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COURT OF APPEAL FOR ONTARIO

MORDEN, LABROSSE AND GOUDGE JJ.A.

B E T W E E N:	)	
	)	
GERMAIN GAIGNARD, TREVOR LEE, JAMES SMITH AND JACK COIMBRA	)	**Angus J. MacLeod for the appellant**
	)	
Plaintiffs (Appellants)	)	
	)	
- and -	)	
	)	
THE ATTORNEY GENERAL OF CANADA, MONTY BOURKE, MICHAEL RYAN, BRENDAN REYNOLDS, RICK ROGERS, BILL ISAACS, BRUCE SOMMERS AND SHERRY CRISP	)	
	)	**R. Jeff Anderson**
Defendants (Respondents)	)	**for the respondent**
	)	
PROCEEDINGS UNDER THE CLASS PROCEEDINGS ACT, 1992	)	
	)	
	)	**Heard: April 10, 2003**

On appeal from the judgment of Justice Maurice Cullity of the Superior Court of Justice dated September 12, 2002.

GOUDGE J.A.:

[1] This case represents yet another debate about the application of the bright line principle laid down in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 that disputes which arise out of a collective agreement must be resolved by arbitration and not by the courts.

[2] Cullity J. decided that this was such a dispute. For the reasons that follow I agree with his conclusion.

[3] The appellants are the plaintiffs in this lawsuit. They are Correctional Officers who work at Kingston Penitentiary. As such, they are covered by a collective agreement between their union, the Public Service Alliance of Canada, and their employer, the Government of Canada.

[4] The respondents, the defendants in the action, are the Attorney General of Canada representing the Government of Canada and seven senior members of its management team at Kingston Penitentiary.

[5] The statement of claim alleges that the defendants authorized and conducted a secret operation to stop the flow of contraband into the penitentiary in which they recruited inmates to coerce the appellants to comply with illegal requests for contraband. The appellants allege that as part of this operation, the respondents covertly supplied these inmates with funds, confidential information and contraband. They say that this management conduct poisoned the atmosphere at the penitentiary for the appellants and put their lives at risk. The appellants plead that these actions constitute the intentional infliction of emotional distress, breach of the duty of good faith, breach of fiduciary duty, breach of the duty of care and breach of the *Charter of Rights and Freedoms* and they claim damages for the physical and emotional injuries they suffered. In addition the appellants plead defamation alleging that public statements made by the respondents about the operation defamed them.

[6] Pursuant to Rule 21.01(3)(a), the respondents moved to strike all the allegations in the statement of claim save those relating to defamation. In granting the order, the motions judge focussed primarily on the relevant provisions of the legislation that governs the union and the employer, the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (*PSSRA*).

[7] Sections 91 and 92 of the *PSSRA* provide *inter alia* that an employee can grieve both about the interpretation or application in respect of him or her of a provision of the collective agreement and about the interpretation or application of any other regulation or directive by the employer about terms and conditions of employment, but can take only the former to arbitration. The relevant parts of these sections read as follows:

> 91. (1) Where any employee feels aggrieved
>
> (a) by the interpretation or application, in respect of the employee, of

> (i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or
>
> (ii) a provision of a collective agreement or an arbitral award ….

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

(2) An employee is not entitled to present any grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 113.

…

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

> (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award ….

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the

> grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

[8] These provisions are in essence repeated in Article 20.01 and Article 20.23 of the collective agreement governing the parties here. They are as follows:

> 20.01 In cases of alleged misinterpretation or misapplication arising out of agreements concluded by the National Joint Council (NJC) of the Public Service on items which may be included in a collective agreement and which the parties to this Agreement have endorsed, the grievance procedure will be in accordance with Section 7.0 of the NJC By-Laws.
>
> ...
>
> 20.23 Where an employee has presented a grievance up to and including the Final Level in the grievance procedure with respect to:
>
> (a) the interpretation or application in respect of him or her of a provision of this Agreement or a related arbitral award,
>
> or
>
> (b) disciplinary action resulting in suspension or a financial penalty,
>
> or
>
> (c) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the *Financial Administration Act,*
>
> and the employee's grievance has not been dealt with to his or her satisfaction, he or she may refer the grievance to

> adjudication in accordance with the provisions of the *Public Service Staff Relations Act* and *Regulations.*

[9] The one other article of the collective agreement that is germane to this dispute is Article 18:

> 18.01 The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Alliance, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.

[10] The motions judge held that the central issue was one of statutory interpretation. Could the complaints of the appellants have been made the subject of a grievance within s. 92(1)(a) as one "with respect to the interpretation or application in respect of [these employees] of a provision of the collective agreement"? Keeping in mind Article 18, the motions judge concluded that (although the appellants had not done so) a grievance presented by the appellants concerning their complaints would have been one with respect to the application of the provisions of the collective agreement within the meaning of s. 92(1)(a) of the *PSSRA*. He further concluded that the arbitration process (called adjudication in the Act) authorized by that section was sufficient to exclude the jurisdiction of the court to entertain the appellants' claims based on the impugned paragraphs of the statement of claim. He therefore struck all the paragraphs from the appellants' pleading save those supporting the defamation claim.

ANALYSIS

[11] I would reach the same conclusion as the motions judge but by a slightly different route. I would focus not on the interpretation of the arbitration provision of the *PSSRA*, but rather on the essential character of the dispute, to determine if it must be resolved by arbitration and not by the courts.

[12] *Weber, supra,* first set out in detail the principle of exclusive jurisdiction – that certain disputes must be resolved by arbitration and the courts have no power to entertain an action in respect of those disputes.

[13] The principle was designed to apply where there is a collective agreement which is required by legislation to provide for the resolution of disputes by arbitration. McLachlin J. spoke for the court on this issue. At p. 959 she made clear that according exclusive

jurisdiction to the arbitration process for certain disputes gives "full credit" to several considerations: the legislation requiring that there be an arbitration procedure to resolve disputes under the collective agreement; the "pattern of growing judicial deference" to the process of grievance and arbitration; and the desire not to allow concurrent actions to duplicate and undermine that dispute resolution process.

[14] The *Weber* principle requires a determination of when a particular dispute is within the exclusive jurisdiction of arbitration under the collective agreement and therefore is beyond the reach of court action. Binnie J. articulated the general test for this determination in *Goudie v. Ottawa (City)*, 2003 S.C.C. 14 at paragraph 23:

> Subsequent cases have confirmed that if the dispute between the parties in its "essential character" arises from the interpretation, application, administration or violation of the collective agreement, it is to be determined by an arbitrator appointed in accordance with the collective agreement, and not by the courts.

[15] *Weber* and cases that have followed it have provided guidance on the considerations for assessing "the essential character" of a particular dispute to determine if the exclusive jurisdiction principle applies and therefore if it must be resolved by arbitration.

[16] First, as McLachlin J. said in *Weber* at p. 955, one must look to the facts giving rise to the dispute rather than the legal characterization of the wrong said to be manifested by those facts. The facts must engage the rights and obligations in the collective agreement in order to be arbitrated.

[17] The second consideration is the corollary of the first, namely (in the language of McLachlin J. at p. 956 of *Weber*), the ambit of the collective agreement. The language chosen by the parties must clearly create rights and obligations that extend to these facts, either expressly or by implication.

[18] The third consideration is whether the arbitration process provided by the collective agreement can furnish an effective remedy for the dispute. The remedy need not be identical to that which the court would provide, but it must be responsive to the wrong complained of. The arbitration process does not acquire exclusive jurisdiction if the result is a real deprivation of any ultimate remedy. McLachlin J. put this point as follows in *Weber* at pp. 958-959:

> It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in *St. Anne Nackawic* confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".

[19] This consideration arises particularly in the context of the *PSSRA*. In *Jadwani v. The Attorney General of Canada et al.* (2001), 52 O.R. (3rd) 660 this court applied the exclusive jurisdiction principle and precluded court action in significant measure because, under the statute, the complaint could be remedied at arbitration. On the other hand, in *Guenette v. Canada (A.G.)* (2002), 60 O.R. (3d) 601 this court declined to apply the exclusive jurisdiction principle, in part because under the *PSSRA* the complaint could be grieved, but could not be taken to arbitration for final resolution as it arose outside the collective agreement. This court relied on the absence of an ultimate remedy at arbitration as an important factor in concluding that the principle of exclusive jurisdiction precluding court action was inapplicable.

[20] The contrary view is that, at least under the *PSSRA*, the principle applies even in the absence of an ultimate remedy at arbitration. With deference to this view, most eloquently put by Evans J.A. in his concurrence in *Vaughan v. the Queen*, [2003] F.C.J. No. 241 (C.A.), I would disagree with this approach. To apply the principle of exclusive jurisdiction if the result is that there is no ultimate remedy available either at arbitration or in court risks having a right without an effective remedy. In my view the legislature should be presumed to have effected such a result only if it has said so very clearly. Parliament has not done so in the *PSSRA*.

[21] These considerations can in effect be consolidated by asking whether, considering the facts of the dispute, the language of the collective agreement, and the effectiveness of the remedy provided by the arbitration mechanism, this is the kind of dispute that the parties intended to be finally resolved there. If so, the principle of exclusive jurisdiction applies to exclude court action. Determining the essential character of the dispute in this

way is consistent with the reality that the terms of the collective agreement both as to substance and as to dispute resolution reflect the shared intention of the parties. It provides some assurance that the disputes to be exclusively resolved by arbitration are ones that the process was designed to deal with.

[22] It remains to determine, in light of these considerations, whether the essential character of this dispute triggers the application of the exclusive jurisdiction principle.

[23] The facts raise a complaint by individuals who are acknowledged to be covered by the collective agreement. Their complaint is against their employer and its executive team and concerns the way the workplace was run by management. The facts centre on an alleged covert operation to stop contraband entering Kingston Penitentiary which employed methods that the appellants say poisoned their work environment and caused them physical and emotional harm. These allegations clearly engage the employer's obligation in Article 18 of the collective agreement to make reasonable provisions for the occupational safety and health of the employees.

[24] The same reasoning makes it equally clear that the ambit of Article 18 extends to the facts which the appellants say underpin this dispute. The employer's obligation under the collective agreement to maintain a safe workplace is directly implicated by the covert operation and its consequences for the appellants as described in the statement of claim.

[25] If this dispute were arbitrated and a breach of the collective agreement were established, the remedy at arbitration would undoubtedly include compensation to injured employees who grieved. That would remedy the wrong in very much the same way as would an award of damages in a court action. There would be no deprivation of ultimate remedy.

[26] Finally, looked at holistically, it seems to me that this is precisely the kind of dispute that the parties intended to be finally resolved by arbitration when they agreed to Article 18. The facts involve a workplace dispute between union members and management. The collective agreement sets out an obligation that fits the problem with some precision. And arbitration can provide an effective remedy. In these circumstances, the essential character of the dispute entails that the principle of exclusive jurisdiction apply. The court thus has no power to entertain an action based on this dispute.

[27] In summary, I agree with the result reached by the motions judge. I would dismiss the appeal with costs on a partial indemnity basis fixed at $4,000 inclusive of disbursements.

Released: October 17, 2003 "JWM"

"S.T. Goudge J.A."

"I agree: J.W. Morden J.A."

"I agree J. Labrosse J.A."