

Fine-tuning *Weber*: unionized employee can sue for malicious prosecution

Many of our readers are likely aware of the key Supreme Court of Canada decision in *Weber v. Ontario Hydro* (June 29, 1995). This judgment placed significant restrictions on the right of parties to a collective agreement to go to court to settle their disputes.

Weber concerned an employee who took an extended leave of absence, during which he collected sick benefits. His employer suspected him of malingering, and hired private investigators to gain entry into his house under false pretences. Following the investigation, Weber was suspended for abuse of sick leave.

Weber grieved the discipline, but also commenced a court action. Ontario Hydro moved to block the proceeding, and the court agreed, holding that it had no jurisdiction over a matter that arose out of the collective agreement. Eventually, the Supreme Court of Canada came to the same conclusion.

WEBER: THE "ESSENTIAL CHARACTER" OF THE DISPUTE

In *Weber*, in the Court's view, if the difference between the parties arose from the collective agreement, it had to be pursued through arbitration. The issue, therefore, is to determine whether the dispute does indeed arise under the agreement. This determination depends on two factors: the dispute itself and the scope of the collective agreement.

In considering the dispute, one must define its "essential character" or the facts that gave rise to it, and not the legal characterization given to it by the parties. This definition may not always be straightforward, and attempts to provide an advance catalogue of criteria should be avoided:

"The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement Sometimes the time when the claim originated may be important The question in each case is whether the dispute, in its essential character arises from the interpretation, application, administration or violation of the collective agreement....This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts."

EMPLOYERS CONDUCT SUBJECT TO GRIEVANCE PROCEDURE

Turning to the facts of the case, the Court in *Weber* observed that, while the use of private investigators to gain entry into an employee's home may seem to go beyond a workplace dispute, the language of the collective agreement was broad enough to cover this conduct:

"Article 2.2 of the collective agreement extends the grievance procedure to "[a]ny allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this Agreement...." The dispute in this case arose out of the content of the Agreement. Item 13.0 ... provides that the "benefits of the Ontario Hydro Sick Leave Plan ... shall be considered as part of this Agreement...."

I conclude that the wide language of Article 2.2 of the Agreement, combined with item 13.0, covers the conduct alleged against Hydro. Hydro's alleged actions were directly related to a process which is expressly subject to the grievance procedure. While aspects of the alleged conduct may arguably have extended beyond what the parties contemplated, this does not alter the essential character of the conduct."

The Court added that, if the employer's conduct was tortious, as claimed by Weber, this could be considered by the arbitration board in fashioning a remedy for the wrongdoing.

PIKO: DISPUTE ARISES OUT OF THE EMPLOYMENT RELATIONSHIP, NOT THE COLLECTIVE AGREEMENT

The uncertainty entailed in applying *Weber* has been highlighted in the Ontario Court of Appeal's decision in *Piko v. Hudson's Bay Co.* (November 19, 1998). The case concerned a retail sales worker with ten years of service who was terminated for allegedly improperly marking down a comforter and then purchasing it at the discounted price. Piko claimed that the Bay had instigated criminal proceedings against her for fraud. The charges were eventually withdrawn by the Crown.

Piko grieved her dismissal, but she did so nearly a year after she lost her job. As a result, the grievance was dismissed for being untimely and the merits of the case were not considered. Some time later, Piko commenced an action against the Bay, seeking damages for malicious prosecution and mental distress caused by the criminal proceedings.

The Bay moved to dismiss the action, citing *Weber* to support the proposition that the court had no jurisdiction to hear the case. The motions judge agreed:

"The essential character of the dispute arises from the plaintiff's employment relationship with the defendant company; and hence, it is covered by the Collective Agreement...."

In my view, the fact that a criminal charge was laid does not take the matter out of the employment context."

However, the Court of Appeal, noting that *Weber* had recognized that not all workplace disputes were governed by the collective agreement, ruled that Piko's suit could proceed. While Piko's claim of unjust dismissal had to be arbitrated, her claim of malicious prosecution did not. By taking the matter to the criminal courts, the Bay had placed it

prosecution did not. By taking the matter to the criminal courts, the Bay had placed it beyond the scope of the collective agreement, despite the disputes having originated from the employment relationship:

"Once [the Bay] took its dispute with Piko to the criminal courts, the dispute was no longer just a labour relations dispute. Having gone outside the collective bargaining regime, the Bay cannot turn around and take refuge in the collective agreement when it is sued for maliciously instituting criminal proceedings against Piko.

[A]lthough the dispute between the Bay and Piko arises out of the employment relationship, it does not arise under the collective agreement. A dispute centred on an employer's instigation of criminal proceedings against an employee, even for a workplace wrong, is not a dispute which in its essential character arises from the interpretation, application, administration or violation of the collective agreement."

CRIMINAL CHARGES "NEITHER A PREREQUISITE TO NOR A NECESSARY CONSEQUENCE OF DISMISSAL"

The Court stated that the *Piko* case differed from *Weber* because the collective agreement language at issue was not as broad as that found in *Weber*. As well, the Bay's actions in instigating criminal proceedings against Piko, unlike the hiring of the private investigators which preceded Weber's suspension, were not directly related to Piko's dismissal:

"The collective agreement [in *Weber*] extended the grievance procedure to "any allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this Agreement....

The language of the collective agreement for the Bay's employees is not nearly as broad And the Bay's actions in instigating criminal proceedings are not directly related to the dispute over whether Piko was unjustly dismissed. The Bay's actions are neither a prerequisite to nor a necessary consequence of its dismissal of Piko. In short, the collective agreement does not regulate the Bay's conduct in invoking the criminal process, which is the conduct at the heart of the present dispute. The dispute, therefore, does not arise under the collective agreement."

In ruling that Piko's suit could proceed, the Court conceded that the court adjudicating her claim of malicious prosecution would have to consider the workplace conduct that led to her dismissal, the very conduct the arbitrator would have considered had Piko filed her grievance on time.

In Our View

The distinction between a dispute that "arises out of the employment relationship" and one that "arises under the collective agreement", if it stands, will expand employees' recourse to the courts even though they are covered by a collective agreement. As well, the reliance on the definition of a grievance in the collective agreement means that added attention should be given to this contract language.

Counsel for the Bay is seeking leave to appeal this decision to the Supreme Court of Canada, leave which may be granted in view of a contrary result in a similar case in the Quebec Court of Appeal. We will keep readers informed of any developments in this case. (For subsequent cases that apply *Weber*, see "[Jurisdiction of courts and arbitrators: the](#)

(For subsequent cases that apply *Weber*, see "[Jurisdiction of courts and arbitrators: the Supreme Court of Canada applies *Weber*](#)".)

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