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COURT OF APPEAL FOR ONTARIO

WEILER, LASKIN and SHARPE JJ.A.

B E T W E E N :	)	
	)	
JACK VERNON	)	C. Scott Ritchie and James D. Virtue
	)	for the appellant
Plaintiff (Appellant)	)	
	)	
	)	
- and -	)	
	)	
GENERAL MOTORS OF CANADA LIMITED, BASIL HARGROVE, JOHN KOVACS, JOHN CAINES, DON WHALEN, JERRY SMITH, DAVID BROADBENT and CHARLIE PEEL	)	J. Brett Ledger and Laura K. Fric for the respondent General Motors of Canada Limited
	)	Lewis N. Gottheil
	)	for Basil Hargrove, John Kovacs,
Defendants (Respondents)	)	John Caines, Don Whalen, Jerry Smith, David Broadbent and Charlie Peel
	)	
	)	Heard: October 26, 2004

On appeal from the order of Justice Dougald R. McDermid of the Superior Court of Justice dated June 1, 1999.

LASKIN J.A.:

A. INTRODUCTION

[1] The appellant Jack Vernon ("Vernon") was a unionized employee of General Motors of Canada Limited ("GM"). He started a class action against his former employer and the members of the executive of his union, the CAW-Canada ("CAW"). He claims that GM and the CAW misrepresented the terms of an early retirement agreement, causing him and other employees to retire prematurely and suffer a monetary loss. The

issue on the appeal is whether the court has jurisdiction to hear the claim. Like the motions judge McDermid J., I conclude that the court has no jurisdiction to entertain Vernon's claim against either his employer or the executive of his union. I would therefore dismiss the appeal.

B. RELEVANT FACTS

[2] Vernon was employed at GM's Oshawa plant and was a member of Local 222 of the CAW. In early 1993, GM indicated that it intended to reduce its workforce in Oshawa.

[3] GM and the CAW negotiated Document 12: Job Security, an arrangement designed to encourage senior employees to retire and to protect younger workers from layoffs. Under the terms of Document 12, senior employees were eligible to take a permanent layoff as a bridge to retirement and to receive benefits previously available only to laid-off (and usually less senior) workers. Vernon was eligible to retire under Document 12.

[4] However, GM was not confident that the benefits under Document 12 would induce enough eligible employees to retire early to permit the company to meet its targeted workforce reductions. Therefore, in May 1993, it offered eligible workers enhanced early retirement incentives under the terms of a Memorandum of Understanding ("MOU") negotiated with the CAW.

[5] The MOU entitled eligible employees who took early retirement under the existing 1990 collective agreement to receive $250 per month for a maximum of five years ($15,000) plus "the benefits in effect under the current Pension Plan". Because GM and the CAW expected to enter into a new collective agreement in the fall of 1993, the MOU provided an additional incentive, which lies at the heart of the substantive dispute between Vernon and the respondents: the MOU provided that on "settlement of the 1993 Pension Plan *these benefits* will be adjusted to reflect the benefits negotiated for those first retiring under the new agreement" (emphasis added). Vernon and others accepted the incentives in the MOU and retired.

[6] The new collective agreement came into effect in mid-September 1993. By the terms of a Miscellaneous Agreement negotiated between GM and the CAW, eligible employees who took early retirement under the new collective agreement received a $35,000 lump sum retirement benefit. Vernon and other employees who had retired earlier claimed that the MOU entitled them to the $35,000 payment. GM rejected their claim. It took the position that the MOU promised Vernon and the others only the pension benefits in the new collective agreement, not the retirement benefit. Both GM and the CAW acknowledge that had Vernon retired under the terms of the new collective

agreement instead of the MOU, the Miscellaneous Agreement would have entitled him to the $35,000 benefit.

[7] Vernon filed a grievance over GM's refusal to pay him the $35,000 benefit, but the CAW refused to take it forward. In January 1994, he filed a complaint about the CAW's conduct with the Ontario Labour Relations Board (the "Board"). The Board dismissed the complaint. Finally, in April 1997, Vernon began this action for misrepresentation and breach of the MOU. Both GM and the CAW moved under Rule 21 to dismiss or stay his claim on a number of grounds, but principally on the basis that the claim had to be determined by arbitration or by the Board, not by the courts. The motions judge agreed and dismissed the action.

C. THE CLAIM AGAINST GM

[8] The principle that governs whether the court has jurisdiction to hear Vernon's claim is now well established. Mandatory and binding arbitration provisions such as s. 48(1) of Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A ("the Act") confer exclusive jurisdiction on arbitration tribunals to deal with all disputes between the parties arising from the collective agreement. If the dispute, however framed, in essence arises from the interpretation, administration, application, or alleged violation of the collective agreement, a court has no jurisdiction to hear it. See *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at para. 67.

[9] Vernon contends that his dispute with his former employer and with his union does not arise from the collective agreement and thus can be heard by the court. In support of his contention, he makes four submissions:

- Document 12 was not part of the 1990 Master Agreement between GM and the CAW and, inferentially, neither was the MOU;
- "Master Agreement" and "collective agreement" are synonymous;
- Even disputes over the payment of the $35,000 benefit under the 1993 collective agreement could not be arbitrated under the standard arbitration provisions of the Master Agreement; and
- The "Marcotte decision" in which the arbitrator held he had no jurisdiction to hear a CAW grievance against GM shows that the court should hear this claim.

[10] I do not agree with these submissions. Vernon's claim rests not on Document 12, but on the MOU and the Miscellaneous Agreement. Although the MOU and the Miscellaneous Agreement are not part of the Master Agreement, they are part of the collective agreement between GM and the CAW. The Master Agreement is not

synonymous with the collective agreement, but merely one part of it. The "Marcotte decision" has no relevance to Vernon's claim. His claim is grounded in his employment relationship with GM and arises out of the interpretation and alleged violation of the MOU, which is part of the collective agreement. It must be heard by an arbitrator or under the dispute resolution procedure in the collective agreement for disputes over pension and retirement benefits. The principle in *Weber* forecloses access to the courts.

[11] Vernon relied heavily on fresh evidence admitted on appeal, which showed that Document 12 was not part of the Master Agreement. The fresh evidence, Vernon argues, demonstrates that the parties never intended that his claim should be arbitrated. This argument faces three obstacles, which are fatal to Vernon's position.

[12] First, Document 12 has little to do with Vernon's claim. Document 12 establishes eligibility for early retirement. But Vernon's eligibility was never disputed. The dispute between Vernon on one side and GM and the CAW on the other centres on entitlement – entitlement to the $35,000 retirement benefit. That dispute turns on the terms of the MOU and the Miscellaneous Agreement. Moreover, the alleged misrepresentations Vernon relies on were made in the context of his employment relationship with GM, not outside it.

[13] Second, Vernon's argument that he can litigate his claim rests on the submission that the Master Agreement between GM and the CAW is the collective agreement between the respondents. But the evidentiary record says otherwise. As set out in GM's factum and as might be expected, the collective agreement between GM and the CAW is the complex product of years of collective bargaining between two very sophisticated parties. Thus, the 1990 GM/CAW collective agreement is not a single document, but a collection of many documents and agreements, including the 1990 Master Agreement; Appendices to the Master Agreement (including some memoranda of understanding); company statements and letters; supplementary agreements; memoranda of understanding signed after the 1990 agreement was negotiated, but during its term; and local agreements for each of the GM plants in Canada.

[14] Ancillary documents, such as company statements, memoranda of understanding, supplementary agreements, and miscellaneous agreements are considered part of a collective agreement if they were so intended by the parties and incorporated in some way into the collective agreement. See D.J.M. Brown and D.M. Beatty, *Canadian Labour Arbitration*, 3d ed. looseleaf (Aurora: Canada Law Book Inc., 2003) at 4:1210. I think it likely that Document 12 is one of the company statements included in the 1990 collective agreement. Indeed, GM and the CAW agree that it is. But even if that is not the case, the MOU is undeniably part of the 1990 collective agreement and the Miscellaneous Agreement is undeniably part of the 1993 collective agreement, though neither is contained in the 1990 or 1993 Master Agreement.

[15] The motions judge found that GM and the CAW intended that the MOU be part of the parties' collective agreement. He was correct in so finding. The MOU adds to the terms of the 1990 Canadian Supplemental Unemployment Benefit Plan, which, in turn, is part of 1990 Supplemental Agreement "C". Paragraph 1(a) of Supplemental Agreement "C" states explicitly that it is part of the "Collective Bargaining Agreement". Similarly, the Miscellaneous Agreement, which provides for the $35,000 benefit, is part of 1993 Supplemental Agreement "C". Paragraph 1(a) of that agreement also states explicitly that it is a part of the "Collective Bargaining Agreement".

[16] Therefore, Vernon's claim, which is based on misrepresentations concerning the MOU and the Miscellaneous Agreement, in essence, is a claim arising from the interpretation and alleged violation of two agreements forming part of successive collective agreements between GM and the CAW. In the words of the motions judge, at para. 21:

> It is a dispute that relates to a benefit that was negotiated between the union and the employer, reduced to writing, signed by both parties and incorporated in a collective agreement, to which benefit the plaintiff claims entitlement as a result of his employment by G.M. I find that the issue of the plaintiff's entitlement arises from the collective agreement and from the employment relationship between the plaintiff and G.M. and from the relationship between the plaintiff and the union.

It is precisely this kind of dispute over which the courts have no jurisdiction.

[17] Third, Vernon's submission assumes that he is entitled to litigate his claim in the courts because, under the collective agreement, disputes over retirement benefits are not resolved by an oral hearing before an arbitrator. In my view, that assumption is wrong because parties to a collective agreement may negotiate different dispute resolution procedures for different kinds of disputes.

[18] Vernon points out that he has no access to the standard grievance/arbitration process for the resolution of his claim. As he rightly states, the "standard process" for a grievance that is not settled culminates in an oral hearing before an arbitrator. Under the GM/CAW collective agreement, that process is available only for disputes arising from the Master Agreement. However, both in the 1990 and 1993 collective agreements, the parties negotiated a separate dispute resolution procedure for disputes arising from Supplemental Agreement "C", in other words for disputes over pension and retirement benefits.

[19] An employee starts that procedure by filing an application for the benefit with GM. If GM rejects the application, the employee may appeal in writing to a seven-person board, consisting of three union and three company representatives, and an "impartial chairman" (who may be an arbitrator), selected by the parties. The board considers the written submissions of the parties and issues a decision.

[20] Vernon submits that this procedure does not meet the requirements for mandatory, binding arbitration under s. 48(1) of the Act, a precondition to the application of the principle in *Weber*. Section 48(1) states:

> Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[21] As I have said, the flaw in this submission is its implicit assumption that every collective agreement must contain only one arbitration mechanism – the standard process – to satisfy s. 48(1). However, it seems to me that a company and a union are free to negotiate different internal resolution mechanisms for different kinds of disputes under their collective agreement, each of which may satisfy s. 48(1). These different mechanisms may be needed to meet a variety of objectives in the collective bargaining process.

[22] Here, these two sophisticated parties have negotiated a simplified and expeditious procedure to resolve disputes over pension and retirement benefits. I have no reason to think that this procedure runs afoul of s. 48(1). Natural justice does not always require an oral hearing. For these disputes over benefits, GM and CAW have agreed that a written hearing will satisfy the requirements of procedural fairness. See D.J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pp. 244-250. In my opinion, the decision of the seven-person board amounts to a "final and binding settlement by arbitration", as the Act requires. If Vernon thinks otherwise, he can apply to the Board under s. 48(3) of the Act:

> If, in the opinion of the Board, any part of the arbitration provision, including the method of appointment of the arbitrator or arbitration board, is inadequate, or if the provision set out in subsection (2) is alleged by either party to be unsuitable, the Board may, on the request of either party, modify the provision so long as it conforms with subsection (1), but, until so modified, the arbitration provision in the

> collective agreement or in subsection (2), as the case may be, applies.

[23] I am therefore satisfied that the motions judge correctly dismissed Vernon's claim against GM for lack of jurisdiction.

[24] I conclude this part of my reasons by dealing briefly with the "Marcotte decision". In that case, the CAW grieved over Document 145, which Vernon analogizes to Document 12. Arbitrator Marcotte held that he had no jurisdiction over the grievance because "Document 145 does not form part of the parties' collective agreement for the purposes of arbitration of its subject matter". Mr. Marcotte's holding does not affect my analysis. Here, the MOU and the Miscellaneous Agreement are part of the collective agreement. Disputes over them must be dealt with by the dispute resolution procedures in the agreement.

D. THE CLAIM AGAINST THE MEMBERS OF THE CAW EXECUTIVE

[25] In his complaint to the Board, Vernon contended that the CAW breached its duty of fair representation contrary to s. 69 – now s. 74 – of the Act. His allegations then mirror the allegations he now makes in his statement of claim against the members of the CAW executive.

[26] The Board took jurisdiction over Vernon's complaint, held a hearing, and dismissed it. At paras. 13-14 of its reasons, the Board said:

> The applicants feel they were mislead by statements made by the union and want the Board to provide them with the option of taking advantage of this later retirement incentive package.
>
> There is nothing in the pleadings or the materials filed by the applicants, assuming they are true, which would cause the Board to find the union had acted in a manner that is arbitrary, discriminatory or in bad faith in its representation of the applicants.

[27] Vernon asked the Board to reconsider its decision, but the Board refused to do so. He did not seek judicial review of the Board's decision.

[28] Vernon argues that he can sue the union executive in the court largely for the same reasons as he argues that he can sue GM. And largely for the same reasons his arguments must fail against GM, so too must they fail against the union executive. Vernon's dispute

with his union centres on whether the CAW fairly represented him on a matter arising from the collective agreement and is rooted in his employment relationship with GM.

[29] Indeed, Vernon's claim against the members of the CAW executive would fail even if the MOU and the Miscellaneous Agreement were not part of the collective agreement. That is because the Board has exclusive jurisdiction over a union's representation of its members on virtually all matters relating to the employees' relationship with their employers. Ordinarily, employees dissatisfied with their union's representation on an employment issue must pursue their grievance by an unfair representation complaint to the Board. See *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298. This principle may admit of rare exceptions, but if so, this case is not one of them.

[30] A union's duty of fair representation arises from its exclusive power to act as a spokesperson for all employees in a bargaining unit. See *Société d'énergie de la Baie James v. Noël*, [2001] 2 S.C.R. 207. This duty extends beyond the negotiation of a collective agreement and arbitration under the agreement. It encompasses all aspects of the employer-employee relationship. See *Great Lakes Forest Limited* (1979), O.L.R.B. Rep. 651 at 661; Jeffrey Sack, C. Michael Mitchell & Sandy Price, *Ontario Labour Relations Board Law and Practice*, 3d ed. looseleaf (Toronto: Butterworths Canada Ltd., 1997) at 8:348. Vernon's allegation that the CAW misrepresented the terms of his retirement allowance falls squarely within the union's duty. Thus, the Board had exclusive jurisdiction to hear Vernon's complaint against his union. And, had the Board found merit in the complaint, it would have had remedial power to grant Vernon the monetary relief he sought. See *Leonard Murphy* (1977), O.L.R.B. Rep. 146.

[31] When the Board dismissed both Vernon's complaint and his request for reconsideration, his only recourse against the CAW was to seek judicial review of the Board's decision. I can do no better than reproduce this key passage from para. 17 of the motions judge's reasons, with which I agree entirely:

> The essential character of the claims advanced by the plaintiff against the union defendants is subsumed under the heading of unfair representation. The Board dismissed the plaintiff's application. At the plaintiff's request, the Board later reconsidered, but refused to change, its decision. As noted, the plaintiff's remedy, if he felt that the Board lacked jurisdiction or had otherwise erred, was to apply for judicial review, which he failed to do. Therefore, the decision of the Board is final and this Court lacks jurisdiction to deal with it.

[32] Vernon's claim against the members of the CAW executive can stand in no better position than a claim against the CAW itself. That is so because the individual respondents have been sued, not in their personal capacity, but as members of the union executive. See *Balanyk v. Great Niagara General Hospital*, [1996] O.J. No. 1124 (Gen. Div.), aff'd 1997 Carswell Ont 4736 (C.A.). I would not give effect to Vernon's appeal against the members of the CAW executive.

E. CONCLUSION

[33] Vernon's dispute with GM arises from the collective agreement. His dispute with the members of the CAW executive arises from the union's duty of fair representation. The court has no jurisdiction over either dispute. Accordingly, I would dismiss the appeal. The parties may make written submissions on costs within three weeks of the release of these reasons.

Released: FEB 15 2005
KMW

Signed: "John Laskin J.A."
"I agree K.M. Weiler J.A."
"I agree Robert J. Sharpe"