

CRIMINAL CONVICTIONS AT ARBITRATION

The Supreme Court of Canada has granted leave to appeal from the Ontario Court of Appeal's decisions in *CUPE v. The City of Toronto and Douglas Stanley* and in *OPSEU v. The Ministry of Community and Social Services & The Ministry of Corrections and the Grievance Settlement Board*. Readers will recall that these cases dealt with the evidentiary status of previous criminal convictions at arbitration. A case comment on these cases, written by Don Jarvis and Joseph Morrison, is found in Volume 4, No. 2 of this newsletter. Both applications for leave to appeal were granted with costs to the applicant in any event of the cause. The nature of the issues before the Supreme Court are described as follows by Eugene Meehan, Q.C., Lang Michener, Ottawa, from Eugene's weekly email Lawletter@r:

Ontario Public Service Employees Union v. Her Majesty the Queen in Right of Ontario as represented by the Ministry of Community and Social Services, et al (Ont.) (28849):

In this appeal, should the proper standard of review of procedural and evidentiary decisions of the Ontario Crown Employees Grievance Settlement Board be one of correctness, and in the absence of issue estoppel, collateral attack and clear finding of abuse of process, is it proper for a court on judicial review to set aside an arbitrator's decision and apply a free standing principle of judicial finality to restrict the evidence permitted in rebuttal of a criminal conviction. In addition, did the Court of Appeal below err in critically assessing the nature and origin of the evidence before an arbitrator and in determining that rebuttal evidence should not have been heard?

Canadian Union of Public Employees, Local 79 v. City of Toronto, et al (Ont.) (28840):

In addition to the issues in the Leave to Appeal above, the Supreme Court of Canada will consider whether there is a new independent "finality principle" separate and different from the principles of issue estoppel and res judicata and the doctrine of abuse of process, rendering prior criminal convictions conclusive and binding in later arbitration proceedings.

***DOES AN ARBITRATOR HAVE EXCLUSIVE
JURISDICTION OVER HUMAN RIGHTS ISSUES***

ARISING IN A UNIONIZED WORKPLACE?

The Court of Appeal's decision in *Ontario Human Rights Commission v. Naraine*, answers this question in the negative. *Ontario Human Rights Commission v. Naraine* was an appeal from a decision of the Divisional Court dismissing an appeal from a Board of Inquiry of the Ontario Human Rights Commission. The Board of Inquiry had ordered the reinstatement of Mike Naraine to employment with the Ford Motor Company, notwithstanding that an arbitrator had ruled ten years earlier that this discharge was justified.

The narrow issue on appeal was whether “in light of jurisprudence such as *Weber v. Ontario Hydro*, what is the effect, if any, of the arbitration award on the jurisdiction and power of the Board of Inquiry to grant the remedy of reinstatement.

History of Case

This case has a fairly lengthy history, which is necessary to set out in some detail.

Mr. Naraine was fired from his position as an electrician with Ford in 1985. However, prior to his discharge, Mr. Naraine had filed a human rights complaint with the Ontario Human Rights Commission alleging racial discrimination and harassment. Following his discharge he filed another human rights complaint. He also filed three grievances through his union: two involving twelve-day suspensions for incidents of verbal insubordination and the third for his discharge.

Mr. Naraine's grievances were arbitrated by E.E. Palmer, Q.C. in February of 1986. On the evidence, Arbitrator Palmer dismissed two of Mr. Naraine's grievances, including the dismissal grievance. While the arbitrator heard some evidence of discrimination, he found that it was irrelevant to the altercation that had resulted in the discharge.

Although Mr. Naraine filed his human rights complaints in May and October of 1985, the Ontario Human Rights Commission did not proceed from the investigation stage to the appointment of a Board of Inquiry until 1993. Ford attempted unsuccessfully to have the complaint dismissed on the basis of various factors such as delay and *res judicata*. The company's motions were denied by the Board of Inquiry, and the Divisional Court dismissed the appeal on June 23, 1999, although it described the Commissioner's eight-year delay from 1985 to 1993 as “shameful and scandalous”.

The Board of Inquiry finally released a decision on the merits on July 25, 1995. The board found that Mr. Naraine had been discriminated against in his employment. On December 1996, the Board ordered as a remedy that Mr. Naraine be reinstated.

Court of Appeal's Findings

The Court of Appeal found that the Divisional Court's rejection of the application of *Weber* to this case was correct.

In *Weber*, the issue was the scope of the arbitrator's jurisdiction to deal with disputes that arise expressly or inferentially out of a collective agreement. The Supreme Court of Canada found that this jurisdiction was exclusive.

In accordance with the exclusive jurisdiction model in *Weber*, the court must determine the "essential character" of the dispute and where the legislature intended the dispute to be resolved.

The *Weber* approach does not preclude all action in the courts between employers and unionized employees. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts. The approach described in *Weber* also applies when the jurisdictional conflict is between two competing tribunals, as in this case.

There is jurisprudential and academic support for the conclusion that the legislature did not intend labour arbitrators to have exclusive jurisdiction over human rights issues. Human rights legislation has consistently been found to have a quasi-constitutional status, which can only be overridden by express and unequivocal legislative language.

In Ontario, it would appear that proceedings under the Labour Relations Act and proceeding under the Human Rights Code are intended to be concurrent, so that neither ousts the jurisdiction of the other. However, it should be noted that in this case, the statutory context of Mr. Naraine's complaints pre-dated both the 1992 amendments to the Labour Relations Act authorizing arbitrators to apply the Human Rights Code and the amendments to the Human Rights Code authorizing the Commission to defer to another tribunal.

In writing for the Court of Appeal, Abella, J.A. noted at para. 58, "I am therefore of the view that *Weber* does not apply so as to oust the jurisdiction of the Board in Mr. Naraine's case. Even now, under the current regime, it seems to me that given the concurrency contemplated by the synchronized discretion provided by s. 34(1)(a) of the Code and s. 48(12)(j) of the LRA, *Weber* is of limited assistance in determining which forum prevails, other than providing conceptual guidance that, to the extent possible, disputes should be resolved in a single proceeding".

The availability of jurisdictional concurrency should not be seen as "forum" shopping. The jurisdictional outcome will depend upon the circumstances of each case, including the reasonableness of the union's conduct, the nature of the dispute, and the desirability of finality and consistency of result.

Although they arose out of the same factual matrix, the legal questions before each tribunal were not identical and the parties were different in each proceeding. In grievance proceedings under a collective agreement, an employee (through his or her union) seeks to vindicate his or her contractual rights; by contrast, in filing a complaint

under the code, an employee asserts independent statutory rights accorded by the legislature.

There may be circumstances where an individual unionized employee finds the arbitral process foreclosed, since the decision whether to proceed with a grievance is the union's and not the employee's. The legal strategy of the grievance proceeding is also determined by the union, which has carriage of the grievance.

In this case, the other question at issue was whether the remedy of reinstatement could be upheld. The Court found that the remedy of reinstatement could not stand, as the Board of Inquiry's decision with respect to the issue of remedy was vulnerable on any standard of review. In this case, the Court found that the Board's decision on remedy was internally inconsistent.

The Board's finding that Mr. Naraine's subsequent employment "terminated" Ford's continuing liability was inconsistent with its reinstatement order. If Ford's obligations to Mr. Naraine terminated at that point, then Ford could have no ongoing obligation to restore his employment.

Finally, while the Board was not bound by the prior decision of the arbitrator upholding the discharge, it ought to have given it more serious weight and consideration. The labour arbitrator found that Mr. Naraine's conduct justified his dismissal. On its face, this finding was tenable and no judicial review of the decision was taken. This factor, combined with the very significant delay from the date of discharge to the date of the Board's decision on remedy and the Board's conclusion that Ford's remedial exposure in this case ended with Mr. Naraine's hiring by General Motors, led the Court to conclude that reinstatement should not have been ordered.

Discussion

If the Court had accepted Ford's position that an arbitrator appointed under the collective agreement has exclusive jurisdiction to address issues in the human rights complaint, this would have a profound effect upon the obligations of trade unions by making them the sole investigators and prosecutors of human rights complaints arising in unionized workplaces.

This proposition would be untenable under the current labour relations regime. While unions are committed to the public policy objectives of the Code and can and do successfully prosecute human-rights based grievances, the criteria used by the Commission in deciding whether to deal with a complaint or refer it to a Board of Inquiry are entirely different from the criteria used by unions in deciding whether to initiate or refer a grievance to arbitration. In determining whether to bring forward a grievance, unions are entitled to consider the interests of the entire bargaining unit, the financial viability of the union, the effect of the grievance on other members, and how the grievance fits into a contract negotiating strategy.

The legislature has clearly given the Commission the discretion to deal with a complaint filed with it, regardless of the availability of grievance arbitration. It must be presumed that the legislature conferred this jurisdiction so that the decision to deal with or refer a complaint to a Board of Inquiry be made in accordance with the criteria used by the Commission, rather than the criteria used by unions. To hold otherwise would be to effectively privatize the enforcement of public rights and deprive unionized workers of publicly funded investigation and adjudication mechanisms. In so doing, the costs of such complaints would be downloaded onto unions and ultimately union members. A very clear legislative intent would be necessary in order to deprive unionized workers of a forum available to all other members of the public.

The interrelationship of human rights and collective agreement rights raises a number of complex jurisdictional issues, which remain to be resolved in the specific circumstances of each case. Abella, J.A. noted, “I leave for another day the question of whether issue estoppel can apply in circumstances where a labour arbitrator has applied the Code and the individual grievor seeks to have the human rights claim reconsidered under the Code...”

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