IN THE MATTER OF AN ARBITRATION

BETWEEN:

GENESTA INC.,
c.o.b. as SPECTRUS or SPECTRUS INC.

(the "Employer")

- and -

UNITE HERE ONTARIO COUNCIL
& UNITE HERE LOCAL 2508G

(the "Union")

SEVERANCE PAY GRIEVANCE

PRELIMINARY AWARD

ARBITRATOR: Paula Knopf

APPEARANCES:

For the Employer
R. Ross Wells, Counsel
Rich Higgins, VP, Corporate Services
Rhonda McLean, Human Resources Manager

For the Union
Andrea Bowker, Counsel
Elmo Hewitt, President
Ed Chambers, Chief Steward
BJ Cardy, Regional Representative

A hearing in this matter was held in Guelph, Ontario, on January 4, 2007.

This case involves a claim for severance pay under the *Employment Standards Act* (hereinafter referred to as the *ESA*). This is a unionized workplace, and the parties have agreed that I have jurisdiction under the *ESA* and/or the Collective Agreement to resolve this issue.

The parties have also agreed that the best way to approach this case is to obtain a ruling on a preliminary question before embarking on other potential complex factual and legal issues. To facilitate this process, the parties filed the following Agreed Statement of Fact:

1. The Employer operated a manufacturing facility in the City of Guelph.

2. The Union is the bargaining agent for certain employees of the Employer at its Guelph facility as set out in the Collective Agreement.

3. The Guelph facility ceased operation and closed December 31, 2006. The bargaining unit employees were laid off as a result of the closure.

4. This grievance asserts an entitlement to severance pay under Section 64(1) of the *Employment Standards Act,* 2000 ("*ESA*").

5. The Employer had fewer than 50 employees in Ontario and a payroll of less than $2.5 million in Ontario.

6. The Union alleges that the Employer has additional employees in the United States and if consideration is given to the payroll relating to those employees, has a payroll greater than $2.5 million. The Employer denies the Union's allegation with respect to additional employees in the United States, but the parties agree that the Arbitrator should be asked the following preliminary question:

   > In determining whether an employer "has a payroll of $2.5 million or more" as that phrase appears in Section 64(1) of the *ESA*, is the payroll of employees employed in the United States to be included in the determination of the magnitude of the payroll?

7. In the event that the question above is answered in the negative, the parties agree that the grievance should be dismissed.

8. In the event that the question above is answered in the affirmative, then a phase 2 of the arbitration will be required to permit the Arbitrator to consider and determine the Union's allegation that the Employer has additional employees in the United States creating a payroll greater then $2.5 million.

The Union asserts that the overall or worldwide payroll of the Employer ought to be considered in the determination of entitlement to severance under the *ESA*. The Employer asserts that only the payroll in Ontario is relevant. Therefore, the preliminary question that must be determined in this Award is whether the computation of "payroll" in the *ESA* includes monies payable to employees outside of Ontario.

The relevant provisions under the *ESA* and related statutes are as follows:

Employment Standards Act, S.O. 2000

Definitions

1. (1) In this Act,

. . .

"employee" includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages,

(b) a person who supplies services to an employer for wages,

(c) a person who receives training from a person who is an employer, as set out in subsection (2), or

(d) a person who is a homeworker,

and includes a person who was an employee; ("employé")

"employer" includes,

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and

(b) any persons treated as one employer under section 4, and includes a person who was an employer; ("employeur")

. . .

"establishment", with respect to an employer, means a location at which the employer carries on business but, if the employer carries on business at more than one location, separate locations constitute one establishment if,

(a) the separate locations are located within the same municipality, or

(b) one or more employees at a location have seniority rights that extend to the other location under a written employment contract whereby the employee or employees may displace another employee of the same employer; ("établissement")

To whom Act applies

3. (1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

(a) the employee's work is to be performed in Ontario; or

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

Separate persons treated as one employer

4. (1) Subsection (2) applies if,

(a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and

(b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.

64. (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of $2.5 million or more.

Payroll

(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of $2.5 million or more if,

(a) the total wages earned by all of the employer's employees in the four weeks that ended with the last day of the last pay period completed prior to the severance of an employee's employment, when multiplied by 13, was $2.5 million or more; or

. . .

Location deemed an establishment

(4) A location shall be deemed to be an establishment under subsection (1) if,

(a) there is a permanent discontinuance of all or part of an employer's business at the location;

(b) the location is part of an establishment consisting of two or more locations; and

. . .

Arbitration and s. 4

101. (1) This section applies if, during a proceeding before an arbitrator, other than the Board, concerning an alleged contravention of this Act, an issue is raised concerning whether the employer to whom the collective agreement applies or applied and another person are to be treated as one employer under section 4.

Restriction

(2) The arbitrator shall not decide the question of whether the employer and the other person are to be treated as one employer under section 4.

. . .

Decision by Board

(5) The Board shall decide whether the employer and the other person are one employer under section 4, but shall not vary any decision of the arbitrator concerning the other matters in dispute.

ONTARIO REGULATION 291/01

Definitions

1. In this Regulation,

. . .

"women's coat and suit industry" means all work done in the manufacture anywhere in Ontario, in whole or in part, of cloaks, coats, suits, wraps, wind-breakers, skirts manufactured for use as part of a suit, jackets or blazers, manufactured from any material including suede, leather, simulated, synthetic, pile and fur fabrics, of any description, for female persons of all ages, but does not include work done in,

(a) the manufacture of,

(i) ski-suits or skating suits, in whole or in part,

(ii) athletic uniforms, in whole or in part,

(iii) riding-coats, or

(iv) lounging-robes, bathrobes, kimonos, pyjamas or beach wraps,

(b) the making of cloaks, coats, suits, wraps, wind-breakers, skirts manufactured for use as part of a suit, jackets or blazers, manufactured from any material including suede, leather, simulated, synthetic, pile and fur fabrics, of any description, for female persons of all ages by a custom tailor, who,

(i) makes cloaks, coats, suits, wraps, wind-breakers, skirts manufactured for use as part of a suit, jackets or blazers individually for a retail customer, according to the measurements and specifications of the retail customer, and

(ii) does not employ more than four persons in making cloaks, coats, suits, wraps, wind-breakers, skirts manufactured for use as part of a suit, jackets or blazers, or

(c) the receiving, warehousing, shipping or distributing of raw materials or manufactured products or in sales, design or administrative operations; (“industrie des manteaux et tailleurs pour dames”)

Pay Equity Act

Pay equity plans required

13. (1) Documents, to be known as pay equity plans, shall be prepared in accordance with this Part to provide for pay equity for the female job classes in each establishment of every employer to whom this Part applies . . .

Minimum adjustments

(4) The first adjustments in compensation under a pay equity plan are payable as of the date provided for in clause (2) (e) and shall be such that the combined compensation payable under all pay equity plans of the employer during the twelve-month period following the first adjustments shall be increased by an amount that is not less than the lesser of,

(a) 1 per cent of the employer's payroll during the twelve-month period preceding the first adjustments; and

. . .

Definition

(8) In this section,

"payroll" means the total of all wages and salaries payable to the employees in Ontario of the employer.

Interpretation Act

All Acts remedial

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

The Submissions of the Union

The Union asserts that section 64(1)(b) applies to the situation at hand even though this Employer does not have a payroll in Ontario of more than $2.5 million. The basis for this argument is the Union's reliance on the "purposive" interpretation of the *ESA*. It was submitted that the *ESA* essentially sets up a "means" test for employers who are deemed to be "big enough" to compensate

employees for long service. It was said that the *ESA* does not tie the obligation to a geographic jurisdiction, but instead determines the liability on the basis of the employers' size or ability to pay. Accordingly, it was said that there is no policy reason to limit the sweep of the *ESA* to only an Ontario payroll. This application of the *ESA* was said to be consistent with the decisions in *Don Park Inc.,* [1994] O.E.S.A.D. No. 12, Decision No. ES 11/93A; and *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, as well as the directive in the *Interpretation Act, supra*, to read the statute in a remedial way.

The Union also stressed that the Ontario Legislature has specified geographic limitations to its statutory authority in other Acts when there is such an intent. The Union points to section 3(1) of the *ESA*, *supra*, as an example of language that gives that statute extra-provincial scope and at the same time contains limits to its application in terms of municipalities through the definition of "establishment" and section 64(4). Counsel for the Union submitted that the Legislature has therefore been clear in spelling out when not to look beyond certain locations. It was said that since section 64 of the *ESA* contains no language limiting the computation of "payroll" to an employer's Ontario operations, no such restriction should be "read in" to the Act. The Union also points to Regulation 291/01 under the *ESA* and its definition of "women's coat and suit industry" to support the argument that where the Legislature intends to limit its application to Ontario, it spells this out clearly. It was said that this means that there should be no presumption that the words "in Ontario" should be applied or read into the meaning of the word "payroll" in the *ESA*.

The Union also points to section 13(8) of the *Pay Equity Act, supra.* This was said to be an example of how the Ontario Legislature has specifically limited the scope of an Act restricting its application to a "payroll" that is to be computed on the basis of the "total of all wages and salaries payable to the employees *in Ontario* of the employer" [emphasis added]. The absence of such language in the *ESA* was said to lead to the conclusion that the *ESA* was not meant to be restricted to Ontario payrolls. In support of this, the Union points to the case of

Re Visteon Canada Inc. and I.A.M., Local Lodge 2113 (2002) 111 L.A.C. (4th) 252 (Devlin). Counsel for the Union argued that this case directs that restrictions should not be "read into" the *ESA* that would defeat a "broad and liberal interpretation" of the Act or that would be inconsistent with its remedial intent.

The Submissions of the Employer

The Employer submits that the very question to be determined in this case has been definitively resolved by the Ontario Labour Relations Board (hereinafter referred to as the OLRB) in the decision *Northland Superior Supply Co.,* [2004] OLRB Rep. March/April 384. That case was a referral from an arbitrator for a determination about whether two legal entities should be treated as one employer under the *ESA*. In the course of that hearing, the parties also asked the OLRB to determine whether the employers' combined payroll includes their operations outside of Ontario. The OLRB ruled that the only payroll that applies to the *ESA* is the payroll of the Ontario operations. The Employer in the case at hand argues that this decision is correct and binding. Counsel for the Employer asserts that since the OLRB has review powers over Employment Standards Officers' decisions, exclusive jurisdiction over the non-unionized sector in terms of *ESA* interpretations, its decision should be considered binding on this arbitrator and not overturned unless it is shown to be "clearly wrong". It was argued that in order for there to be consistency in statutory enforcement and application, an arbitrator considering a question of the pure interpretation of the *ESA* should consider him/herself as part of the OLRB panel and would not overturn a decision from within that tribunal unless it can be demonstrated that it was unreasonable.

Further, or in the alternative, the Employer argues that the *Northland Superior Supply* case is correct and soundly reasoned. It was submitted that when the *ESA* is read as a whole, it is clear that the legislative intent is to limit its application to employees and payrolls in Ontario. The Employer asserts that section 64(2) and the definition sections of the Act make it clear that the Act does not apply to employees outside of Ontario. Further, it was said that when

determining the size of a payroll, one must look at the total wages of employees in Ontario because the *ESA* does not and cannot apply to employers and employees outside of Ontario. It was said that this is made very clear in section 3(1)(a) of the *ESA* where it is spelled out that the standards apply to work performed in Ontario. The only exception to this is contained in section 3(1)(b) where the *ESA* specifies that the standards can also apply to work performed outside of Ontario if that work is a "continuation of work performed in Ontario". It was argued that there is a presumption that Ontario legislation applies to Ontario, and section 3 simply affirms this presumption and spells out the one specific exception to the application of the Act. Absent the specific exception in section 3(1)(b), it was said that the *ESA* would have no application to work performed outside of Ontario. The Employer points out that its interpretation is consistent with the *Policy and Interpretation Manual* published by the Employment Standards Branch of the Ontario Ministry of Labour [Thomson Carswell] that states that the obligations under section 64(1)(ii) arise from employment with an employer who "has a payroll in Ontario of at least $2.5 million." [p.19-90]. The Manual also states that it is Ministry Policy to compute only the payrolls of associated or related businesses within Ontario in determining whether the payroll meets the $2.5 million threshold. While counsel for the Employer readily conceded that the Ministry's Manual is not binding upon this arbitrator, it was argued that this publication ought to be considered relevant and persuasive, as well as being consistent with the *Northland Superior Supply Co., supra,* case.

The Employer also relies on the decision in *Tullett and Tokyo Forex (Canada) Ltd. v. Singer,* [1998] O.J. No. 2248. It was said that this decision makes it clear that the *ESA* creates standards for Ontario based employment, and that the rights cannot be determined by looking at "enterprises" outside of this province. The Employer suggests that if the Union succeeds with its argument, an employer with one employee in Ontario and worldwide payrolls outside of the province would be drawn within the severance obligations under section 64. It was said that there is a real question as to whether the Ontario Legislature has

the authority to impose such obligations, but even if it could, one would expect clearer language than one finds in the *ESA* to support such a claim.

The Union's Reply Submissions

Counsel for the Union submits that a decision of the OLRB regarding the *ESA* should not be given any special deference by an arbitrator because the *ESA* gives decision making authority over matters of interpretation and application to arbitrators and the OLRB. In fact, where there is a collective agreement, an arbitrator has exclusive jurisdiction over the *ESA* claim. Therefore, it was said that the concept of tribunal deference should not be applied in this situation.

Further, and more importantly, counsel for the Union argues strenuously that the *Northland Superior Supply Co., supra*, decision was wrongly decided and should not be followed. First, the decision itself cites several authorities that the Union asserts do not support its conclusions. In particular, the OLRB relied upon *Tullett and Tokyo Forex (Canada) Ltd., supra*, which Union counsel described as "incomprehensible". Further, Union counsel asserted that, at best, that decision stands only for the proposition that employment outside of Ontario with an employer based in Ontario cannot be used for the calculation of continuous employment in Ontario. Further, it was said that the Ontario court was only dealing with the employee and did not deal with the question of the employer's payroll.

Second, it was said that the reasoning in the *Northland Superior Supply Co., supra,* case is wrong and/or that it is not binding upon this arbitrator. It was suggested that the decision is self contradictory in paragraph 15 where it states that the Ontario Legislature has no authority to legislate concerning the payrolls of other provinces and yet it also acknowledges that the authority does reach to work outside of the province if it is incidental to work in Ontario. Further, it was pointed out that the conclusions regarding payrolls outside of Ontario were part of the OLRB's decision regarding the determination of whether the related

employers' combined payrolls should be calculated on the basis of the operations outside of Ontario. Counsel for the Union pointed out that the OLRB's "jurisdiction" to consider that question only arose because of the parties' consensual request that the OLRB determine that secondary issue. Under section 101(5), the determination of the "payroll" question should properly have remained within the exclusive jurisdiction of the original arbitrator. Accordingly, it was said that the *Northland Superior Supply Co., supra*, decision is neither binding nor correct.

The Union also pointed out that the *Policy and Interpretation Manual* is not binding on this arbitrator and that its interpretation is based on wording that is not contained in the *ESA* itself. It was stressed that only wording of the *ESA* must be applied and enforced in this case.

The Union stressed that there is no policy reason why an operation outside of Ontario should not be excluded from consideration under the *ESA*. If that were the case, it would mean that an employer could escape the application of the *ESA* by simply creating a corporation in the U.S. or another province simply to administer the payroll of an Ontario based operation. It was said that this would defeat the purpose and intent of the *ESA*. It was stressed that the *ESA* does not "care how a corporation sets itself up". The Act simply creates the bright line criteria contained in section 64 which does not include the words "in Ontario" as a consideration of the computation of payroll. It was stressed that employees in Ontario should not be deprived of their rights under the *ESA* simply because of the corporate structure of the Employer.

The Decision

The issue at this preliminary stage of this case is whether the payroll of employees outside of Ontario should be included in the determination of the magnitude of the payroll under section 64(1)(b) of the *ESA*.

The analysis shall begin with rejection of certain arguments that have been presented. First, although the Employment Standards Branch's *Policy and Interpretation Manual, supra,* is interesting and supports the Employer's arguments, that publication is not binding upon this arbitrator. While it is a statement of what the Ontario Ministry of Labour has interpreted to be the legislative intent or application of the *ESA*, only the wording of the statute itself is determinative. Secondly, this arbitrator is not bound by the OLRB ruling in *Northland Superior Supply Co., supra,* and/or by considerations of tribunal consistency. Union counsel is correct in pointing out that the ruling concerning the computation of payroll was not made within the exclusive jurisdiction of the OLRB. That aspect of the *Northland Superior Supply Co*. decision was made only because of the specific invitation of the parties to have the OLRB resolve the "payroll" issue at the same time as it made the determination of the "related employer" question. The "payroll" issue would otherwise have been within the exclusive authority of an arbitrator under sections 99, 100 and 101 of the *ESA*. Therefore, the *Northland Superior Supply Co., supra*, case shall be given the same effect as another arbitral decision in this matter.

This brings us to the merits of the preliminary issue. Section 64(1)(b) provides that "An employer who severs an employment relationship with an employee shall pay severance to the employee if the employee was employed by the employer for five years or more and …. the employer has a payroll of $2.5 million or more." What is to be considered in the computation of the "payroll"? Section 64(2) tells us only what pay periods and formula to apply for the computation. It does not tell us what funds are available for consideration. The Union is correct that nothing in the *ESA* specifies that only the payroll in Ontario needs to be considered. However, when the *ESA* is read as a whole, which must be done, it must be concluded that only the Ontario payroll is relevant to section 64. Section 3 of the *ESA* spells out that the Act sets up standards for employers only where "the employee's work is performed in Ontario" or "the employee's work is performed in Ontario and outside Ontario but the work performed outside Ontario is a continuance of work performed in Ontario." It other words, section 3 sets out

the scope of application of the Ontario employment standards. Those standards are imposed on employers who have employees working in this province. The only extra-territorial effect of the *ESA* is that it covers employers who have employees working within and outside of Ontario, and if their work outside the province is a continuation of their work in Ontario. Again the Union is correct in that the *ESA* does not care about the corporate structure or headquarters of the Employer. The Act binds employers who are situate outside of the province, however, the *ESA* does limit its application to employers who have employees who fit within the scope of the "application" criteria in section 3. Interestingly, the *ESA* also sets up a safeguard provision in section 4 by ensuring that the intent of the Act cannot be defeated by setting up associated or related businesses. While that situation does not apply to the issue in this preliminary ruling, the presence of section 4 does provide protections for the kind of harm that the Union has expressed. Therefore, it must be concluded that scope, intent and application of the *ESA* is to protect Ontario based employment.

The Union has argued that I should follow the directive in *Visteon Canada Inc., supra,* and give the *ESA* a "broad and liberal interpretation, consistent with the remedial purpose of the legislation, which is to protect the interests of employees by requiring employers to comply with certain minimum standards" (p. 261). That statement is incontrovertible. However, that principle does not give an arbitrator license to impose a policy decision that goes beyond the authority of a statute. The *Tullett and Tokyo Forex (Canada) Ltd. and Singer,* case, *supra,* concluded, in paragraph 4, that the current section 3 of the *ESA* "is directed at Ontario based employment." This was said to be a "foundation element" in the determination of an employer's obligations under the Act. This conclusion was followed in the *Northland Superior Supply Co., supra*, case where it was stated, "The Ontario legislature has no authority to legislate concerning the payrolls of other provinces. It has legislative authority with respect to business operating in Ontario. It is the payroll of an employer's operation in Ontario which is relevant for the purposes of the Act." [*ESA*] (at para. 15). This reasoning is based on the wording of the *ES*A and an acknowledgment of the limits of legislative authority of

the province. This reasoning is sound, persuasive and consistent with the remedial purpose of the *ESA*. That statute can only protect Ontario based employment and cover employers who operate in this province. While an employer may have operations and payrolls outside of the province, it is only the Ontario based employment that is caught by and relevant to section 3 and therefore section 64 of the *ESA*.

It must be admitted that this case would have been much easier to decide if the Legislature had been as clear as it was in the drafting of the *Employment Equity Act, supra.* In that situation, the statute states "'payroll' means the total of all wages payable to the employees *in Ontario* of the employer" (emphasis added). Also, in Regulation 291/91 of the *ESA*, the definition of "women's coat and suit industry" is said to mean "all work done in the manufacture anywhere in Ontario, in whole or in part." If the words "in Ontario" were contained in section 64 of the *ESA*, no doubt this preliminary issue would not have had to be litigated. However, the absence of the words "in Ontario" in section 64 of the *ESA* does not mean the Union's argument must succeed. The words "in Ontario" are found in section 3 of the ESA, and their effect is to bind only employers whose employees' work is performed in Ontario or outside the province as a continuation of their work. The fact that this case was so well argued by counsel for the Union reveals that the legislative drafters could have been clearer, as they were in the *Pay Equity Act* and Regulation 291/91 of the *ESA*. However, the intent of the *ESA* remains clear enough to extend its protections to Ontario payrolls of employers who fall within the criteria set out in section 3 and 64. Further, it cannot be otherwise. Neither the *ESA* nor any other provincial statute needs to say that it has no application outside of provincial authority. Nor does it make legal or common sense to presume that provincial legislation could affect anything other than work or operations in Ontario. A company, no matter where it is based, will be bound by the *ESA* if it has employees in Ontario. But it is only the employment of those Ontario based employees that the *ESA* is concerned about. It is not concerned with the operations or payrolls outside of this province.

For all these reasons, it must be concluded that in determining whether an "employer has a payroll of $2.5 million or more", the payroll of employees employed outside of Ontario is not to be included in the determination of the magnitude of the payroll.

I remain seized with this grievance should there be any issues arising from the implementation of this ruling or any other matters that remain outstanding.

DATED at TORONTO this 11th day of January, 2007.

"Paula Knopf"

_____

Paula Knopf – Arbitrator