

parry sound social services v. o.p.s.e.u.

District of Parry Sound Social Services Administration Board

Appellant

v.

Ontario Public Service Employees Union, Local 324

Respondent

and

Ontario Human Rights Commission

Intervener

**Indexed as: Parry Sound (District) Social Services Administration Board v.
O.P.S.E.U., Local 324**

Neutral citation: 2003 SCC 42.

File No.: 28819.

2003: January 24; 2003: September 18.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour,
LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

*Labour relations – Arbitration – Jurisdiction – Human Rights – Collective
agreement providing that probationary employee may be discharged at sole discretion of*

and for any reason satisfactory to employer and such discharge not subject to grievance and arbitration procedures – Probationary employee discharged shortly after return from maternity leave – Employee filing grievance – Whether grievance arbitrable – Whether substantive rights and obligations of Human Rights Code implicitly incorporated within all collective agreements over which arbitrator has jurisdiction – Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 48(1), (12)(j) – Human Rights Code, R.S.O. 1990, c. H.19, s. 5(1).

Labour relations – Collective agreement – Grievance – Procedural requirements – Arbitration – Employment standards – Probationary employee discharged shortly after return from maternity leave – Employee filing grievance – Collective agreement providing that grievance must set out section of agreement that is alleged to have been violated – Employment Standards Act barring discrimination on basis of “pregnancy leave” explicitly incorporated within all collective agreements – Employment Standards Act claim not raised by Union at any stage of proceedings – Whether Union’s failure to raise Employment Standards Act curable – Whether s. 64.5(4) of Employment Standards Act binding Union to prior decision not to seek enforcement of the Act – Whether Court of Appeal erred in raising and resolving appeal on basis of Employment Standards Act – Employment Standards Act, R.S.O. 1990, c. E.14, ss. 44, 64.5(1).

O was a probationary employee of the appellant employer and a member of the respondent Union. Her terms of employment were governed by a collective agreement which states that “a probationary employee may be discharged at the sole discretion of and for any reason satisfactory to the Employer and such action by the Employer is not subject to the grievance and arbitration procedures and does not constitute a difference between the parties”. Prior to the expiry of her probationary term,

O went on maternity leave. Within a few days of returning to work, the employer discharged her. O filed a grievance.

The majority of the Board of Arbitration found that s. 48(12)(j) of the Ontario *Labour Relations Act, 1995 (LRA)*, empowers a board of arbitration to interpret a collective agreement in a manner consistent with the *Human Rights Code* and imports the substantive rights of the *Human Rights Code* into a collective agreement over which an arbitrator has jurisdiction. The Board ruled that it was entitled to consider whether O had been a victim of discrimination under the *Human Rights Code*. The Divisional Court granted the employer's application for judicial review, holding that s. 48(12)(j) confers power on a board of arbitration to interpret and apply the *Human Rights Code* when and if it already has jurisdiction to hear a grievance, but not otherwise. Because the grievance was not a difference arising out of the collective agreement, the Board did not have the jurisdiction to resolve the dispute. The Court of Appeal set aside the decision. Although the court was inclined to the view that the Divisional Court erred in its application of s. 48(12)(j) *LRA*, it preferred not to express a concluded opinion on this question. The court decided the matter with reference to the *Employment Standards Act (ESA)*, noting, first, that s. 44 *ESA* provides that an employer shall not dismiss an employee because the employee takes "pregnancy leave" and, second, that under s. 64.5(1) *ESA*, the terms and conditions of the *ESA* are enforceable against the employer as if they were a part of the collective agreement. The Court of Appeal concluded, therefore, that the Board had jurisdiction to consider whether O's dismissal was inconsistent with s. 44.

Held (Major and LeBel JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, **Iacobucci**, Bastarache, Binnie, Arbour and Deschamps JJ.: The Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract. The plain and ordinary meaning of s. 48(12)(j) *LRA*, which provides that an arbitrator has the power “to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement”, affirms that grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement. Granting arbitrators the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes also advances the stated purposes of the *LRA*, which include promoting the expeditious resolution of workplace disputes, and has the additional advantage of bolstering human rights protection. The fact that the Human Rights Commission currently has greater expertise than the Board in respect of human rights violations is an insufficient basis on which to conclude that a grievance arbitrator ought not to have the power to enforce the rights and obligations of the *Human Rights Code*. An alleged violation of the *Human Rights Code* therefore constitutes an alleged violation of the collective agreement and falls squarely within the Board’s jurisdiction.

Accordingly, the Board's finding that the discriminatory discharge of a probationary employee is arbitrable is not patently unreasonable and should be upheld.

Even if there was no basis on which to conclude that the alleged violation of the *Human Rights Code* is arbitrable, the application of ss. 44 and 64.5(1) *ESA* leads to the conclusion that the subject matter of O's grievance is arbitrable. The joint effect of ss. 44 and 64.5(1) is that each collective agreement is deemed to contain a provision that prohibits the discharge of a probationary employee because she took or intends to take pregnancy leave. Thus, the subject matter of O's grievance clearly constitutes a dispute that arises under a collective agreement over which the Board has jurisdiction.

It was not improper for the Court of Appeal to take into account the fact that the substantive rights and obligations of the *ESA* are incorporated directly into each collective agreement. The finding under review is not the Board's finding that s. 5(1) of the *Human Rights Code* is enforceable against the employer, but its finding that O's grievance is arbitrable. If the Court of Appeal had upheld the Divisional Court's decision to reverse the arbitration award without taking into account the potential impact of ss. 44 and 64.5(1) *ESA*, it would arguably have committed an error of law.

The Union was not bound by its prior decision not to seek enforcement of s. 44 *ESA* at the initial hearing. The purpose of s. 64.5(4) *ESA* is not to bind a union to such a prior decision, but, rather, to affirm the principle that an employee to whom a collective agreement applies is not entitled to file or maintain a complaint under the Act.

Lastly, the Union's failure to comply with the procedural requirements of the collective agreement, which demand that a discharge grievance must set out the section of the collective agreement that is alleged to have been violated, does not preclude the Union from subsequently raising s. 44 *ESA* as a potential basis of liability. Procedural

requirements should not be stringently enforced in those instances where, as here, the employer suffered no prejudice.

Per Major and LeBel JJ. (dissenting): O's *Human Rights Code* claim is not the subject of the agreement between her employer and her Union, and is therefore not arbitrable. Unless the legislature passes legislation incorporating the substance of its statutes into collective agreements, it is to be assumed that unions and employers may define which employees and disputes are covered by a collective agreement and therefore have access to binding arbitration, as long as the agreement does not conflict with statute or public policy. Absent legislative action, courts should not on their own initiative interfere with the terms of a collective agreement. Here, the *Human Rights Code* is not implicitly incorporated into all collective agreements. To read into s. 48(12)(j) *LRA* the extraordinary power to take jurisdiction of any claim based on statute, despite the plain wishes of the parties to the contract, is a subversion of the legislative intent. If the legislature wished to thus expand the power of arbitrators, it would have signalled its intent more clearly. O's dismissal is not arbitrable because her Union and her employer agreed not to cover the dismissal of probationary employees in their collective agreement, and the legislature did not intend to require that they do so.

It was improper for the Court of Appeal, *sua sponte*, to ignore the procedural requirements negotiated by the parties and raise the *ESA* argument. Article 8.06(a) of the collective agreement clearly required the Union to state "the section or sections of the Agreement which are alleged to have been violated". The Union should therefore have raised s. 44 *ESA*, barring employment discrimination on the basis of "pregnancy leave", which the legislature has explicitly incorporated into all collective agreements via s. 64.5(1) *ESA*. This the Union chose not to do. Even if the failure to raise the *ESA* might have been curable or seen as a simple procedural defect, the Union would at the

very least have had the obligation to raise the matter at the arbitration stage. The Union and O should be bound by the specific claims they made and the manner in which they presented them. The Court of Appeal erred in raising this issue, not chosen by the parties.

O is not without a remedy. She may use the mechanisms carefully set out by the legislature to vindicate her human rights, and may bring her claim before the Human Rights Commission, as the employer urged and as the legislature intended.

Cases Cited

By Iacobucci J.

Applied: *McLeod v. Egan*, [1975] 1 S.C.R. 517; **referred to:** *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178; *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768; *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975)*, 8 O.R. (2d) 103; *Spruce Falls Inc. and I.W.A.-Canada, Local 2995 (Trudel) (Re) (2002)*, 106 L.A.C. (4th) 41; *Peel District School Board and O.P.S.T.F., District 19 (Havery) (Re) (2000)*, 84 L.A.C. (4th) 289; *Re Harry Woods Transport Ltd. and Teamsters Union, Local 141 (1977)*, 15 L.A.C. (2d) 140; *Aro Canada Inc. and I.A.M., Re (1988)*, 34 L.A.C. (3d) 255; *Liquid Carbonic Inc. and U.S.W.A., Re (1992)*, 25 L.A.C. (4th) 144.

By Major J. (dissenting).

McLeod v. Egan, [1975] 1 S.C.R. 517; *Bank of Toronto v. Perkins (1883)*, 8 S.C.R. 603.

Statutes and Regulations Cited

Employment Standards Act, 1968, S.O. 1968, c. 35, s. 11(2).

Employment Standards Act, R.S.O. 1990, c. E.14, ss. 44, 64.5(1)-(4) [ad. 1996, c. 23, s. 18].

Human Rights Code, R.S.O. 1990, c. H.19, s. 5(1) [am. 1999, c. 6, s. 28(5)].

Labour Relations Act, R.S.O. 1990, c. L.2, s. 45(8)3 [rep. & sub. 1992, c. 21, s. 23(3)].

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A., s. 48(1), (12).

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APPEAL from a judgment of the Ontario Court of Appeal (2001), 54 O.R. (3d) 321, 147 O.A.C. 183, 10 C.C.E.L. (3d) 290, 40 C.H.R.R. D/190, [2002] C.L.L.C. 210-005, [2001] O.J. No. 2316 (QL), allowing an appeal from a judgment of the Divisional Court (2000), 131 O.A.C. 122, [2000] C.L.L.C. 220-336, [2000] O.J. No. 475 (QL). Appeal dismissed, Major and LeBel JJ. dissenting.

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CITATION

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IACOBUCCI J. —

1 This appeal raises questions about the application of human rights and other employment-related statutes in the context of a collective agreement. More specifically, does a grievance arbitrator have the power to enforce the substantive rights and obligations of human rights and other employment-related statutes and, if so, under what circumstances? As I discuss in these reasons, I conclude that a grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement. Consequently, I would dismiss the appeal.

I. Background

2 Joanne O’Brien was a probationary employee of the appellant District of Parry Sound Social Services Administration Board and a member of the respondent Ontario Public Service Employees Union (the “Union”). Her terms of employment were governed by a collective agreement negotiated between the parties. For the purposes of this appeal, the most important provision of the collective agreement is Article 5.01:

ARTICLE 5 – MANAGEMENT RIGHTS

5.01. The Union recognizes that the management of the operations and the direction of the employees are fixed exclusively in the Employer and shall remain solely with the Employer except as expressly limited by the clear and explicit language of some other provision of this Agreement and, without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Employer to:

.....

- (b) hire, assign, retire, promote, demote, classify, transfer, direct, lay off, recall and to suspend, discipline or discharge employees who have successfully completed their probationary period for just cause provided that a claim by an employee who has successfully completed his/her probationary period that she/he has been disciplined, suspended or discharged without just cause may be the subject of a grievance and dealt with as hereinafter provided;

3 Under Article 5.01, the Union recognizes that management has the right to manage the enterprise and direct the work force, subject only to express provisions of the collective agreement that provide otherwise. On its face, Article 5.01 is sufficiently broad to include the right of the employer to discharge an employee. Under paragraph (b), a claim by an employee who has successfully completed his or her probationary period that she or he has been disciplined without just cause may be the subject of a grievance. The right of the appellant to manage the enterprise is thus subject to the right of an employee who has completed the probationary period not to be discharged without just cause. There is no provision that limits the right of the employer to discharge a probationary employee. To the contrary, Article 8.06(a), under the heading “Grievance Procedures”, states that “a probationary employee may be discharged at the sole discretion of and for any reason satisfactory to the Employer and such action by the Employer is not subject to the grievance and arbitration procedures and does not constitute a difference between the parties”.

4 Prior to the expiry of her probationary term, Ms. O'Brien went on maternity leave. Within a few days of returning to work, the appellant discharged her. On June 26, 1998, Ms. O'Brien filed a grievance with the Union. The grievance alleged as follows:

I grieve that I have been discharged from my position without justification and that this decision was arbitrary, discriminatory, in bad faith and unfair.

At the arbitration hearing, the appellant objected on the basis that the Board of Arbitration (the "Board") did not have jurisdiction over the subject matter of the grievance. It was the appellant's submission that the collective agreement clearly expressed that it was the parties' intention that the discharge of a probationary employee was not arbitrable. The appellant submitted that the parties have the right to make such a bargain and that it would be a jurisdictional error for the Board to resolve the dispute.

II. Relevant Legislative Provisions

5 *Employment Standards Act*, R.S.O. 1990, c. E.14

44. An employer shall not intimidate, discipline, suspend, lay off, dismiss or impose a penalty on an employee because the employee is or will become eligible to take, intends to take or takes pregnancy leave or parental leave.

64.5 (1) If an employer enters into a collective agreement, the Act is enforceable against the employer with respect to the following matters as if it were part of the collective agreement:

1. A contravention of or failure to comply with the Act that occurs when the collective agreement is in force.

...

(2) An employee to whom a collective agreement applies (including an employee who is not a member of the trade union) is not entitled to file or maintain a complaint under the Act.

(3) Despite subsection (2), the Director may permit an employee to file or maintain a complaint under the Act if the Director considers it appropriate in the circumstances.

(4) An employee to whom a collective agreement applies (including an employee who is not a member of the trade union) is bound by a decision of the trade union with respect to the enforcement of the Act under the collective agreement, including a decision not to seek the enforcement of the Act.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

48.(1) 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.

48.(12) An arbitrator or the chair of an arbitration board, as the case may be, has power,

- (a) to require any party to furnish particulars before or during a hearing;
- (b) to require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing;
- (c) to fix dates for the commencement and continuation of hearings;
- (d) to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases; and
- (e) to administer oaths and affirmations,

and an arbitrator or an arbitration board, as the case may be, has power,

- (f) to accept the oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;
- (g) to enter any premises where work is being done or has been done by the employees or in which the employer carries on

business or where anything is taking place or has taken place concerning any of the differences submitted to the arbitrator or the arbitration board, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any such thing or any of such differences;

- (h) to authorize any person to do anything that the arbitrator or arbitration board may do under clause (g) and to report to the arbitrator or the arbitration board thereon;
- (i) to make interim orders concerning procedural matters;
- (j) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.

Human Rights Code, R.S.O. 1990, c. H.19

5.(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

III. Judicial History

A. *Arbitration Award (February 1, 1999)*

6 The majority of the Board found that the collective agreement, considered alone, imposed no restriction on the right of the employer to discharge probationary employees. The language of the collective agreement clearly indicated that it was not the parties' intention that the discharge of a probationary employee would be arbitrable.

7 The majority of the Board then considered the impact of s. 48(12)(j) of the *Labour Relations Act, 1995* ("LRA"). The Board found that s. 48(12)(j) obligates and empowers a board of arbitration to interpret a collective agreement in a manner consistent with the *Human Rights Code*. Section 48(12)(j), in other words, imports the

substantive rights of the *Human Rights Code* into a collective agreement over which an arbitrator has jurisdiction. The majority of the Board thus determined that it had the power and responsibility to hear and determine the narrow question of whether discrimination was a factor in the discharge of Ms. O'Brien.

8 Board member O'Byrne dissented on the basis that s. 48(12)(j) of the *LRA* can only be utilized if an arbitrator has jurisdiction in the first instance. In his view, the fact that the difference did not arise out of the express terms and conditions of the collective agreement should have been sufficient to dispose of the matter. He concluded that the Board did not have jurisdiction to resolve this dispute.

B. *Ontario Superior Court of Justice (Divisional Court)* (2000), 131 O.A.C. 122

9 On an application for judicial review, O'Leary J. held that s. 48(12)(j) of the *LRA* confers power on a board of arbitration to interpret and apply the *Human Rights Code* when and if it already has jurisdiction to hear a grievance, but not otherwise. On this view, the Board has jurisdiction only over differences between the parties arising from the interpretation, application, administration or alleged violation of the express terms and conditions of the collective agreement. Because the grievance was not a difference arising out of the collective agreement, O'Leary J. was of the view that the Board did not have the jurisdiction to resolve the dispute. If there is no difference arising out of the four corners of the collective agreement, s. 48(12)(j) is of no application.

C. *Ontario Court of Appeal* (2001), 54 O.R. (3d) 321

10 According to Morden J.A., the approach adopted by the Divisional Court gives too narrow a meaning to s. 48(12)(j) of the *LRA*. In his view, s. 48(12)(j) requires arbitrators to interpret the collective agreement in the context of the relevant statutory provisions. The collective agreement must be read in light of human rights and other employment-related statutes. If the terms of the collective agreement are in conflict with the *Human Rights Code*, the *Human Rights Code* will prevail. Applying this reasoning to the facts of this case, Morden J.A. found that the right of the employer under the collective agreement to discharge a probationary employee “for any reason satisfactory to the employer” is in direct conflict with s. 5(1) of the *Human Rights Code*. He concluded that Article 8.06 should be read down not to include the power to discharge for discriminatory reasons.

11 In the end, however, Morden J.A. chose not to rely on the preceding analysis for the purpose of disposing of the appeal. His reasoning was that he felt that the requirement of an express conflict between the statute and the collective agreement could involve some incongruity. In his view, the requirement of a direct conflict between the statute and the agreement would have the incongruous result that an arbitrator will find the dispute arbitrable and resolve it on the basis of the external statute where the parties have said something inconsistent with the statute, but not where they have said nothing at all on the matter. Noting that this feature of s. 48(12)(j) results in some uncertainty regarding the scope of its application, Morden J.A. chose not to resolve the matter on this basis.

12 Instead, Morden J.A. decided the matter with reference to the *Employment Standards Act*, (“*ESA*”), which he considered to be a much firmer ground. Morden J.A. first noted that s. 44 of the *ESA* provides that an employer shall not dismiss an employee because the employee takes pregnancy leave or parental leave. He then noted that under

s. 64.5(1) of the *ESA* the terms and conditions of the Act are enforceable against the employer as if they were a part of the collective agreement. In view of the direct incorporation of the *ESA* into the collective agreement, Morden J.A. found that the Board had jurisdiction to consider whether the dismissal of Ms. O'Brien was inconsistent with s. 44 of the *ESA*.

13 Morden J.A. rejected the appellant's submission that the court should not resolve the matter with reference to the *ESA* because the statute was not raised before the Board; he did so on the basis that the appellant would suffer no prejudice if the matter was resolved in this manner. Having concluded that the Board had jurisdiction to resolve the grievance, Morden J.A. allowed the appeal and made an order dismissing the application for judicial review.

IV. Issues

14 The principal question in this appeal concerns the Board's finding that Ms. O'Brien's grievance is arbitrable. In reviewing this finding, the primary substantive question to be answered is whether the substantive rights and obligations of the *Human Rights Code* are incorporated into a collective agreement over which the Board has jurisdiction. A second question that arises is whether it was appropriate for the Court of Appeal to determine that the subject matter of the grievance is arbitrable on the basis that the substantive rights and obligations of the *ESA* are incorporated into the collective agreement.

15 I also note that the Ontario Human Rights Commission has intervened in this appeal for the purpose of ensuring that its jurisdiction is not ousted because the aggrieved employee is a party to a collective agreement over which the Board has

jurisdiction. The Commission submits that if the Court finds that the grievance is arbitrable, the Board and the Commission have concurrent jurisdiction. In my view, it is unnecessary to determine this matter at the present time. Consequently, in concluding that a grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of the *Human Rights Code* in this case, I make no holding on whether the jurisdiction of the Human Rights Commission is ousted by that of the Board.

V. Analysis

A. *What is the Appropriate Standard of Review?*

16 Where an arbitration board is called upon to determine whether a matter is arbitrable, it is well-established that a reviewing court can only intervene in the case of a patently unreasonable error. See for example *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178; *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230; and *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487.

17 This high degree of curial deference to the decisions of arbitration boards is necessary to maintain the integrity of the grievance arbitration process. As Cory J. wrote in *Toronto Board of Education, supra*, at para. 36, “the whole purpose of a system of grievance arbitration is to secure prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and the disciplinary actions taken by an employer”. This is a basic requirement for peace and harmony in industrial relations, which is important both to the parties and to society as a whole. The protective clause found in s. 48(1) of the *LRA* is the legislative recognition that the basic nature of labour disputes requires their prompt and final resolution by expert tribunals.

18 The patent unreasonableness standard is a very high standard that will not easily be met. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 57, the Court described the difference between an unreasonable and patently unreasonable decision in the following terms:

The difference . . . lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. . . . But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident. [Emphasis added.]

See also *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29.

B. *Was the Arbitration Award Patently Unreasonable?*

19 As La Forest J. noted in *Dayco, supra*, at p. 251, the collective agreement is the "foundation" of a grievance arbitrator's jurisdiction. Absent a violation of the collective agreement, a grievance arbitrator has no jurisdiction over a dispute; if the alleged misconduct does not constitute a violation of the collective agreement, there is no basis on which to conclude that a dispute is arbitrable.

20 In the present case, the parties are in agreement that the express provisions of the collective agreement in question impose no fetters on the employer's right to

discharge a probationary employee. The Union, however, submits that s. 5(1) of the *Human Rights Code* is implicit in the collective agreement between the parties. If this is the case, there is no doubt but that the discriminatory discharge of a probationary employee is arbitrable. Under s. 5(1), every person has a right to equal treatment with respect to employment without discrimination. Ms. O'Brien's grievance – that she was discharged for discriminatory reasons – falls squarely within s. 5(1) of the *Human Rights Code*. If s. 5(1) is implicit in the collective agreement between the parties, the grievance falls squarely within the ambit of the collective agreement as well. But if s. 5(1) of the *Human Rights Code* is not incorporated into the collective agreement between the parties, it is equally obvious that the discriminatory discharge of a probationary employee is not arbitrable.

21 Consequently, the critical issue to be determined at the arbitration hearing was whether or not the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction. Put a different way, it is only once this issue has been resolved that the lines of the problem come into focus. This, in my opinion, is an issue that the Board must resolve correctly. As the Court concluded in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at pp. 187-88, there may be instances in which the reasonableness of a tribunal's decision is dependent on it having correctly answered a question of law in the course of reaching that decision. If the critical question that the tribunal must answer is a question of law that is outside its area of expertise and that the legislature did not intend to leave to the tribunal, the tribunal must answer that question correctly.

22 The question of whether the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has

jurisdiction is not, in my view, a question that the legislature intended to leave to the Board. The Board's expertise does not lie in answering legal questions of general applicability, but, rather, in the interpretation of collective agreements and the resolution of factual disputes related to those agreements. See for example *Dayco, supra*, at p. 266, and *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 336. Determining whether the substantive rights and obligations of an external statute are incorporated into a collective agreement is a legal question of broad applicability that does not fall within an arbitrator's core area of expertise. Although the Board has the power to determine whether the substantive rights and obligations of the *Human Rights Code* are incorporated into the collective agreement, the Court has the power to interfere if the Board resolved the issue incorrectly.

23 For the reasons that follow, it is my conclusion that the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes.

(1) The Case Law

24 The leading case regarding the effect of employment-related statutes on the content of collective agreements is *McLeod v. Egan*, [1975] 1 S.C.R. 517. Prior to *McLeod*, the prevailing view was that an arbitrator was not authorized to apply statutes in the course of grievance arbitration other than as an aid to interpreting a collective

agreement: D.J.M. Brown and D.M. Beatty, *Canadian Labour Arbitration* (loose-leaf ed.), at p. 2-60. On this view, an arbitrator had no alternative but to construe and apply a collective agreement in accordance with its express terms and conditions. If the alleged misconduct did not constitute a violation of an express provision of the collective agreement, the subject matter of the dispute was not arbitrable. In *McLeod*, however, the Court established that it is necessary to look outside the collective agreement in order to ascertain the substantive rights and obligations of the parties to that agreement.

25 In *McLeod*, the appellant employee alleged that he had been disciplined for refusing to work beyond 48 hours in a week. The collective agreement between the parties contained a broad management rights clause that expressly stated that the control of all operations and working forces, including the right to discipline employees and to schedule operations, is vested solely in the employer, subject only to the express provisions of the collective agreement. There were no provisions of the collective agreement that limited the right of an employer to require an employee to work overtime beyond 48 hours a week. In the absence of language limiting the broad power vested in the employer, the arbitrator concluded that insofar as the collective agreement was concerned the employer was entitled to discipline an employee who refused to work in excess of 48 hours a week.

26 The Court, however, concluded that an arbitrator must look beyond the four corners of the collective agreement in order to determine the limits on an employer's right to manage operations. Under a collective agreement, this right is subject not only to the express provisions of the agreement, but also to statutory provisions such as s. 11(2) of the *Employment Standards Act, 1968*, S.O. 1968, c. 35 (the "*ESA, 1968*"), Martland J. held as follows, at p. 523:

The basic provision of the Act is that which places a maximum limit upon the working hours of an employee of eight in the day and forty-eight in the week. Any provision of an agreement which purported to give to an employer an unqualified right to require working hours in excess of those limits would be illegal, and the provisions of art. 2.01 of the collective agreement, which provided that certain management rights should remain vested in the Company, could not, in so far as they preserved the Company's right to require overtime work by its employees, enable the Company to require overtime work in excess of those limits.

Put another way, the absence of a provision that expressly prohibits an employer from requiring an employee to work in excess of 48 hours a week does not mean that the right to manage operations includes the right to violate s. 11(2) of the *ESA, 1968*. Management rights must be exercised not only in accordance with the express provisions of the collective agreement, but also in accordance with the employee's statutory rights. As Martland J. concluded, at p. 524, "[b]y the operation of the statute, the right to require overtime beyond 48 hours per week from any individual employee had been taken away from the employee and became subject to the rights of the employee under s. 11(2)".

27 Major J. states that this case stands for the proposition that a union and employer are restricted from making an agreement contrary to law. This rule, he states, is no more than a modern application of a long-standing rule that courts will not enforce contracts that are illegal or against public policy. This may be true, but I believe it important to consider carefully what it was that made the collective agreement in *McLeod* objectionable. In *McLeod*, the collective agreement did not expressly state that the employer was authorized to require overtime beyond 48 hours a week. It did, however, contain a broad management rights clause that recognized the employer's right to control all operations and working forces, including the right to discipline employees and to schedule operations. The collective agreement was objectionable because the powers it extended to the employer were sufficiently broad to include the power to violate its employees rights under s. 11(2) of the *ESA, 1968*.

28 As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.

29 As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the mutual intentions of the contracting parties as expressed in that agreement. Under *McLeod*, there are certain terms and conditions that are implicit in the agreement, irrespective of the mutual intentions of the contracting parties. More specifically, a collective agreement cannot be used to reserve the right of an employer to manage operations and direct the work force otherwise than in accordance with its employees' statutory rights, either expressly or by failing to stipulate constraints on what some arbitrators regard as management's inherent right to manage the enterprise as it sees fit. The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate.

30 In some sense, *McLeod* is inconsistent with the traditional view that a collective agreement is a private contract between equal parties, and that the parties to the agreement are free to determine what does or does not constitute an arbitrable difference. But this willingness to consider factors other than the parties' expressed intention is consistent with the fact that collective bargaining and grievance arbitration

has both a private and public function. The collective agreement is a private contract, but a contract that serves a public function: the peaceful resolution of labour disputes. See for example Professor P. Weiler, “The Remedial Authority of the Labour Arbitrator: Revised Judicial Version” (1974), 52 *Can. Bar Rev.* 29, at p. 31. This dual purpose is reflected in the fact that the content of a collective agreement is, in part, fixed by external statutes. Section 48(1) of the *LRA*, for example, dictates that every collective agreement must provide for final and binding settlement by arbitration of all differences arising under a collective agreement. Section 64.5(1) of the *ESA* provides that the Act is enforceable against an employer as if it was part of the collective agreement. In each collective agreement, certain procedural requirements and substantive rights and obligations are mandatory. In *McLeod*, the Court determined that these include the obligation of an employer to exercise its management rights in accordance with the statutory rights of its employees.

(2) Application of the Case Law

31 As in *McLeod*, the collective agreement at issue in this appeal expressly recognizes the employer’s broad right to manage the enterprise and direct the work force as it sees fit, subject only to express terms providing otherwise. Article 5, under the heading “Management Rights”, provides as follows:

5.01 The Union recognizes that the management of the operations and the direction of the employees are fixed exclusively in the Employer and shall remain solely with the Employer except as expressly limited by the clear and explicit language of some other provision of this Agreement ...

Under the traditional view, the management rights recognized therein are unlimited, except to the extent that the express provisions of the collective agreement provide

otherwise. In the absence of a provision in the collective agreement that limits the right of the employer to discharge a probationary employee for discriminatory reasons, Ms. O'Brien's grievance is non-arbitrable.

32 Under *McLeod*, a collective agreement cannot extend to an employer the right to violate the statutory rights of its employees. On the contrary, the broad power of the appellant to manage operations and direct employees is subject not only to the express provisions of the agreement, but also to the statutory rights of its employees. Just as the collective agreement in *McLeod* could not extend to the employer the right to require overtime in excess of 48 hours, the collective agreement in the current appeal cannot extend to the appellant the right to discharge an employee for discriminatory reasons. Under a collective agreement, as under laws of general application, the right to direct the work force does not include the right to discharge a probationary employee for discriminatory reasons. The obligation of an employer to manage the enterprise and direct the work force is subject not only to express provisions of the collective agreement, but also to the statutory rights of its employees, including the right to equal treatment in employment without discrimination.

33 The one factor that distinguishes this case from *McLeod* is the fact that there is more evidence that the parties to the agreement specifically turned their minds to the subject matter of the grievance and agreed that it was not arbitrable. In *McLeod*, the collective agreement contained a broad management rights clause, but did not directly address the right of the employer to require overtime beyond 48 hours a week. Thus, it is difficult to prove with any degree of certainty that it was the mutual intention of the parties that the collective agreement extend to the employer the right to require overtime in violation of s. 11(2) of the *ESA, 1968*. In this case, the collective agreement contains both a broad management rights clause and an express statement that “[n]otwithstanding

anything in this Agreement, a probationary employee may be discharged at the sole discretion of and for any reason satisfactory to the Employer and such action by the Employer is not subject to the grievance and arbitration procedures and does not constitute a difference between the parties”. Article 8.06(a) might be understood as an explicit expression of the parties’ mutual intention that the discriminatory discharge of a probationary employee is not arbitrable.

34 In response to this line of argument, I should state that I am not entirely comfortable attributing this intention to the parties. Although the language of Article 8.06(a) is broad, it cannot be established, as a matter of fact, that the parties reached a common understanding that the discriminatory discharge of a probationary employee is non-arbitrable. It is more likely, in my view, that the mutual intention was to affirm the right of the employer to discharge a probationary employee who did not perform his or her tasks to the employer’s satisfaction. As O’Leary J. rightly observed, it is sometimes difficult for an employer to assess a candidate without hiring that employee for a probationary period; it is not unreasonable that the employer would have the right to assess whether the probationary employee has adequately satisfied the requirements of the post. I find it unlikely, however, that it was the parties’ mutual intention to affirm the right of the employer to discharge a probationary employee on the basis of human rights grounds, namely, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

35 But even if Article 8.06(a) does, in fact, reflect a common intention that the discriminatory discharge of a probationary employee is not an arbitrable dispute, I remain of the view that Ms. O’Brien’s grievance is arbitrable. One reason I say this is that s. 48(1) of the *LRA* states that every collective agreement shall provide for the final

and binding settlement by arbitration of all differences between the parties arising under the collective agreement. Section 48(1) prohibits the parties from enacting provisions stating that a violation of the collective agreement is non-arbitrable. By the operation of s. 5(1) of the *Human Rights Code*, the right of probationary employees to equal treatment without discrimination is implicit in the collective agreement, and thus the discriminatory discharge of a probationary employee constitutes a violation of that agreement. To the extent that Article 8.06(a) establishes that an allegation that the discriminatory discharge of a probationary employer is non-arbitrable, it is void as contrary to s. 48(1) of the *LRA*.

36 More fundamentally, the interpretation of Article 8.06(a) that it reflects a common intention is inconsistent with the principle that under a collective agreement an employer's right to manage operations and direct the work force is subject not only to the express provisions of the collective agreement but also to the employees' statutory rights, irrespective of the parties' subjective intentions. In *McLeod*, the Court stated that any provision that purports to give to an employer the right to require working hours in excess of 48 hours a week is void. The same logic applies to a provision that purports to give to an employer the right to discharge a probationary employee for discriminatory reasons. Even if the parties to the agreement had enacted a substantive provision that clearly expressed that, insofar as the collective agreement is concerned, the employer possessed the right to discharge a probationary employee for discriminatory reasons, that provision would be void. Put simply, there are certain rights and obligation that arise irrespective of the parties' subjective intentions. These include the right of an employee to equal treatment without discrimination and the corresponding obligation of an employer not to discharge an employee for discriminatory reasons. To hold otherwise would lessen human rights protection in the unionized workplace by allowing employers

and unions to treat such protections as optional, thereby leaving recourse only to the human rights procedure.

37 The effect of my analysis is to modify Article 8.06(a). Under this analysis, it is only a probationary employee being discharged “at the sole lawful discretion of and for any lawful reason satisfactory to the Employer” that does not constitute a difference between the parties. Any exercise of this discretion otherwise than in accordance with a probationary employee’s rights under the *Human Rights Code* and other employment-related statutes is an arbitrable difference under the collective agreement.

(3) Section 48(12)(j) of the LRA.

38 Having determined that *McLeod* established that an employer’s right to manage the operations and direct the work force is subject not only to the express provisions of the collective agreement but also to the right of each employee to equal treatment without discrimination, the question that arises is whether this principle applies under s. 48(12)(j) of the *LRA*. Put directly, did the enactment of s. 48(12)(j) displace or otherwise restrict the principles established in *McLeod*? If it did not, the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are implicit in a collective agreement over which an arbitrator has jurisdiction.

39 To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that “a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed”. In

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that “in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law”.

40 In my view, s. 48(12)(j) does not clearly indicate that it was the legislature’s intention to alter the principles described above. Quite the opposite. I believe that the amendments to the legislation affirm that grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement. If the right of an employer to manage operations and direct the work force is subject to both the express provisions of the collective agreement and the employee’s statutory rights, then it follows that a grievance arbitrator must have the power to implement and enforce those rights.

41 This conclusion is consistent with the modern approach to statutory interpretation. As this Court has repeatedly stated, the proper approach to statutory interpretation is that endorsed by the noted author E. A. Driedger, in *Construction of Statutes* (2nd ed. 1983), at p. 87: “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”. See for example *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. A consideration of these factors supports the proposition that under s. 48(12)(j) of the *LRA* an arbitrator has the power to enforce the substantive rights and obligations of human rights and other employment-related statutes that are, under the legal principles established in *McLeod*, part of the collective agreement.

(i) *The Plain and Ordinary Meaning of Section 48(12)(j) of the LRA*

42 The primary factor that supports this conclusion is the very language of s. 48(12)(j), which provides that an arbitrator has the power “to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement”.

43 The power to interpret and apply a particular statute would, in my view, ordinarily be understood to include the power to implement and enforce the substantive rights and obligations contained therein. The *Oxford English Dictionary* (2nd ed. 1989), vol. I, at p. 577, states that to “apply” means to “bring (a law, rule, test, principle, etc.) into contact with facts, to bring to bear practically, to put into practical operation”. Major J. suggests that my reasons do not respect the intention of the legislature. In my view, the use of the phrase “to interpret and apply human rights and other employment-related statutes” indicates that it was the legislature’s intention that an arbitrator would have the power not only to enforce those rights and obligations that are expressly provided for in the collective agreement, but those that are provided for in human rights and employment-related statutes as well. My colleague’s reasons leave unanswered the question of what result the legislature intended when it specifically incorporated the power of an arbitrator to interpret and apply human rights and other employment-related statutes into the *LRA*.

44 The appellant submits that the power to interpret and apply human rights and other employment-related statutes arises only when there is a direct conflict between the collective agreement and the statute. Read grammatically, s. 48(12)(j) supports precisely the opposite conclusion. Section 48(12)(j) does not state that the power arises if, and only if, there is a conflict between the collective agreement and the employment-related

statute, but that it arises even if there is a conflict between the agreement and the statute.

The obvious implication is that a conflict between the collective agreement and an employment-related statute is not a condition precedent of the power to bring that statute into practical operation.

45 Considered alone, the language of s. 48(12)(j) reinforces the principles discussed above, namely, that the right of an employer to manage operations and direct the work force is subject not only to the express provisions of the collective agreement, but also to its employees' statutory rights. For this to be the case, an arbitrator must have the power to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes. Section 48(12)(j) does not displace or otherwise restrict the principles discussed above, but, rather, affirms that an arbitrator does, in fact, have the power to bring human rights and other employment-related statutes into practical operation. In any event, I am of the view that the inclusion of a management rights clause that is sufficiently broad to include the right of management to discharge a probationary employee for discriminatory reasons gives rise to a conflict between the statute and the collective agreement.

(ii) *The Scheme of the Act*

46 The appellant's primary submission is that an arbitrator has the power to interpret and apply human rights and other employment-related statutes if, and only if, it already has been determined that the arbitrator has jurisdiction over the subject matter of the grievance. According to the appellant, an arbitrator's primary source of jurisdiction is s. 48(1), which states that each collective agreement shall provide for final and binding settlement by arbitration of a difference arising out of that agreement. Section 48(12)(j), on the other hand, sets out the powers that an arbitrator possesses once it already has

been determined that a grievance is arbitrable. On this view, the power to interpret and apply other statutes is merely one among nine other incidental powers that an arbitrator may exercise for the purpose of resolving a difference over which she or he already has jurisdiction.

47 To a certain extent, I would agree. Indeed, the structure of s. 48 does seem to suggest that an arbitrator is intended to interpret and apply human rights and other employment-related statutes for the purpose of resolving a dispute that is arbitrable. This understanding of s. 48(12)(j) is consistent with the language of its predecessor, s. 45(8)3 of the *Labour Relations Act*, R.S.O. 1990, c. L.2, which provided as follows:

45. (8) An arbitrator or arbitration board shall make a final and conclusive settlement of the differences between the parties and, for that purpose, has the following powers:

...

3. To interpret and apply the requirements of human rights and other employment-related statutes, despite any conflict between those requirements and the terms of the collective agreement. [Emphasis added.]

The inclusion of the phrase “for that purpose” provides support for the proposition that the legislature envisioned that a dispute must be arbitrable before an arbitrator obtains the power to interpret and apply human rights and other employment-related statutes.

48 But even if it is true that a dispute must be arbitrable before an arbitrator obtains the power to interpret and apply the *Human Rights Code*, it does not thereby follow that an alleged contravention of an express provision of a collective agreement is a condition precedent of an arbitrator’s authority to enforce the substantive rights and obligations of employment-related statutes. Under *McLeod*, the broad right of an employer to manage operations and direct the work force is subject not only to the

express provisions of the collective agreement but also to the statutory rights of its employees. This means that the right of a probationary employee to equal treatment without discrimination is implicit in each collective agreement. This, in turn, means that the dismissal of an employee for discriminatory reasons is, in fact, an arbitrable difference, and that the arbitrator has the power to interpret and apply the substantive rights and obligations of the *Human Rights Code* for the purpose of resolving that difference.

49 Consequently, it cannot be inferred from the scheme of the *LRA* that it was the legislature's intention to displace or otherwise restrict the legal principles enunciated in *McLeod*. The appellant's submissions in respect of the structure of s. 48 are consistent with the conclusion that the substantive rights and obligations of the *Human Rights Code* are implicit in each collective agreement over which an arbitrator has jurisdiction. If an arbitrator is to enforce an employer's obligation to exercise its management rights in accordance with the statutory provisions that are implicit in each collective agreement, the arbitrator must have the power to interpret and apply human rights and other employment-related statutes. Section 48(12)(j) confirms that an arbitrator does, in fact, have this right.

(iii) *Policy Considerations*

50 In respect of policy considerations, I first note that granting arbitrators the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes advances the stated purposes of the *LRA*, which include promoting the expeditious resolution of workplace disputes. As this Court has repeatedly recognized, the prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole. See for

example *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768, at p. 781; *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at p. 489; and *Toronto Board of Education*, *supra*, at para. 36. It is essential that there exist a means of providing speedy decisions by experts in the field who are sensitive to the workplace environment, and which can be considered by both sides to be final and binding.

51 The grievance arbitration process is the means by which provincial governments have chosen to achieve this objective. As Professor P. Weiler puts it, grievance arbitration is both “an antidote to industrial unrest and an instrument of employment justice”: *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at pp. 91-92. The primary advantage of the grievance arbitration process is that it provides for the prompt, informal and inexpensive resolution of workplace disputes by a tribunal that has substantial expertise in the resolution of such disputes. It has the advantage of both accessibility and expertise, each of which increases the likelihood that a just result will be obtained with minimal disruption to the employer-employee relationship. Recognizing the authority of arbitrators to enforce an employee’s statutory rights substantially advances the dual objectives of: (i) ensuring peace in industrial relations; and (ii) protecting employees from the misuse of managerial power.

52 Granting arbitrators the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes has the additional advantage of bolstering human rights protection. Major J. correctly observes that if the dispute is non-arbitrable, aggrieved employees have available the same mechanism for enforcing fundamental human rights as any other member of society: they may file a complaint before the Human Right Commission. But the fact that there already exists a forum for the resolution of human rights disputes does not mean that granting arbitrators the authority to enforce the substantive rights and obligations of the *Human Rights Code*

does not further bolster human rights protection. As discussed above, grievance arbitration has the advantage of both accessibility and expertise. It is a reasonable assumption that the availability of an accessible and inexpensive forum for the resolution of human rights disputes will increase the ability of aggrieved employees to assert their right to equal treatment without discrimination, and that this, in turn, will encourage compliance with the *Human Rights Code*.

53 A countervailing consideration is the fact that the Human Rights Commission has greater expertise than grievance arbitrators in the resolution of human rights violations. In my view, any concerns in respect of this matter are outweighed by the significant benefits associated with the availability of an accessible and informal forum for the prompt resolution of allegations of human rights violations in the workplace. It is of great importance that such disputes are resolved quickly and in a manner that allows for a continuing relationship between the parties. Moreover, expertise is not static, but, rather, is something that develops as a tribunal grapples with issues on a repeated basis. The fact that the Human Rights Commission currently has greater expertise than the Board in respect of human rights violations is an insufficient basis on which to conclude that a grievance arbitrator ought not to have the power to enforce the rights and obligations of the *Human Rights Code*.

54 Support for this conclusion can be found in the Ministry of Labour's 1991 discussion paper, *Proposed Reform of the Ontario Labour Relations Act*, in which the Minister proposed that all collective agreements should be deemed to include the employment-related prohibitions of the *Human Rights Code* (p. 42). This indicates that it is the government's view that grievance arbitrators already possess sufficient expertise to address allegations that an employer contravened the right of each employee to equal treatment without discrimination. Similarly, in its submissions before this Court the

intervener, Human Rights Commission, stated that it believes that the grievance arbitration process has an important role to play in the resolution of human rights issues. It did not intervene on the basis that arbitrators should not have the power to resolve human rights issues, but on the basis that arbitrators and the Board should have concurrent jurisdiction. This suggests that the Commission also is of the view that grievance arbitrators have sufficient expertise to hear alleged violations of the *Human Rights Code*.

(4) Conclusion

55 For the foregoing reasons, the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction. Because of this interpretation, an alleged violation of the *Human Rights Code* constitutes an alleged violation of the collective agreement, and falls squarely within the Board's jurisdiction. Accordingly, there is no reason to interfere with the Board's finding that the subject matter of Ms. O'Brien's grievance is arbitrable. The Board's finding that the discriminatory discharge of a probationary employee is arbitrable is not patently unreasonable.

C. *The Court of Appeal's Application of the ESA*

56 The foregoing analysis is sufficient to dispose of the appeal. The Board's finding that the subject matter of Ms. O'Brien's grievance is arbitrable was not patently unreasonable and should be upheld. However, even if there was no basis on which to conclude that the alleged violation of the *Human Rights Code* is arbitrable, I would still be of the opinion that the analysis furnished by the Court of Appeal would provide

sufficient grounds to conclude that Ms. O'Brien's grievance is a proper subject of the arbitration process.

57 In substantive terms, there is no doubt but that the application of ss. 44 and 64.5(1) of the *ESA* leads to the conclusion that the subject matter of Ms. O'Brien's grievance is arbitrable. Under s. 64.5(1), the terms and conditions of the *ESA* are enforceable against an employer as if they were part of the collective agreement. Under s. 44, an employer is prohibited from dismissing an employee because the employee intends to take or takes pregnancy leave. The joint effect of ss. 44 and 64.5(1) is that each collective agreement is deemed to contain a provision that prohibits the discharge of a probationary employee because she took or intends to take pregnancy leave. Thus, the subject matter of Ms. O'Brien's grievance clearly constitutes a dispute that arises under a collective agreement over which the Board has jurisdiction.

58 However, the appellant raised a number of objections to the Court of Appeal's decision to resolve the matter with reference to ss. 44 and 64.5(1) of the *ESA*. For the reasons that follow, it is my view that these objections are insufficient to preclude the resolution of the dispute on this basis.

(1) Limitations on the Scope of Judicial Review

59 The appellant's first objection is that the Court of Appeal exceeded its jurisdiction by considering an issue that was not raised at the initial hearing. According to the appellant, the finding that currently is under review is the Board's finding that s. 5(1) of the *Human Rights Code* is enforceable against the employer as if it was part of the collective agreement. On this view, the Court of Appeal had the authority to review the Board's finding that s. 5(1) of the *Human Rights Code* is enforceable against the

employer, but did not have the authority to consider whether s. 44 of the *ESA* is enforceable against the employer. Although I do not disagree with the general principle that on judicial review a court is limited to reviewing the tribunal's decision, I do not agree with the appellant's characterization of the finding that currently is under review. As above, the finding under review is not the Board's finding that s. 5(1) of the *Human Rights Code* is enforceable against the employer, but its finding that Ms. O'Brien's grievance is arbitrable.

60 In reviewing a decision on a standard of patent unreasonableness, the reviewing court must consider the decision-making process in its entirety, including the failure of the tribunal to consider all of the relevant factors and legal principles. This reflects the fact that a decision will be patently unreasonable if the tribunal reaches a particular conclusion on account of its failure to take into account legal principles or statutory provisions that clearly are relevant to the issue that must be resolved: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 29. Consequently, the mere fact that a board of arbitration has determined that a grievance is arbitrable on grounds that have no basis in law will not lead inexorably to the conclusion that the arbitration award must be quashed. If there are alternative and legally correct grounds that lead to the conclusion that the grievance is arbitrable, quashing the award without considering those grounds would be perverse.

61 In this instance, once the Board concluded that the subject matter of the grievance was arbitrable on the basis that s. 5(1) of the *Human Rights Code* is incorporated into the collective agreement, it was, in effect, unnecessary for the Board to consider the possible impact of ss. 44 and 64.5(1) of the *ESA*. But if there had been no basis on which to conclude that s. 5(1) of the *Human Rights Code* is enforceable against the employer, the Board could not properly have concluded that the subject matter of Ms.

O'Brien's grievance was non-arbitrable without first considering the possible impact of ss. 44 and 64.5(1) of the *ESA*. Thus, it was not improper for the Court of Appeal to take into account the fact that the substantive rights and obligations of the *ESA* are incorporated directly into each collective agreement. If the Court of Appeal had upheld the Divisional Court's decision to reverse the arbitration award without taking into account the potential impact of ss. 44 and 64.5(1) of the *ESA*, it would arguably have committed an error of law.

62 However, even if the Court of Appeal could, in theory, resolve the matter on this basis, the appellant nonetheless submits that the *ESA* and the collective agreement contain procedural provisions that prevent the Union from litigating the matter on the basis that the alleged misconduct constitutes a violation of s. 44 of the *ESA*.

(2) Procedural Considerations

63 The appellant's primary submission in respect of this argument is that the Union is statute-barred from relying on the *ESA*. Section 64.5(4) of the *ESA* states that:

An employee to whom a collective agreement applies (including an employee who is not a member of the trade union) is bound by a decision of the trade union with respect to the enforcement of the Act under the collective agreement, including a decision not to seek the enforcement of the Act.

According to the appellant, s. 64.5(4) binds a union to a prior decision not to seek enforcement of the *ESA*. Under this view, the respondent Union is bound by its prior decision not to seek enforcement of s. 44 of the *ESA* at the initial hearing. However, this interpretation of s. 64.5(4) is inconsistent with both its words and its fundamental purpose.

64 First, s. 64.5(4) clearly states that an employee is bound by a decision of the trade union with respect to the enforcement of the Act under the collective agreement. It does not, however, provide that the union is bound by a decision not to seek enforcement of the *ESA*. If the purpose of s. 64.5(4) was to bind a trade union to its prior decision not to seek enforcement of the *ESA*, one would have expected the legislature to have used language indicating as much. On its face, s. 64.5(4) is directed not at the Union, but rather at the individual employee; it has no bearing on the circumstances in which a union is permitted to seek enforcement of the Act.

65 This interpretation of s. 64.5(4) is consistent not only with its words but also with its basic purpose, namely, to ensure that the union has sole carriage over employment standards issues that arise during the currency of a collective agreement. This accords with established principles governing labour-management relations. Section 64.5(2), for example, provides that an employee to whom a collective agreement applies is not entitled to file or maintain a complaint under the *ESA*. Section 64.5(3), in turn, provides that notwithstanding subs. (2) the Director of Employment Standards may permit an employee to file or maintain a complaint under the Act if the Director considers it appropriate in the circumstances. Each subsection suggests that the default presumption is that the union must decide whether or not to pursue a particular grievance. Section 64.5(4) reinforces this principle by binding an employee to the decision of a union not to seek enforcement of the *ESA*. The purpose of the provision is not to bind a union to a prior decision not to pursue an *ESA* complaint, but, rather, to affirm the principle that an employee to whom a collective agreement applies is not entitled to file or maintain a complaint under the Act.

66 Consequently, s. 64.5(4) has no effect in this appeal. This case does not involve an individual employee who seeks to file or to maintain a complaint under the

ESA despite the fact that the Union has decided not to seek enforcement of her rights under the Act. As a result, it is not necessary to consider the possibility that the Union has made a “decision”, as the word is used in s. 64.5(4), not to seek enforcement of the *ESA*.

67 In the alternative, the appellant submits that the Union’s failure to comply with the procedural requirements of the collective agreement precludes it from seeking enforcement of s. 44 of the *ESA*. Under Article 8.06 (a) of the agreement, a discharge grievance must set out the section of the collective agreement that is alleged to have been violated. Ms. O’ Brien’s initial grievance, however, alleged only that she had been discharged from her position “without justification” and that the decision was “arbitrary, discriminatory, in bad faith and unfair”. The grievance did not allege that the employer had violated s. 44 of the *ESA*, or even that she had been discharged because she took pregnancy leave. In the appellant’s submission, the Union’s failure to allege that s. 44 of the *ESA* had been violated precludes it from subsequently raising s. 44 as a potential basis of liability.

68 As a general rule, of course, it is important that the parties to a collective agreement comply with the procedural requirements set out therein. If a union intends to plead that the employer has breached the employee’s statutory rights, it should, as a matter of general practice, specify the statutory provision that the employer is alleged to have breached. That said, it is important to acknowledge the general consensus among arbitrators that, to the greatest extent possible, a grievance should not be won or lost on the technicality of form, but on its merits. In *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (C.A.), at p. 108, for example, Brooke J.A. wrote as follows:

Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions and this whether by way of declaration of rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one to the proper position he would have been in had the agreement been performed.

69 This approach has been adopted by numerous arbitrators. In *Spruce Falls Inc. and I.W.A. - Canada, Local 2995 (Trudel) (Re)* (2002), 106 L.A.C. (4th) 41, at p. 61, the arbitrator observed that a “grievance must be construed so that the ‘real complaint’ is dealt with and an appropriate remedy is provided to bring resolution to the matters which have given rise to the grievance”. In *Peel District School Board and O.P.S.T.F., District (Havery) (Re)* (2000), 84 L.A.C. (4th) 289, the arbitrator rejected the employer’s motion to dismiss on the basis that the employer suffered no prejudice as a consequence of the union’s failure to specify the section of the collective agreement that was alleged to have been breached. See also *Re Harry Woods Transport Ltd. and Teamsters Union, Local 141* (1977), 15 L.A.C. (2d) 140; *Aro Canada Inc. and I.A.M., Re* (1988), 34 L.A.C. (3d) 255; and *Liquid Carbonic Inc. and U.S.W.A., Re* (1992), 25 L.A.C. (4th) 144. These cases reflect the view that procedural requirements should not be stringently enforced in those instances in which the employer suffers no prejudice. It is more important to resolve the factual dispute that gives rise to the grievance.

70 In this case, the employer was aware from the outset that the essence of the grievance was that Ms. O’Brien was discharged as a consequence of taking maternity leave. Although the written grievance did not specify that Ms. O’Brien believed that she had been discharged because she took maternity leave, or that the alleged misconduct constituted a violation of s. 44 of the *ESA*, the employer was fully apprised that this was the factual basis of the grievance. Further, the appellant was provided with a fair opportunity to prepare and make submissions in respect of this matter prior to the Court

of Appeal's determination that the Board was authorized to resolve the dispute with reference to s. 44 of the *ESA*. Considered against this backdrop, I agree with Morden J.A. that the employer suffered no prejudice as a consequence of the Court of Appeal's decision to resolve the matter with reference to s. 44 of the *ESA*.

71 Thus, if it had been patently unreasonable for the Board of Arbitration to conclude that the grievance was arbitrable because it had the authority to enforce s. 5(1) of the *Human Rights Code* as if it were part of the collective agreement, I do not believe that it would have been improper for the Court of Appeal to conclude that the grievance was arbitrable on the basis that the alleged misconduct constituted a violation of s. 44 of the *ESA*. Construing Ms. O'Brien's allegation that the decision to discharge her was "arbitrary, discriminatory, in bad faith and unfair" as sufficiently broad to encompass the allegation that she was discharged because she took maternity leave ensures that the "real complaint" is dealt with and that the matter that gave rise to the grievance is adequately addressed.

VI. Disposition

72 For the foregoing reasons, Ms. O'Brien's grievance is arbitrable. I would therefore dismiss the appeal with costs.

MAJOR J. ___

73 I respectfully disagree with the reasons of Iacobucci J.

74 Are all employment and human rights statutes incorporated into every collective bargaining agreement? Collective agreements occupy an important role in Canadian management-union relations. As both parties are experienced in various components of labour law including grievance procedures, the courts should reluctantly interfere and only when necessary. In this case, there were alternatives available to the parties. They, having chosen one, should not have had it usurped by the Court of Appeal on its own initiative. Because I believe that courts should assume that parties may set out the limits of their agreements absent express or implied legislative override, and because the parties should be bound by the form and substance of the grievance they chose, I would allow the appeal.

75 I agree with Iacobucci J.'s characterization of the factual background of this appeal. However, a brief review of some of the procedural history may help put these reasons in context.

I. Procedural Background

76 In June 1998, Joanne O'Brien, a "counsellor/casual field worker" who had probationary employment status, was dismissed by the Parry Sound Social Services Administration Board. She grieved, making a generalized claim of discrimination under a collective bargaining agreement between Parry Sound and her Union, the Ontario Public Service Employee Union, Local 324 ("OPSEU"). Parry Sound argued that O'Brien was not entitled to arbitration because the collective agreement explicitly did not cover the dismissal of probationary employees. It also claimed that O'Brien, who had never mentioned the *Employment Standards Act*, R.S.O. 1990, c. E.14, in her grievance, had not met the procedural requirements set out by Article 8.06(a) of the collective agreement, which required her to state "the section or sections of the Agreement which are alleged to have been violated". Since s. 64.5(1) of that Act

specifies that it is to be treated as part of the collective agreement, Parry Sound argued that the Act should have been raised. The Union replied that the grievance's broad reference to discrimination sufficed, since O'Brien was not relying upon any explicit section of the collective agreement, but was rather relying upon an implicit incorporation of the *Human Rights Code*, R.S.O. 1990, c. H.19.

77 In February 1999, a board of arbitrators ruled that it was entitled to consider whether O'Brien had been a victim of discrimination under the *Human Rights Code*. In January 2000, the Ontario Superior Court of Justice (Divisional Court) granted Parry Sound's application for judicial review, ruling that since the agreement did not cover the dismissal of probationary employees, the board of arbitrators had no jurisdiction to arbitrate the dispute. The Union appealed to the Ontario Court of Appeal.

78 Several months after the hearing, and years after the Union had first brought the grievance on its chosen grounds, the Court of Appeal, *sua sponte*, sought submissions from the parties on a new issue: the applicability of the *Employment Standards Act*. In June 2001, the Court of Appeal held, on the basis of this novel argument, that the board of arbitration had jurisdiction over the grievance. In *obiter dicta*, it also hinted that it believed that the arbitrator may have also had jurisdiction through an implied incorporation of the *Human Rights Code*.

II. Issues

79 Two issues arise in this dispute. Is the *Human Rights Code* incorporated by implication into all collective agreements entered into under the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A? Was it proper for the Court of Appeal, *sua sponte*, to ignore the procedural requirements negotiated by the parties and raise the

Employment Standards Act argument? I disagree with Iacobucci J.'s reasons, and would answer both questions in the negative.

80 His reasons conclude that the *Human Rights Code* is implicitly incorporated into all collective agreements. I respectfully disagree. Unless the legislature passes legislation incorporating the substance of its statutes into collective agreements, it is to be assumed that unions and employers may define which employees and disputes are covered by a collective agreement and therefore have access to binding arbitration, as long as the agreement does not conflict with statute or public policy. Absent legislative action, courts should not on their own initiative interfere with the terms of a collective agreement.

81 Iacobucci J.'s reasons also conclude that the *Employment Standards Act* may be applied against Parry Sound years after the initial grievance, the process of which had been negotiated and agreed to by the parties, because Parry Sound would suffer no prejudice. I respectfully disagree. Where the parties have negotiated procedural guarantees relating to the timeliness, form and specificity of grievances, courts should not interfere. OPSEU is a sophisticated party, and should be bound by its decision to not pursue an *Employment Standards Act* claim.

82 O'Brien is not without a remedy. She may use the mechanisms carefully set out by the legislature to vindicate her human rights, and may bring her claim before the Human Rights Commission. This appeal is not one about public policy and human rights. It is about discerning the intent of the parties and the legislature on the appropriate forum for vindicating those rights.

III. Standard of Review

83 I agree with Iacobucci J.'s treatment of the standard of review: on the question of whether the *Human Rights Code* is incorporated into each labour agreement, the arbitrator must be correct. But if the arbitrator is correct on this issue, then his overall decision is subject to reversal only if it is patently unreasonable.

IV. Is the *Human Rights Code* Incorporated Into All Collective Agreements?

A. *Intention of the Parties*

84 Some disputes between an employer and an employee are not subject to arbitration; the *Labour Relations Act, 1995*, s. 48(1), states that all differences between the parties in the interpretation of a collective agreement are to be arbitrated, "including any question as to whether a matter is arbitrable". It is permissible for a bargaining agreement simply to not cover certain decisions on matters such as worker training or pensions, or to restrict the scope of the working conditions applicable to some employees, such as temporary workers. An arbitrator would be obligated to conclude that such a dispute is not arbitrable.

85 In the present appeal, the collective agreement does not extend to the grievances of probationary employees over discharge. As with all employees, the rights of probationary employees are determined by the collective agreement. One of the provisions of that agreement states that the right to grieve does not extend to probationary employees grieving discharge during the probationary period. Article 8.06(a) of the collective agreement states:

Notwithstanding anything in this Agreement, a probationary employee may be discharged at the sole discretion of and for any reason satisfactory to the

Employer and such action by the Employer is not subject to the grievance and arbitration procedures and does not constitute a difference between the parties.

This language, “difference between the parties”, is a reference to the language in s. 48(1) of the *Labour Relations Act, 1995*, specifying that differences between the parties are to be arbitrated. The intention of the parties is clear: Parry Sound and OPSEU explicitly chose not to bring the discharge of probationary employees under the grievance procedures in their collective agreement. The contract is silent as to other rights the employee or the Union might invoke in order to challenge or remedy a discharge.

B. Intention of the Legislature

86 Does the *Human Rights Code* give probationary employees grievance rights under the collective agreement despite the intention of the parties not to cover them? The heart of the answer to this issue lies in the correct interpretation of the short judgment in *McLeod v. Egan*, [1975] 1 S.C.R. 517.

87 Iacobucci J. states that *McLeod, supra*, stands for the proposition that all employment-related statutes, including the *Human Rights Code*, are implicitly incorporated into every collective bargaining agreement, and that s. 48(12)(j) of the *Labour Relations Act, 1995* codified this common law understanding. Although I agree that the structure and language of s. 48(12)(j) suggest no legislative intent to alter the common law rule from *McLeod*, I take a different view as to what that rule is.

88 *McLeod* involved a conflict between an earlier version of the *Employment Standards Act* and a collective agreement (*Employment Standards Act, 1968*, S.O. 1968, c.35). The earlier Act required that an employee consent to overtime hours, but the

collective agreement in *McLeod* gave the company the sole authority over operations generally, including the right to “schedule its operations or to extend, limit, curtail or reschedule its operations when in its sole discretion it may deem it advisable to do so” (at p. 521). This Court held, at p. 523:

Any provision of an agreement which purported to give to an employer an unqualified right to require working hours in excess of those [overtime] limits would be illegal, and the provisions . . . of the collective agreement, which provided that certain management rights should remain vested in the Company, could not . . . enable the Company to require overtime work in excess of those limits.

89 Iacobucci J. derives from this case the proposition that “[a]s a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction”. He later states that “a conflict between the collective agreement and an employment-related statute is not a condition precedent of the power to bring that statute into practical operation”, and concludes, therefore, that all statutory protections are arbitrable under any collective agreement, even if the agreement purports not to cover the dispute in question.

90 I come to a different conclusion. In *McLeod*, the employer was relying upon the explicit language of the collective agreement, which gave it the sole discretion to set overtime hours. This discretion was in clear and direct opposition to the *Employment Standards Act* of the time. The *McLeod* proposition is more limited than suggested: *McLeod* concludes only that a union and an employer are restricted from making an agreement contrary to law. This rule is no more than a modern application of a long-

standing rule of the common law of contracts: courts will not enforce contracts that are illegal or against public policy. See *Bank of Toronto v. Perkins* (1883), 8 S.C.R. 603, in which the Court refused to enforce a secured loan made in contravention of the *Banking Act*. Labour contracts are not exempt from this rule.

91 Iacobucci J.'s reasons too broadly apply *McLeod* to the facts of this case. In *McLeod*, there was a broad management rights clause that was held to be in violation of employee statutory rights granted by the *Employment Standards Act*. Iacobucci J.'s reasons conclude that “[j]ust as the collective agreement in *McLeod* could not extend to the employer the right to require overtime in excess of 48 hours, the collective agreement in the current appeal cannot extend to the appellant the right to discharge an employee for discriminatory reasons”.

92 But here, the appellant does not point to Article 5.01, which purports to give management the power to discharge probationary employees for any reason. It points to Article 8.06(a), stating that such discharges are not covered by the agreement at all, that they are not “differences” as defined by the *Labour Relations Act, 1995*, and implying that they are therefore inarbitrable.

93 This distinction is crucial. Under *McLeod*, the parties attempted to explicitly “contract around” the protections conferred by statute, which is clearly impermissible. Here, the parties simply chose not to come to agreement on certain kinds of disagreements, explicitly choosing to remove the arbitrator’s jurisdiction. The common law rule that parties may not contract in contravention of public policy does not require parties to agree to arbitrate violations of statutory rights.

94 Under this more restrained reading of *McLeod, supra*, explicit statutory directions override conflicting provisions of collective agreements, but they do not affect the parties' ability to define the limits of their agreement. Parties remain free to exclude certain classes of employees, such as probationary, part-time, or temporary employees, from some of the provisions of the agreement, just as they remain free to exclude certain kinds of disputes from the jurisdiction of the arbitrator. They do this by limiting the scope of the grievance procedure on some matters or acknowledging that a party retains the right to make a unilateral final decision on certain questions.

95 Although these labour agreements are entered into under the collective bargaining framework established by the *Labour Relations Act, 1995*, they are essentially private contracts of significant public importance. The decision to inject legislative protections into these private contracts is a serious one, though clearly one within the powers of a legislature. A court should not lightly infer such intent. When the Ontario legislature wishes to insert such protections directly into collective bargaining agreements, it knows how to do so explicitly and clearly. For example, s. 64.5(1) of the *Employment Standards Act* reads:

If an employer enters into a collective agreement, the Act is enforceable against the employer with respect to the following matters as if it were part of the collective agreement:

1. A contravention of or failure to comply with the Act that occurs when the collective agreement is in force.

There is no equivalent provision in the *Human Rights Code*.

96 Iacobucci J's reasons state that the legislature must have intended that

s. 48(12)(j) grant arbitrators jurisdiction over claims based on statutory protections. But I believe that this provision, coming as it does at the end of a long list of uncontroversial arbitrator's powers (the power to compel document production, the power to fix dates for hearings, the power to summon witnesses, the power to administer oaths, the power to accept oral or written evidence, etc.), does no more than confirm the rule from *McLeod*. Arbitrators may not enforce any contract that violates public policy by "contracting around" the protections of statute. To read into this innocuous provision the extraordinary power to take jurisdiction of any claim based on statute, despite the plain wishes of the parties to the contract, is a subversion of the legislative intent. If the legislature wished to thus expand the power of arbitrators, it surely would have signalled its intent more clearly.

97 It is not for the court but rather the legislature to decide that particular statutory protections are so important that they must be injected into every collective agreement. Iacobucci J.'s rather expansive holding stands upon an extension of a 30-year-old case and an inexplicable notion of public policy. It does not respect the intention of the parties and the legislature, and is inconsistent with the court leaving to the legislature the duty of implementing what I take to be new policy.

98 A more focussed reading of *McLeod, supra*, serves the public interest. It allows employers and unions to craft the mutually beneficial agreements most appropriate to their circumstances, subject to explicit legislative direction. In this appeal, it gives Parry Sound the flexibility to hire probationary employees, allowing it to reserve the full panoply of employment benefits and guarantees for employees who have demonstrated their value.

99 Human rights abuses will not go unchecked. Aggrieved employees will have available the same mechanisms for enforcing their human rights as any other member of society: they may file a complaint before the Human Rights Commission, as the employer urged and as the legislature intended.

100 Collective agreements reflect the outcome of a sometimes difficult process of negotiation. The content of the agreement may reflect the acknowledgment of the union that it should not be called upon to deal with matters it is not equipped to deal with or that might cause conflicts within its membership. Where remedies are available elsewhere, the silence of the agreement may reflect the wishes of the union that those remedies be used in preference to the remedies available under the agreement. Silence in the agreement does not indicate a denial of a right or its remedies. On the other hand, overloading the grievance and arbitration procedure with issues the parties neither intended nor contemplated channelling there, may make labour arbitration anything but expeditious and cost-effective. The present case speaks for itself in this respect.

101 O'Brien's dismissal is not arbitrable because her Union and her employer agreed not to cover the dismissal of probationary employees in their collective agreement, and the legislature did not intend to require that they do so. She must seek the vindication of her rights before the Human Rights Commission, as would any employee not covered by a collective agreement.

V. The Tardy *Employment Standards Act* Argument

102 As Iacobucci J. notes, there is little question that had OPSEU, Local 324, brought a claim in the original instance under ss. 44 and 64.5(1) of the *Employment Standards Act*, the claim would have been arbitrable. However, Article 8.06(a) of the collective

agreement clearly required the Union to state “the section or sections of the Agreement which are alleged to have been violated”. OPSEU should therefore have raised s. 44 of the *Employment Standards Act*, barring employment discrimination on the basis of “pregnancy leave”, which the legislature has explicitly incorporated into all collective agreements via s. 64.5(1). This OPSEU chose not to do. Even if the failure to raise the *Employment Standards Act* might have been curable or seen as a simple procedural defect, the Union would at the very least have had the obligation to raise the matter at the arbitration stage.

103 The Union chose not to raise the *Employment Standards Act* claim at four different stages:

- (i) when it grieved in June 1998,
- (ii) at arbitration in February 1999,
- (iii) at its first appeal before the Ontario Superior Court of Justice (Divisional Court) in January 2000, and
- (iv) at its second appeal before the Ontario Court of Appeal.

This clearly was a decision by the Union not to raise the *Employment Standards Act*. This decision rests with the Union and the employee. In the Court of Appeal, the employer should have been entitled to rely on this decision of the Union. In spite of the Union decision, the Court of Appeal raised the issue *sua sponte* months after the hearing, sought briefing, and decided the case based upon grounds never advanced in the grievance.

104 OPSEU and Parry Sound, both sophisticated entities, negotiated an agreement calling for certain procedural formalities — among them, that any grievance identify

with specificity the section of the collective agreement alleged to have been violated. Furthermore, the *Employment Standards Act* makes clear that it is the union and not the individual who is to control the course of a grievance under the Act.

105 Section 64.5(2) reads:

An employee to whom a collective agreement applies . . . is not entitled to file or maintain a complaint under the Act.

106 Section 64.5(4) reads:

An employee to whom a collective agreement applies . . . is bound by a decision of the trade union with respect to the enforcement of the Act under the collective agreement, including a decision not to seek the enforcement of the Act.

107 The Union and O'Brien should be bound by the specific claims they made and the manner in which they presented them. The Court of Appeal erred in raising this issue, not chosen by the parties.

VI. Conclusion

108 O'Brien's *Human Rights Code* claim is not the subject of the agreement between her employer and her Union, and is therefore not arbitrable. To vindicate these rights, she must proceed before the Human Rights Commission.

109 I would allow the appeal with costs.

Appeal dismissed with costs, MAJOR and LEBEL JJ. dissenting.

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