

*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 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

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 in February of 1986. On the evidence, the Arbitrator 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.

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.

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.

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”.

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.

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.

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.

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 resulted in making trade unions the sole investigators and prosecutors of

human rights complaints arising in unionized workplaces. Having said this, there are certainly circumstances where it is may be worthwhile for an employer to argue that the substance of the grievance is really a human rights complaint and therefore the employee or union should not get two opportunities to argue the same issue.

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