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Arbitrator Dismisses Union Grievance Regarding Decision Not to Fill Position After Employee's Retirement

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On May 17, 2022, Emond Harnden's very own Sébastien Huard and Marianne Abou-Hamad successfully represented their client in a grievance arbitration involving the long-debated point of whether an employer is obligated to post a vacant position following the departure of an employee. In the matter of *Brookfield Renewable Partners LP operating as Evolugen (Mississagi Power Trust) and Society of United Professionals*, the Union grieved the Employer's decision not to post and fill a vacant position following an employee's retirement. The Arbitrator agreed with the Employer's position and dismissed the grievance.

Background

For nearly two decades, the Society of United Professionals ("SUP" or the "Union") bargaining unit consisted of a single individual who held the position of Protection and Control Supervisor (the "Supervisor"). The position in question works at Mississagi Power Trust, a series of four hydroelectric power stations on the Mississagi River. In 2002, Mississagi Power Trust was purchased by Brascan Ltd. ("Brascan"), later renamed Brookfield Asset Management. This company owns a majority stake in Brookfield Renewable Partners LP/Brookfield Renewable Corp. ("Brookfield" or the "Employer"), which operates Mississagi Power Trust as part of its Canadian renewable energy brand, Evolugen.

In mid-2019, the Supervisor retired. Since that time, the SUP bargaining unit has been empty, with the Supervisor's work having been redistributed to various people, including management, other employees and outside contractors. Of note, besides the SUP bargaining unit, another bargaining unit at Mississagi Power Trust is also relevant to the issue in this case: a Power Workers' Union ("PWU") bargaining unit consisting of 17 employees, including two Protection and Control Technicians.

The SUP collective agreement is comprised of the 2001-2003 agreement between a previous employer, Ontario Power Generation, and the Union's predecessor, Society of Energy Professionals, as amended by a series of memorandums signed in several rounds of bargaining between Brascan/Brookfield and the Union. The last memorandum to be signed by the parties covered a three-year period ending on December 31, 2019, but contained automatic renewal language such that it remained in effect at the time of the hearing. For the purposes of the Union's grievance, the parties referred to several provisions in the collective agreement, including the recognition clause and the definition of "supervisor", in addition to the vacancies provision which provides as follows:

> Article 65 – VACANCIES (RELIEF, ROTATIONS AND SELECTIONS)
>
> …
>
> 65.6 Selections for Assignments Other Then Relief or Rotations
>
> 65.6.1 All vacancies for assignments which do not fall into the category of relief or rotations shall be advertised OPGI-wide unless there is Agreement with the Society Unit Director or the following conditions apply:
>
> *[eight conditions listed, not relevant for this case]*
>
> 65.6.2 All applications which represent a promotion must be processed…

Notably, the SUP collective agreement does not contain a minimum staffing guarantee.

Positions of the Parties

In the Union's view, the Supervisor's retirement had created a vacancy and the Employer was required to fill it. In other words, there was still a "job of work" to be performed, notwithstanding the fact that it had been broken into pieces and was being performed by various other people. The Union argued that the case law indicated that if the work was still being done, there was a vacancy and that the collective agreement therefore required the position to be posted and filled. Furthermore, the Union argued that the Employer had a long-term plan not to replace the Supervisor once he retired, a decision it felt had been made arbitrarily. In terms of remedy, the Union requested a declaration that the collective agreement had been violated, an order that the position be posted and filled, as well as compensation for lost dues since the Supervisor's retirement.

For its part, the Employer took the position that it had the discretion to determine whether there was a vacancy in the legal meaning of the term and, in this case, that it had decided in good faith that there was not enough work to justify replacing the Supervisor. In its view, because no business case had been established to replace the Supervisor, there was no requirement in either the collective agreement or the case law to post and fill his position. Furthermore, the Employer argued that it had the right to redistribute the Supervisor's work to other employees and that it had done so. Accordingly, the Employer sought the dismissal of the grievance, and requested that if a violation of the collective agreement were to be found, that any remedy should be limited to a declaration or, in the alternative, an order that the Company decide on the position or remitting the matter back to the parties.

Decision

In Arbitrator Slotnick's estimation, the issue to be determined in the context of the grievance hearing

was whether a “vacancy” existed because of the Supervisor’s retirement. If so, the collective agreement required that it be posted and filled.

In his decision, Arbitrator Slotnick noted four relevant principles:

1. The fact that a collective agreement contains posting procedures does not, in and of itself, mean a position must be filled any time an employee leaves. Rather, absent some specific language in the collective agreement limiting an employer’s flexibility, arbitrators have typically given employers significant discretion to organize and reorganize work in the way they see fit, subject to their obligation to act in good faith. This is so even where the collective agreement does not contain an explicit management rights clause.
2. The use of the word “vacancy” in a collective agreement does not mean an employer is under an obligation to declare a vacancy and post the position any time an employee leaves. The case law has interpreted the term “vacancy” not to mean an emptiness or vacant position in the dictionary sense of the term, but instead as a vacant position for which there is adequate work in the opinion of the employer to justify filling that position.
3. The question of whether there is a “job of work” to be done is determined not by the existence of potential work, but rather by actual work that an employer chooses to have done. That being said, if there is indeed a “job of work” to be done, the employer cannot keep a position open indefinitely.
4. Finally, the above-noted principles have been applied even where the consequence of an employer’s failure to fill a position has resulted in there being no employees in a bargaining unit.

In light of the foregoing principles, Arbitrator Slotnick indicated that absent specified provisions in a collective agreement such as a minimum staffing guarantee or a favourable definition of “vacancy”, it is generally quite difficult for a union to compel an employer to post and fill a departing employee’s position where the employer determines it is not necessary.

After hearing detailed evidence about the duties of the position from which the Supervisor retired, as well as of the two PWU Protection and Control Technicians he supervised, Arbitrator Slotnick held as follows:

- The Supervisor’s duties were akin to those of a working foreperson, and much of his work was identical to that of the PWU Protection and Control Technicians. In fact, only a minority of his duties could be called supervisory in nature; and
- The work that the Supervisor was performing had not disappeared, but had instead been redistributed.

On the evidence, Arbitrator Slotnick held that the Employer’s reorganization fit within the principles he had noted, as there was nothing in the collective agreement requiring the Employer to declare that

a vacancy existed in the supervisor position, and to subsequently post and fill the position, in the circumstances. Furthermore, he held that not only was there no allegation by the Union of bad faith, but that the Employer had in fact looked at the situation on an ongoing basis in the past three years and had concluded, in good faith, that a vacancy did not exist based on its reasonable belief that the redistribution of work, modernization of equipment, and possibly additional overtime for remaining employees meant that there was not enough for a supervisor "job of work". In his view, the evidence was that the Supervisor was "winding down" for some time before he retired, and the Employer should not be faulted for having been willing to keep him in the position and waiting until his retirement before proceeding with its reorganization.

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