



ONTARIO
CROWN EMPLOYEES

EMPLOYÉS DE LA COURONNE
DE L'ONTARIO

GRIEVANCE
SETTLEMENT
BOARD

COMMISSION DE
RÈGLEMENT
DES GRIEFS

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GSB#1093/01
UNION#01C792

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Group Grievance, Andersen *et al.*)

Grievor

-and-

The Crown in Right of Ontario
(Ministry of Correctional Services)

Employer

BEFORE

Richard Brown

Vice-Chair

FOR THE UNION

Susan Ballantyne
Barrister and Solicitor
Raven, Allen, Cameron & Ballantyne

FOR THE EMPLOYER

Ferina Murji
Counsel
Management Board Secretariat

HEARING

October 29, 2002.

DECISION

The dispute underlying the grievance at hand is described in my interim decision, dated June 27, 2002:

This group grievance was filed on behalf of seven correctional officers employed at the Rideau Correctional Centre. The grievors claimed compensation for vandalism to their vehicles which occurred in the parking lot at their workplace. The union contended that the damage was done by persons loitering in the parking lot while awaiting admission to serve intermittent sentences. According to this line of argument, the employer did not take reasonable precautions to protect the automobiles in the lot. (page 2)

In the interim award, I upheld the employer's preliminary objection that the facts alleged by the grievors would not constitute a violation of the collective agreement:

In summary, the facts alleged would not constitute a violation of either article 2.1 or article 9.1. Neither of those articles confers upon me the jurisdiction to grant the relief sought by the union. It remains to be determined whether such jurisdiction flows from the principles enunciated by the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. (page 2)

This decision addresses the application of *Weber* to the facts alleged by the union.

I

The scenario in *Weber* is succinctly summarized in the judgement of the Supreme Court:

Mr. Weber was employed by Ontario Hydro. As a result of back problems, he took an extended leave of absence. Hydro paid him the sick benefits stipulated by the collective agreement. As time passed, Hydro began to suspect that Mr. Weber was malingering. It hired private investigators to investigate its concerns. The investigators came on Mr. Weber's property. Pretending they were someone else, they gained entry to his home. As a result of the information it obtained, Hydro suspended Mr. Weber for abusing his sick leave benefits.

Mr. Weber responded by taking the matter to his union, which filed grievances against Hydro on August 28, 1989. One of the grievances alleged that Hydro's hiring of the private investigators violated the terms of the collective agreement. Among other things, the union asked the arbitrator to require Hydro to give an undertaking to discontinue using private security firms to monitor health absences, and to pay Mr. Weber and his family damages for mental anguish and suffering arising out of the surveillance. The arbitration commenced on March 8, 1990, and was subsequently settled.

In the meantime, on December 27, 1989, Mr. Weber commenced a court action based on tort and breach of his Charter rights, claiming damages for the surveillance. The torts alleged were trespass, nuisance, deceit, and invasion of privacy. Weber's claims under the *Canadian Charter of Rights and Freedoms* were for breaches of his rights under ss. 7 and 8. (page 949)

Ontario Hydro contended the courts could not hear Weber's suit because the matters about which he complained fell within the jurisdiction of an arbitrator.

Speaking for the Court, Madame Justice McLachlin considered the sorts of disputes which only an arbitrator may adjudicate. She quoted with approval the following passage from the judgement of Mr. Justice Estey in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union*, [1986] 1 S.C.R. 704:

The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This

relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that *matters addressed and governed by the collective agreement* may nevertheless be the subject of actions in the courts at common law. . . . The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks. (page 718-719; emphasis added)

According to this ruling, matters “addressed and governed” by a collective agreement” fall exclusively within the scope of arbitration.

As in *St. Ann Nackawic*, the Supreme Court in *Weber* based its decision on the legislative requirement that disputes arising under a collective agreement be resolved by arbitration:

Section 45(1) of the *Ontario Labour Relations Act*, like the [statutory] provision under consideration in *St. Anne Nackawic*, refers to “all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement.” The Ontario statute makes arbitration the only available remedy for such differences. ...

It is important that disputes be resolved quickly and economically, with a minimum of disruption to the parties and the economy. To permit concurrent court actions whenever it can be said that the cause of action stands independent of the collective agreement undermines this goal, as this Court noted in *St. Anne Nackawic*. (page 954; emphasis added)

Elaborating on the test to be applied in determining whether a particular controversy is within the sole jurisdiction of arbitration, the Supreme Court stated:

[T]he analysis of whether a matter falls within the exclusive arbitration clause must *proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed*. The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". (page 953; emphasis added)

Having emphasized what matters is the factual basis of a conflict, not the legal labels applied to it, the Court went on to address the proper way to determine whether a dispute belongs in arbitration:

This approach does not preclude all actions in the courts between employer and employee. *Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts ...*

This does not mean that the arbitrator will consider separate "cases" of tort, contract or Charter. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter. (pages 756-758)

The Court directed labour arbitrators to adjudicate controversies "which expressly or inferentially arise out of the collective agreement" and to consider "whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the *Charter*". Arbitrators were told not to "consider separate 'cases' of tort, contract or *Charter*."

The Supreme Court released its decision in *Weber* on the same day as its ruling in *O'Leary v. The Queen in Right of New Brunswick* [1995] 2 S.C.R. 967. The Court in *O'Leary* adopted and applied its ruling in *Weber*.

II

In the case at hand, counsel for the union submits the dispute about property damage arises “inferentially” from articles 2.1 and 9.1 of the collective agreement, within the meaning of the ruling in *Weber*, notwithstanding the interim award holding the facts alleged would not constitute a breach of the agreement. As to article 2.1 dealing with management rights, counsel submits the damage to the grievors’ vehicles resulted from the employer’s improper decisions about staffing levels and the kinds and location of security equipment and from management’s failure to enforce rules concerning the consumption of alcohol by inmates and where they park their own vehicles. Counsel also argues the same improper decisions and failures on the part of management lead to the conclusion that the dispute arises inferentially under article 9.1 dealing with health and safety.

Based on a different understanding of *Weber*, employer counsel contends the interim ruling leads inexorably to the conclusion that the grievors’ claim is not arbitrable. According to this line of argument, by saying arbitral jurisdiction encompasses matters which “*expressly or inferentially*” arise under a collective agreement, the Supreme Court limited the scope of arbitration to matters governed by the express or implied terms of such an agreement.

III

Counsel for the employer relies upon *Abbott Laboratories Ltd. and Retail, Wholesale Canada* (1998), 74 L.A.C. (4th) 331 (R.M. Brown) where I commented on the meaning of the phrase “expressly or inferentially” in *Weber*:

[T]he Supreme Court said the jurisdiction of an arbitrator encompasses disputes arising from the *express or implied terms* of a collective agreement. This is how the Court's reference to "expressly or inferentially" was interpreted by Mr. Hope in *Canada Safeway*. ... I agree with his interpretation. (page 347; emphasis added)

This understanding of *Weber* subsequently was adopted by the Supreme Court of Canada as well as by the Ontario Court of Appeal. Mr. Justice Bastarache spoke for the Supreme Court in *Board of Commissioners of the City of Regina v. Regina Police Association Inc.*, [2000] 1 S.C.R. 360:

Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is *covered by the collective agreement*. ... It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises *either explicitly, or implicitly*, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide. (page 373)

To say that the subject of a dispute is "covered by the collective agreement" and arises from it "either explicitly or implicitly" is another way of saying the matter is governed by an express or implied term of that agreement.

In *London Life Insurance Co. v. Dubreuil Brothers Employees Assoc.* (2000), 49 O.R. (3d) 766, the Court of Appeal explained the ruling in *Weber* by using the precise terminology of implied rights under a collective agreement. Mr. Justice Goudge wrote:

Both *Weber* and *Regina Police Association Inc.* provide that the arbitrator's exclusive jurisdiction extends to disputes that arise *not just expressly, but also inferentially* out of the collective agreement. *Those that arise implicitly must, nonetheless, be rooted in that agreement.* *New Brunswick v. O'Leary*, [1995] 2 S.R.C. 967 is such a case. There, McLachlin J. found that the collective agreement conferred an implied right on the employer to claim for breach of the employee's express

obligation to ensure the safety and dependability of the employer's property and equipment. Hence, where the essence of the dispute was the employee's failure to preserve the employer's property and equipment, it was found to fall within the exclusive jurisdiction of the arbitrator. It was the *implied right* of the employer contained in the collective agreement that *made the jurisdictional difference*. (page 773; emphasis added)

The Court of Appeal limited arbitral jurisdiction to matters governed by the express or implied terms of a collective agreement and stated this limitation is consistent with the outcome in *O'Leary*.

This conception of the role of arbitration is also consistent with the outcome in *Weber*. Addressing the facts in that case, Madame Justice McLachlin wrote:

The [employer's] act of hiring private investigators who used deception to enter [Weber's] family home and report on him does not, he contends, relate to the interpretation, application or administration of the collective agreement. ...

Isolated from the collective agreement, the conduct complained of in this case might well be argued to fall outside the normal scope of employer-employee relations. However, placed in the context of that agreement, the picture changes. The provisions of the agreement are broad, and *expressly purport to regulate* the conduct at the heart of this dispute.

Article 2.2 of the collective agreement extends the grievance procedure to "[a]ny allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this Agreement. . .". The dispute in this case arose out of the content of the Agreement. Item 13.0 of Part A of the Agreement provides that the "benefits of the Ontario Hydro Sick Leave Plan ... shall be considered as part of this Agreement". ... Under the plan, Hydro had the right to decide what benefits the employee would receive, subject to the employee's right to grieve the decision. In the course of making such a decision, Hydro is alleged to have acted improperly. That allegation would appear to fall within the phrase "unfair treatment or any dispute

arising out of the content of [the] Agreement" within Article 2.2.
(page 963-965; emphasis added)

In short, the Supreme Court characterized management's impugned treatment of Mr. Weber as being "expressly" regulated by specific articles in the collective agreement. Based upon this characterization, the Court held Weber's claim fell within the exclusive jurisdiction of an arbitrator. (For present purposes, the validity of the Court's characterization of the dispute in *Weber*, as being governed by the collective agreement, is not relevant. The accuracy of this characterization is challenged in M. Picher, "Defining the Scope of Arbitration: The Impact of *Weber*" [1999-2000] Labour Arbitration Yearbook 99.)

IV

The foregoing review of the case law leads me to conclude that the exclusive jurisdiction of arbitration includes all controversies with a factual basis governed by the express or implied terms of a collective agreement but extends no further.

The Supreme Court's decision in *Weber* did not broaden the range of disputes coming within the scope of arbitration, even though the Court curtailed the range of disputes judges may decide. This point can be illustrated by considering two types of conflicts between an employer and employees governed by a collective agreement. In the first, the factual basis of the dispute gives rise to an alleged violation of some common-law right but not to any allegation that the collective agreement has been breached. The courts had exclusive jurisdiction over matters of this sort before *Weber* and continue to have it after. The Supreme Court's decision does not give

arbitrators any role in this context. The impact of *Weber* is limited to another sort of controversy, one where the factual basis of the dispute gives rise to both an alleged contravention of the collective agreement and an allegation of some common-law wrong. In this scenario before *Weber*, an arbitrator had authority to interpret and apply the express and implied terms of the agreement, and a court could entertain an action at common law based on the same facts. The Supreme Court's decision precludes a judge from playing any part in the resolution of such a conflict and relegates it to the exclusive jurisdiction of arbitration. Now all legal issues arising from a common set of facts must be adjudicated in the single forum of arbitration.

Weber does not widen the range of disputes which may be arbitrated, but it does alter in two ways the role of arbitrators when dealing with the sorts of controversies with which they always have dealt. The Supreme Court's decision gives arbitrators a larger set of legal tools to use in fashioning resolutions to these problems. For example, an arbitrator may award damages for defamation based upon facts which also constitute a violation of a collective agreement. (See *Bhaduria and Toronto Board of Education*, [1999] O.J. 582 (C. A.) holding only an arbitrator could entertain a claim for defamation based upon allegations which resulted in a teacher's termination.) The second impact of *Weber* on the role of arbitrators is less obvious than the first but just as significant. By empowering arbitrators to apply the common law, the Court assigned to them the task of determining to what extent this judge-made law has been displaced or modified by a collective agreement. In a case like *O'Leary*, an arbitrator will be the one to decide whether a contractual prohibition against discipline without just cause

modifies or negates an employer's common law right to be compensated for a loss caused by the negligence of an employee.

V

As noted above, the interim award held the facts alleged would not constitute a breach of the collective agreement. The relevant portion of that award states:

I begin my analysis with article 2.1 entitled "Management Rights." The relevant portion states:

For the purpose of this Central Collective Agreement and any other Collective agreement to which the parties are subject, the right and authority to manage the business and direct the workforce, including the right to ... make reasonable rules and regulations shall be vested exclusively in the Employer. It is agreed that these rights are subject only to the provisions of this Central Collective Agreement and any other Collective agreement to which the parties are subject.

Counsel for the union submitted the employer contravened this article by failing to enforce existing "rules and regulations" in a manner which would have prevented the property damage for which compensation is claimed. Article 2.1 was mentioned by counsel during her opening statement but she did not return to it in argument.

The essence of the management rights article is an acknowledgement that "the right and authority" to do certain things is "vested exclusively" in the employer, so long as the doing of these things does not violate any other provision of the collective agreement. In my view, there is nothing in the language of this article to suggest it places the employer under any sort of positive obligation to protect the property of employees.

The union relies primarily upon article 9.1 dealing with health and safety which states:

The employer shall continue to make reasonable provisions for the safety and health of its employees during the hours of their

employment. It is agreed that both the Employer and the Union shall co-operate to the fullest extent possible in the prevention of accidents and in the reasonable promotion of safety and health of all employees.

This article is identical to the contract provision applied in two decisions of this Board upon which the union relies: *OPSEU (Gonneau) and Ministry of Attorney General*, File 227/81, decision dated February 1, 1982, (Teplitsky); and *OPSEU (Kelly) and Ministry of Correctional Services*, File 371/84, decision dated April 19, 1987 (Saltman). ...

In short, as noted by counsel for the employer in her written submission, compensation for property damage was awarded in *Gonneau* and *Kelly* because it flowed directly from carelessness which violated the collective agreement by placing the grievor at risk of bodily injury.

The language of article 9.1 leaves no doubt that it creates an obligation to protect employees. The absence of any reference to property indicates this article does not place the employer under an independent obligation to protect their belongings. ... To recover compensation for damage to an employee's property, the union must demonstrate the loss resulted from carelessness which contravened the agreement by placing the employee in peril. In a scenario of this sort, article 9.1 is violated and, according to the decisions in *Gonneau* and *Kelly*, the employee is entitled to compensation for property damage flowing directly from such a violation.

Turning to the case at hand, I agree with counsel for the employer that the facts alleged are significantly different than the scenario addressed in *Gonneau* and *Kelly*. Here the union did not suggest the seven grievors themselves were endangered by any failure on the employer's part to take reasonable precautions in the parking lot. Indeed, there was no suggestion that any employee was in the vicinity of the lot when the vandals were there. Rather, the union alleges only that adequate measures were not implemented to protect the grievors' automobiles. Any failure to provide appropriate safeguards for property, standing alone, could not constitute a violation of article 9.1. (pages 3 to 6)

My jurisdiction does not extend beyond controversies with a factual basis governed by the express or implied terms of the collective agreement. As the interim award held the facts alleged by the grievors would not constitute a breach of the agreement, I am without jurisdiction to entertain their grievance. It is dismissed.

Dated at Toronto this 12th day of November, 2002.

A handwritten signature in cursive script, appearing to read "Richard Brown", written in black ink. The signature is fluid and somewhat stylized, with a prominent initial "R".

Richard Brown
Vice-Chair