N.B.J. No. 1125 (C.A.); Via Rail Canada Inc. v. Cairns (2001), 200 D.L.R. (4th) 95 (F.C.A.); Group of Seagrams Employees, [1978] 1 Can. L.B.R. 375 (B.C.); Renaud & USWA, Local 2471 (Re), [1976] 2 Can. L.R.B.R. 28 (Ont.); Thunder Bay (City) and CUPE, Local 87 (Re) (1983), 3 C.L.R.B.R. (N.S.) 14 (Ont.); Swing Stage Ltd., [1983] O.L.R.B. Rep. Nov. 1920; Windsor Western Hospital (Riverview Unit) [1984] O.L.R.B. Rep. Nov. 1643; Knight v. C.B.R.T. & G.W., [1988] N.B.J. No. 1125; CUPE v. Deveau (1976), 19 N.S.R. (2d) 44 (S.C.T.D.); United Food & Commercial Workers, Local 1252 v. Cashin, [1996] N.J. No. 343 (S.C.T.D.).

10 By the court: On the issue of the burden on a summary judgment application by a defendant: Somers Estate v. Maxwell, [1996] M.J. No. 46 (C.A.)

Appendix A:

Letter of Understanding, dated June 4, 1997, between AUPE and the Department of Justice

Appendix B: Letter of Intent, dated March 31, 1998, between AUPE and the Crown in Right of Alberta

Appendix C:
Undertakings and answers to undertakings

1. Background

11 Mr. Joseph was an employee of the Alberta Department of Justice from May 3, 1992 until March 23, 1998, when his employment was terminated.

12 The Alberta Union of Provincial Employees ("AUPE") is a trade union which is the collective bargaining agent acting on behalf of many groups of workers, including provincial government employees.

13 AUPE was, at all relevant times, the sole bargaining agent for Mr. Joseph and other employees of the Government of Alberta under the terms of the Public Service Employee Relations Act, R.S.A. 2000, c. P-43 ("PSERA"), and had exclusive power to act as bargaining agent for its members.

14 The terms and conditions of employment in the public service are governed by the Public Service Act, R.S.A. 2000, c. P-42, the Public Service Employee Relations Act, supra, by the Collective Agreement entered into by the Government of Alberta and AUPE. The terms and conditions of employment for Correctional and Regulatory Services Employees are further provided for in Subsidiary Agreement, #.003.

15 There is no provision in the Collective Agreement between AUPE and the Employer dealing with the recruitment, selection, appointment or promotion to positions within the public service including the position of corrections officer. The process for filling vacancies is governed solely by the Public Service Act, and not by the Collective Agreement.

16 The Collective Agreement, in Article 4.02, defines three types of employees: permanent employees, temporary employees and wage employees. Wage employees who achieve 2,850 hours status receive the same benefits of the collective agreement that are applicable to temporary employees:

Notwithstanding other provisions of this Article (4.05), an Employee hired for wage employment who has worked twenty eight hundred and fifty (2850) hours, exclusive of overtime, in a twenty-four (24) month period with the same Department, shall receive the same provisions of this Agreement that are applicable to an Employee who is appointed to a temporary position.

17 In 1991 AUPE brought an application for judicial review of the decision appointing Greg Elzinga to a permanent position with the Public Service of Alberta as a Corrections Officer without first holding a competition in accordance with the provisions of the Public Service Act, *supra*. The issue in the application was whether the Deputy Department Head had exceeded his authority to "exempt" Elzinga into the position thereby breaching the provisions of the Public Service Act, *supra*.

18 Mr. Elzinga had been "exempted" into a permanent position as Corrections Officer I from his "wage" status. The rationale advanced for the exemption was then section 15(3)(a) [now section 16(3)(a)] - "the person to be appointed has specialized knowledge or qualification which are unlikely to be bettered through competition". Approval for the exemption had been given by the Deputy Department Head.

19 Justice Girgulis granted an Order quashing the decision to "exempt" Elzinga to a permanent position, on the ground that the Deputy Department Head had failed to comply with the subsections of the Public Service Act, *supra*, and by the express terms of the written delegation.

20 In 1996, AUPE brought an application ("the 1996 application") seeking a declaration from the Court of Queen's Bench that wage employees in correctional officer positions were being misused contrary to the Public Service Act, *supra*. AUPE argued that the Public Service Act, *supra*, permitted wage employment as a limited exception to the general rule of permanent appointment, where conditions did not permit employment throughout a day, week or month. AUPE claimed that wage employees were being used to do work that was regularly and continuously scheduled over a lengthy period of time which was contrary to the terms of the Public Service Act, *supra*.

21 AUPE was concerned that wage employees were being used on an increasing basis, and for lengthy periods of time, were doing work that could be done by appointments to permanent positions that were regularly and continuously scheduled, and that section 26 of the Public Service Act, *supra*, was breached by using wage employees under conditions which did allow for employment throughout the day, week or month.

22 It was AUPE's position that the Employer was using wage employees to do the job of permanent employees without giving the benefits and status of a permanent employee. The purpose of the 1996 application was to force the Employer to create and fill permanent jobs. AUPE wanted every full-time vacancy to be posted and filled in accordance with the requirements of the Public Service Act, *supra*.

23 The 1996 application was discussed at meetings of AUPE.

24 AUPE and the Employer reached a settlement of the 1996 application, before it was heard in Court, and entered into a Letter of Understanding, dated June 4th, 1997 (the "Letter of Understanding").

25 The relevant paragraphs of the Letter of Understanding, which is set out in Appendix A, state:

1. The Department shall continue filling permanent positions as per the attached Schedule "A", with a completion date of September 1, 1997;
2. The A.U.P.E. agrees to withdraw the application in Court of Queen's Bench file no. 9603 17643, dated August 22, 1996 regarding use of wage employees in the Peace River Correctional Centre and the Lethbridge Young Offenders Centre contrary to section 26 of the Public Service Act;
3. On or about October 1, 1997 and every six (6) months thereafter a joint Committee, comprised of three (3) representatives for the A.U.P.E. and three (3) representatives for the Department shall meet and review the employment status of subsidiary 003 members working at Adult and Young Offenders Centres and Community Corrections Centres.
4. The Employer shall provide the joint committee with staffing information and should the joint committee find that staff employed on wages do not have their proper employment status, they shall be appointed to a permanent position within three (3) months of such finding.
5. These terms have application only for the Department of Justice Corrections Division.

26 AUPE and the Employer agreed that, pursuant to the Letter of Understanding, full-time permanent positions would be created and would be filled by the competition process in accordance with the Public Service Act, supra.

27 AUPE's Correctional Services Branch had maintained the position, from before the Elzinga application in 1991, that appointments to permanent positions must be filled by competition only, and had been opposed to exempting appointments from competition.

28 AUPE explained to its membership that pursuant to the Letter of Understanding full time permanent positions would become available and that employees would be entitled to compete for the full time positions.

29 Mr. Joseph has acknowledged that he began working as a Corrections Officer I at the Edmonton Remand Center in May, 1992. Mr. Joseph was hired as a "casual wage employee". A "casual wage employee" is a person who is paid on an hourly, daily, weekly or monthly rate (s. 26 of the Public Service Act, supra). As a casual wage employee, Mr. Joseph was called in when he was required to work. Mr. Joseph acknowledges that he knew that he was not hired into a full-time permanent job.

30 Records produced in this litigation indicate that in February, 1996 Mr. Joseph was made a "2850 wage employee". Mr. Joseph was initially put on the payroll at 40% level and then in May, 1996, was put on the payroll at 100% level and received all of the benefits of a permanent staff. Mr. Joseph, however, was never appointed to a permanent position.

31 Mr. Joseph acknowledges that he was aware that he was viewed as a wage employee and that the Government did not regard him as a permanent employee. Mr. Joseph acknowledges that he was never told that he was a permanent employee of the Government, and that he knew that in order to become a permanent employee he would have to apply on a permanent job posting. Mr. Joseph acknowledges that he knew that only management had the right to appoint people to a permanent position and that the Union did not have a say in the matter. Mr. Joseph acknowledges that he was never promised a permanent position.

32 Records indicate that Mr. Joseph applied for a permanent position with the Employer shortly before March 24, 1997. Mr. Joseph underwent a recruitment interview with the Employer in August, 1997.

33 On October 28, 1997, Mr. Joseph was told by the Employer that he would no longer be assigned to work on full-time hours and that he would go to an on-call basis. Mr. Joseph's hours were reduced from the 100% level to the 40% level.

34 On October 30, 1997, Mr. Joseph went on sick leave until March 1, 1998. Although Mr. Joseph's hours had been reduced from 100% to 40% shortly before he went on sick leave, the Employer paid Mr. Joseph 100% of his salary as general illness until December 17, 1998, and 70% of his salary as general illness entitlement for the next 45 days. After February 16, 1998, Mr. Joseph had the option of using his vacation days or go on unpaid leave. Mr. Joseph chose to go on unpaid leave.

35 The records indicate that Mr. Joseph applied, but was unsuccessful in several Correctional Officer competitions for permanent positions. In March 1998 the Employer informed Mr. Joseph that his services were no longer required and he was terminated effective March 23, 1998. Mr. Joseph was offered pay in lieu of notice under the Collective Agreement.

36 Mr. Joseph was one of approximately 24 "2850 wage employees" who received letters in March, 1998 informing them they were being terminated.

37 Mr. Joseph acknowledges that he was aware that no Correctional Officer who was a wage employee, whether above or below 2850 hours had been appointed to a permanent position without a competition after June, 1997.

38 Mr. Joseph filed the following individual grievances:

- (a) On November 10, 1997, a grievance stating "I received written confirmation that I did not secure full-time employment at the Edmonton Remand Centre." As a remedy Mr. Joseph requested "that I receive a permanent position at the Edmonton Remand Centre". (Grievance No. #08 835606).
- (b) On November 10, 1997, a grievance stating "Actions being taken against

me by the Department amount to a constructive dismissal". As a remedy, Mr. Joseph requested "that I receive a permanent position at the Edmonton Remand Centre; and that I be reimbursed all wages/benefits lost as a result of this violation." (Grievance No. #O8 835608).

- (c) On March 26, 1998, a grievance stating "I received a letter on or about March 23, 1998 that notified me that I was fired." As remedy Mr. Joseph requested "That I be reinstated to my former position without loss in pay or benefits; and that I be made otherwise whole." (Grievance No. #O8 835906)

39 The three individual grievances were advanced through the grievance procedure but were not pursued to arbitration. AUPE's Grievance Review Board determined that the grievances were without merit at a hearing attended by Mr. Joseph in December, 1998, and they were discontinued by AUPE.

40 Mr. Joseph acknowledges that he was familiar with the provisions of the Public Service Act relating to appointments prior to the Grievance Review Board hearings.

41 Mr. Joseph acknowledges that he was aware of the Union's decision not to proceed to arbitration with the three individual grievances in December, 1998 and he did not commence any legal action with respect to that decision.

42 In this action Mr. Joseph initially claimed that AUPE's discontinuance of his individual grievances was a breach of AUPE's duty of fair representation. As those claims were barred by the Limitations Act, supra (Mr. Joseph's action was commenced in June, 2001) they were omitted from Mr. Joseph's Amended Statement of Claim.

43 On May 29, 1998, AUPE filed a group grievance applying to Mr. Joseph and other wage employees who had been terminated in March, 1998. As a remedy the group grievance requested, in part "that these employees be reinstated immediately". They did not request the remedy of being placed in permanent positions without a competition. Mr. Joseph acknowledges that no representative from the Union told Mr. Joseph that an objective of the group grievance would be to place Mr. Joseph in a permanent position without a competition. Mr. Joseph was aware that the group grievance was seeking reinstatement and was not seeking his placement in a permanent position.

44 Several of the grievors in the group grievance signed separation agreements and abandoned their grievances.

45 On or about August 5, 1998 AUPE's Chris Vermette wrote to Mr. Joseph informing him that she had attended a Level III hearing of the group grievance. Following the hearing, the Employer requested and was granted an extension to respond until August 14, 1998. She encouraged Mr. Joseph to continue to apply for positions.

46 Mr. Joseph testified that he had applied in some competitions for permanent positions. Mr. Joseph acknowledged that he never received any statement or indication from the Government that he was not allowed to apply for positions after he had been terminated. Mr. Joseph was interviewed for those positions he applied for, however he was not successful in any of the competitions. Mr. Joseph did not apply for further positions with the Employer in the corrections field.

47 On or about December 10, 1998, the Grievance Review Board met and decided to advance the group grievance to arbitration. AUPE wrote to the Employer to advance the group grievance to arbitration.

48 Brenda Kuzio of AUPE wrote to Mr. Joseph on January 15, 1999 stating that AUPE's position with respect to the Letter of Understanding was that if as a result of the committee process a permanent position was created then a competition would be held to fill it.

49 The arbitration was originally scheduled for October 1999 and was then adjourned.

50 On or about October 8, 1999, Eric Lund, a lawyer with Hladun & Company wrote to AUPE to inform it that he had been retained by Mr. Joseph and to ask for further details about the arbitration.

51 Brenda Kuzio of AUPE wrote to Mr. Lund to inform him that the arbitration hearing was now scheduled for March, 2000.

52 The group grievance was further adjourned to permit settlement discussions to take place (Affidavit of Ronald Hodgins sworn August 3, 2004, paragraph 32).

53 As a result of the settlement discussions, on May 31, 2000 the Employer sent a draft Settlement Agreement to AUPE as an offer to resolve the outstanding grievance of Mr. Joseph. The Settlement offer was to remain open until June 23, 2000.

54 On June 15, 2000, Mr. Derksen sent a letter to Mr. Lund setting forth the proposed settlement. In the proposed settlement agreement, the Government offered the following:

1. The Employer agrees to reinstate the Grievor to employment with the status of a 2850-hour wage employee at the Edmonton Remand Centre.
2. The Grievor will commence work in the normal shift rotation at the institution named in paragraph 1 above.
3. Upon his return to work, the Grievor's normal hours of work will follow a pattern similar to that worked by the Grievor prior to his termination in March 1998 Agreement.
4. The Grievor and the Alberta Union of Provincial Employees agree not to disclose the terms of this Agreement to any other person.
5. The Alberta Union of Provincial Employees will withdraw the Grievor's grievance from Arbitration within five days of the signing of this

Agreement.

55 Mr. Joseph acknowledges that he reviewed the Employer's Settlement offer with his lawyer Mr. Lund. Mr. Joseph further acknowledges that he was aware that the group grievance was seeking reinstatement and was not seeking his placement in a permanent position. Mr. Joseph was aware that the Employer was prepared to reinstate him to a 2850 wage employee at the Edmonton Remand Centre. Mr. Joseph acknowledges that he was not interested in being reinstated to his employment and so the issue about whether it was full time or part time hours was quite irrelevant to him.

56 Mr. Lund wrote back on July 10, 2000 to AUPE stating that Mr. Joseph found the offer was unacceptable.

57 Mr. Joseph acknowledges that nobody from the Union ever told Mr. Joseph that his position had been examined or assessed by a joint committee under the Letter of Understanding.

58 Mr. Joseph acknowledges that at no time did Mr. Joseph or Mr. Lund propose any alteration to the Government's settlement proposal.

59 The Employer's offer to Mr. Joseph was renewed as recently as 2003. In April, 2003 AUPE's counsel Simon Renouf, Q.C. wrote to Mr. Joseph's counsel Ms. Chotalia advising of the renewal of the offer from the Employer.

60 By telephone call of June 3rd, 2003 Ms. Chotalia informed Mr. Renouf that Mr. Joseph was not prepared to accept the Employer's offer. Mr. Renouf again wrote to Ms. Chotalia on September 22nd, 2003 cautioning her that the Employer's offer might be withdrawn.

61 By telephone call of October 8th, 2003 Ms. Chotalia again informed Mr. Renouf that Mr. Joseph was not prepared to accept the Employer's offer.

62 On July 12, 2000, AUPE wrote to Mr. Lund to inform him that the Grievance Review Board would be reviewing Mr. Joseph's file and the group grievance on July 27, 2000. The Grievance Review Board hearing was rescheduled to September 7, 2000.

63 On July 26, 2000, Mr. Lund wrote to AUPE confirming that Mr. Joseph wished to attend the Grievance Review Board meeting. Mr. Lund requested that all materials provided to the Grievance Review Board also be provided to Mr. Joseph "in order that Mr. Joseph know what types of submissions he should prepare".

64 On July 27, 2000, the Union prepared a case summary that it provided to Mr. Lund (Affidavit of Ronald Hodgins sworn August 3, 2004, paragraph 44).

65 On or about August 10, 2000 Ken Derksen wrote to Mr. Lund and invited him to make a written submission to the Grievance Review Board prior to September 7, 2000. Mr. Derksen stated in his letter:

...

Assuming, for the sake of argument, that you can prove that you were improperly laid off, what provision in the Collective Agreement do you rely on to claim reinstatement with full back pay to a full time position:

It would be very helpful to your appeal if you can show us what provision of the Collective Agreement you say the Employer breached, and factually how that provision has been breached in your case.

As you know, the Employer has offered to settle your grievance by either paying you severance or reinstating you to employment equal to the normal hours of work and pattern of shifts that you enjoyed prior to your termination. There is a concern that, unless you can show that there has been a breach of a provision of the Collective Agreement entitling you to reinstatement to a full time position with full back pay, the current offer of settlement appears to be more generous than what you would otherwise receive from an arbitrator, assuming, for the sake of argument, that you could prove you were improperly laid off.

66 Mr. Lund prepared a written submission on Mr. Joseph's behalf and sent it to the Grievance Review Board.

67 Mr. Joseph requested documents from the Union and they were provided to enable him to present his case to the Grievance Review Board. Mr. Joseph acknowledges that he never requested anything from the Union that it failed to provide.

68 On September 7, 2000, the Grievance Review Board held a hearing. Mr. Joseph and Mr. Lund attended the hearing. Mr. Joseph presented oral submissions to the Grievance Review Board. Mr. Joseph acknowledges that the Grievance Review Board asked Mr. Joseph questions to which he responded. Mr. Joseph acknowledges that he was given the opportunity to communicate his position fully to the Grievance Review Board.

69 After reviewing the submissions of Mr. Joseph's counsel and listening to Mr. Joseph's oral submissions, the Grievance Review Board decided that the file should be closed, and recommended that the remaining grievors accept the Government's offer. It was the unanimous decision of the Grievance Review Board that the Collective Agreement did not support the relief sought by Mr. Joseph or the arguments he was advancing.

70 By letter dated September 7, 2000, the Grievance Review Committee advised Mr. Lund of its decision.

71 On May 4th, 2000, Mr. Joseph's counsel filed a complaint on behalf of Mr. Joseph with the Alberta Labour Relations Board claiming that AUPE had breached its duty of fair representation contrary to s. 151 (now 153) of the Alberta Labour Relations Code.

72 On or about June 16, 2000 the Alberta Labour Relations Board wrote to the parties indicating that they would not be proceeding with the complaint as PSERA had no provisions for duty of fair representation.

73 Mr. Joseph filed his statement of Claim against AUPE on June 4, 2001. He filed his Amended Statement of Claim on November 10, 2003.

2. The test for summary judgment

74 AUPE acknowledges that the test for summary judgment is extremely demanding: it must prove that Mr. Joseph's action is doomed to fail.

75 As I recently had occasion to observe, the test for summary judgment when the defendant applies has recently been clarified by the Manitoba Court of Appeal, which had developed a formulation that was approved by the Supreme Court of Canada in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165. That reformulation, found in *Somers Estate*, ensures that a court will not mistakenly require that a plaintiff in the position of Mr. Joseph prove that he has a good chance of success at trial: that would be too high an onus. For the purposes of this application, both parties agree that AUPE can only obtain summary judgment if it proves that Mr. Joseph's action is doomed to fail.

76 Mr. Joseph incorrectly argues that a motion for summary judgment must fail if there are competing affidavits. The authority on which he relies, *Stevenson & Cote's Alberta Civil Procedure Handbook 2004*, does not say that: it says that where the opposing affidavits clash on relevant facts, the judge can rarely prefer one over the other and that "it does not matter" if the opposing affidavits clash on immaterial points.

77 On this application, I am able to prefer the evidence filed by the applicant where it conflicts on a material point with the evidence filed by Mr. Joseph. However, the main factor in this assessment is that where the affidavits from the two parties clash, it is on immaterial points.

78 The mere fact that the facts are complicated does not prevent the court from awarding summary judgment. The relevant inquiry on a summary judgment application is whether the facts are clear, not whether they are complicated. In *Arrotta v. Komonoski*, on which Mr. Joseph relies, the Court of Appeal did not emphasize that the facts were complicated, but rather that they were in dispute:

[para2] This case raises complicated issues of fact and law which the Chambers Judge could not decide on the conflicting evidence before him.

79 In summary, a court has jurisdiction to grant summary judgment where, on the basis of clear evidence, the applicant has demonstrated that the respondent cannot succeed at trial.

3. Has AUPE satisfied the test on this application?

80 AUPE has established that Mr. Joseph's action is bound to fail.

a) Claims for breach of duty of fair representation that arose prior to June 4, 1999 are statute barred: the only remaining claim is in relation to the group grievance

81 When Mr. Joseph amended his statement of claim in November, 2003, he recognized the application to his claim of the Limitations Act, and limited his claims to action taken by AUPE on or after June 4, 1999.

82 The result of the amendment to the pleadings is that the only claim Mr. Joseph can make in relation to the breach of the duty of fair representation is in relation to the group grievance.

b) The dispute on which the claim is based does not relate to rights arising from the collective agreement

83 The dispute on which the claim is based does not relate to rights arising from the collective agreement.

84 Mr. Joseph states that the dispute concerns the interpretation, application, operation and contravention of the June 1997 Letter of Understanding, which, he maintains, was clarified by the March 31, 1998 Letter of Intent. He asserts that both of these documents amend the collective agreement preceding them.

85 However, Mr. Joseph acknowledges that the decision as to whether a letter of intent forms part of the collective agreement depends upon the "manifest intention of the parties". Mr. Joseph is, however, wrong when he states that letters of understanding and letters of intent necessarily amend collective agreements through the doctrine of incorporation; whether they are incorporated into the collective agreement depends on the circumstances.

86 Here, the letter of intent clearly states that it is not to form part of the collective agreement. Although there are situations in which a court has held that specific words of a letter of intent stating that the letter does not form a part of the collective agreement are not effective to achieve that result (Allen) those situations are limited to the exceptional situations where a collective agreement would become a nonsense without the incorporation of the letter of intent. Such an exceptional situation does not arise here. The Letter of Understanding on which Mr. Joseph relies was created as a settlement agreement to an application initiated by AUPE contesting the government's use of wage staff. The collective agreement does not address the issue of selection,

appointment and promotion to positions within the public service; those positions are solely governed by the Public Service Act, in which the Legislature has determined that a collective agreement cannot bypass the Act. While it is true that, in the past, AUPE advanced grievances on behalf of Mr. Joseph relative to his termination, it clearly had no jurisdiction to do so. It would be a wrong public policy message if courts were to require unions to continue to do improper things if they have ever started to do improper things. Nor can it be argued that, because it had embarked on an improper course of action, the union must continue to do so: not only would that be using estoppel as a sword rather than a shield, but, in this case, it would require action where there was no jurisdiction. Although, in the past, AUPE wrongly advanced grievances on Mr. Joseph's behalf, it was not required to do so and cannot be required to do so in the future.

87 Indeed, AUPE has established that Mr. Joseph is unable to rely on the March 31, 1998 Letter of Intent for three reasons:

- Mr. Joseph ceased to be an employee of the Government of Alberta on March 23, 1998, that is prior to the execution of the letter of intent;
- the Letter of Intent does not purport to provide a permanent job for any wage or temporary employee. On the contrary, it simply commits the Government of Alberta to reviewing the use of wage and temporary employees;
- as indicated above, the Letter of Intent itself indicates that it is not to become part of the collective agreement, and that the letter was not subject to the grievance and arbitration process.

88 In summary, whatever is the effect of the Letter of Intent, it is clear that the letter did not, in the circumstances here, modify the collective agreement by incorporation into that agreement.

- c) In the circumstances, AUPE owed no common law duty of fair representation to Mr. Joseph

89 Because whatever the Letter of Intent granted could not be enforced by grievance and arbitration, AUPE did not have the exclusive right to represent workers relative to the interpretation of the agreement, which exclusive right is essential, is the sine qua non, of the duty of fair representation.

90 Mr. Joseph acknowledges that his employment was governed by the Public Service Employee Relations Act which contains no codified duty of fair representation.

91 In the absence of a statutory duty of fair representation, AUPE's duty of fair representation is based in common law. However, that duty only extends to disputes arising under the collective agreement: Noel.

92 The reason why that duty is limited to disputes arising under the collective agreement is

because the union receives the right of exclusive representation in relation to those agreements. Since, for public policy reasons, an individual worker is prevented from taking individual action in relation to the collective agreement, fairness required the imposition of a duty of fair representation upon the union which has effectively taken away individual rights of workers.

93 The obverse of that coin is this: where a worker maintains her right to assert her own action in relation to any employment-related issue, the union has no duty of fair representation: *Sawchuk*, *Re Grant*, *Re Hauck*, *Re Lien*, etc.

94 AUPE did, improperly, advance grievances on Mr. Joseph's behalf. That does not mean, however, that it should be required to continue to do so.

95 On the contrary, even when a matter is properly within a collective agreement, a union is not required to take every grievance to arbitration: *Re Reid*. It would be both ludicrous and bad public policy for the courts to require a union to take improper steps on behalf of a union member in relation to a matter that is outside the collective agreement. In the situation here, AUPE put its mind to Mr. Joseph's situation and made a reasoned judgment concerning how it should continue to represent Mr. Joseph's interests. The court should not interfere with that decision.

96 Although Mr. Joseph asserts that AUPE is in a conflict in advancing the interests of one group of wage employees to the detriment of a minority of such wage employees, including himself, he fails to recognize that a union is entitled to pursue one set of interests to the detriment of another: *Noel*, *Tremblay*, *Leung*, *Gendron*.

97 In fact, when AUPE decided to discontinue Mr. Joseph's grievance, he was represented by counsel and, in advance of the hearing, AUPE provided his counsel with a case summary prepared by AUPE. Mr. Joseph and his counsel were given a full opportunity to communicate Mr. Joseph's position to the Grievance Review Board.

98 Moreover, AUPE negotiated a reasonable settlement with Mr. Joseph's employer pursuant to which Mr. Joseph was offered reinstatement to his former position, which was the remedy he had requested in the group grievance. Mr. Joseph rejected the proposed settlement and demanded placement in a permanent position.

4. AUPE has no fiduciary duty here other than the duty of fair representation

99 Although Mr. Joseph has claimed that AUPE failed in its fiduciary duty towards him, that is, in essence, merely a restatement of the duty of fair representation. In the circumstances here, the claim for breach of fiduciary duty is merely duplicitous.

5. What is the status of the existing undertakings?

a) Factual circumstances relating to the undertakings

100 Mr. Joseph examined AUPE's officer on discovery in May 2002. AUPE provided answers to those undertakings in November 2002

101 In November 2002, Mr. Joseph sought the assistance of AUPE in obtaining certain records from the Government of Alberta and suggested to AUPE that it sign a form of authorization purporting to authorize the Government to release certain documents.

102 In December 2002, AUPE refused to sign the proposed authorization, with the exception of documents relating solely to Mr. Joseph. It wrote to Mr. Joseph stating:

It is likely that my client will not consent to the release of any information to you by the Government that would divulge any personal information about any member of AUPE (other than Mr. Joseph). It would appear that items 1, 3, 4, 6, 7, 8, 9 and 10 would require the Government to divulge such information.

...

... request number 2 deals with the number of full time permanent positions that were available with the Government in various fiscal years. I am sure that my client would have no objection to the Government providing you with that information and you may feel free to use this letter as confirmation of that if you decide to communicate directly with the Personnel Administration Office.

103 It appears that no action was taken by Mr. Joseph in response to that offer.

104 In January 2003, AUPE suggested to Mr. Joseph that he might wish to use the provisions of R. 209 to obtain any government records that might be of assistance to him. No such R. 209 application was ever brought by Mr. Joseph.

b) Relevance of delay

105 I adopt the approach of Stevenson and Côté:

The defendant cannot derail the motion for summary judgment by giving notice of his own discoveries, if he had a chance to have them before.

106 That approach is solidly based in the law: Anglo Canadian and Armcorp 4-8 Ltd.

107 Mr. Joseph did not take any timely steps to rectify what he perceived to be inadequate answers to undertakings. He cannot raise his wish to now attempt to rectify the undertakings as a

bar to the summary judgment application.

108 In any event, the documents that Mr. Joseph wishes to have produced are not of assistance to him in his suit against the union. For the reasons set out above, AUPE owed no duty of fair representation to Mr. Joseph with respect to the Letter of Understanding and the Letter of Intent.

6. Costs

109 If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

VEIT J.

* * * * *

LETTER OF UNDERSTANDING

BETWEEN:

THE CROWN IN RIGHT OF ALBERTA
as represented by the Department of Justice
(hereinafter referred to as the "Department")

- and -

THE ALBERTA UNION OF PROVINCIAL EMPLOYEES
hereinafter referred to as the "A.U.P.E."

WHEREAS it is the desire of the parties to maintain proper employment status of wage employees working for the department of Justice Corrections Division;

THEREFORE, the parties agree to the following:

1. The Department shall continue filling permanent positions as per the attached Schedule "A", with a completion date of September 1, 1997;
2. The A.U.P.E. agrees to withdraw the application in Court of Queen's Bench, Queen's Bench file no. 9603 17643, dated August 22, 1996 regarding use of wage employees in the Peace River Correctional Centre and the Lethbridge Young Offenders Centre contrary to Section 26 of the Public Service Act;
3. On or about October 1, 1997 and every six (6) months thereafter a Joint Committee comprised of three (3) representatives for the A.U.P.E. and three (3) representatives for the Department, shall meet and review the employment status of Subsidiary 003 members working at Adult and Young Offenders Centres and Community Corrections Centres.

4. The Employer shall provide the joint committee with staffing information and should the joint committee find that staff employed on wages do not have their proper employment status, they shall be appointed to a permanent position within three (3) months of such finding.
5. These terms have application only for the Department of Justice Corrections Division.

LETTER of INTENT

Between:

The Crown in Right of Alberta
(the Employer)

and

The Alberta Union of Provincial Employees
(the Union)

Whereas the Union has identified to the Employer its concerns regarding the use of wage and temporary employees. and whereas the Employer is committed to addressing these concerns the Employer agrees to the following:

1. The Employer agrees to review the use of all wage employees and temporary employees in all employing departments.
2. The review will be conducted by each employing department in conjunction with personnel Administration Office representatives.
3. The review shall commence effective the date of signing and shall be completed within six (6) months from the date of signing of the Master Agreement.
4. The results of the review respecting any conversion will be provided to the Union within twenty (20) work days of completion of the process within each employing department. The Union shall advise the Employer of any concerns or issues which it has respecting the results of the review within twenty (20) workdays of the receipt of the information from the Employer. Any concerns or issues raised by the Union which arise out of the conversion shall be addressed by representatives of the Parties within twenty (20) work days of the receipt of the results of the review respecting the conversion.
5. This Letter of Intent shall not form part of the Collective Agreement and, therefore, is not subject to the grievance or arbitration process set out in Article 29 of the Master Agreement.

Signed at Edmonton this 31st day of March, 1998

"Jim Campbell" _____ Jim Campbell

* * * * *

Appendix "C "

To produce AUPE files with respect to 11 positions which were filled at the Edmonton Remand Center without competition in the year 1992 (under advisement).

- A. After taking this matter under advisement we are unable to provide this undertaking.
- (1) Mr. MacLennan advises that he does not have any knowledge of appointments to vacant positions in 1992;
 - (2) AUPE does not have such records. Any such records (if they exist) would be in the possession of the Government of Alberta, and
 - (3) Any such appointments (if they did occur) occurred prior to AUPE's Rule 410(e) application and are therefore not relevant to this lawsuit.

Review AUPE files and advise of any agreement or understandings that were entered into between AUPE and the Government of Alberta with respect to filling permanent positions in the years 1996 to 2000.

Representatives of AUPE have had discussions with some government departments with respect to filling permanent positions between 1996 and 2000. AUPE advises that it has had records with respect to discussions between AUPE and other governmental departments. AUPE has not been able to locate such documents. If and when they are located they will be reviewed for producibility, and any producible records will be provided.

Advise what other government departments were involved in these "conversions" (meaning the transfer or administrative process by which wage employees were converted or changed on paper in government records into full-time permanent employees with the benefits of full-time permanent employees) without competition during the years 1996 - 2000.

This request for undertaking was taken under advisement as it was not clear what capacity AUPE had to find out the information sought. See answer to undertaking #4.

Review the minutes of AUPE Chapters during the period 1997 to 2000 to see if there is any reference to conversions of wage employees to full-time positions.

There is no requirement for locals to deposit ongoing minutes with Head Office. AUPE has located some Local 3 minutes which are attached at Tab 2.

Review AUPE files and confirm the number of 2850 wage employees reflected in the Corrections Department in Alberta for the years 1996 to 2000 and for each year.

The request was that AUPE review its files and confirm the number of 2850 wage employees "reflected in the Corrections Department in Alberta for the years 1996 to 2000 and for each year". AUPE does not have that information.

Check the AUPE files and advise if that is a conversion issue and what, if any, information AUPE has about the rollover at the Michener Centre.

AUPE has not been able to locate files relating to this email. To the best of Mr. MacLennan's knowledge this appears to refer to the creation of permanent positions at Michener Centre.

List all of the positions that were filled through competitions after the June 1997 LOU in the Province of Alberta with a breakdown by centre, Edmonton Remand Centre, Fort Saskatchewan, Young Offenders for correction officers positions.

AUPE does not keep records of positions filled. See related documents attached at Tab 5.

AUPE to provide each and every LOU entered into between the Union and any other government departments which have the same or similar content and spirit as the June 1997 LOU. And to provide all correspondence, documentation and memos regarding these LOU's and the number of positions created further to them and the number of terminations if any that arose out of them, and confirmation as to how they were filled.

This was a request that the Defendant take under advisement. Mr. Chotalia's request for an undertaking to produce "all correspondence, documentation and memos regarding LOU's and the number of positions created further to them and the number of terminations if any that arose out of them, and confirmation as to how they were filled. AUPE will not give this undertaking. As indicated earlier, AUPE does not have access to information about all competitions. Part of this duplicates undertakings 4 and 5. This request for an undertaking is not sufficiently specific to enable AUPE to respond to it. AUPE would consider responding to a written interrogatory with respect to whatever specific information the Plaintiff is seeking on this topic.

cp/e/qlsmw/qlhcs

---- End of Request ----

Print Request: Current Document: 1

Time Of Request: Tuesday, June 29, 2010 09:38:29