

"No adequate alternative remedy": Ontario Court orders hospital not to adjust schedules pending outcome of grievance

Readers of *FOCUS* alerts are well aware of the importance of the 1995 decision of the Supreme Court of Canada in *Weber v. Ontario Hydro*. Under the *Weber* approach, courts will decline to take jurisdiction over a dispute if the essence of the dispute arises out of a collective agreement. However, even in those cases, courts will take jurisdiction if the arbitration process offers no adequate remedy. This important, but sometimes overlooked, aspect of the *Weber* doctrine has been demonstrated in *Aranas v. Toronto East General & Orthopaedic Hospital Inc.* (January 19, 2005), a decision of the Ontario Superior Court of Justice.

That case involved a grievance against the employer's implementation of a "Master Rotating Schedule" and its elimination of permanent schedules in one of its units. The grievors had specifically sought permanent evening and night shifts and had been hired on that basis. They had sought those arrangements largely because they were raising young children and wanted one parent to be at home with the children while the other was at work. The collective agreement provided for permanent shift schedules, and such scheduling had been a longstanding practice over a period of at least thirty years.

The employer had agreed to postpone implementation of its new schedules from September 2004 until January 2005 but, even under the expedited arbitration procedure, the earliest the dispute could be resolved was April 2005. When the employer declined to agree to a further postponement, the union sought an interim injunction from the court prohibiting the employer from implementing its new schedules.

COURT: "RESIDUAL JURISDICTION" TO INTERVENE

The Court, noting that it was difficult to justify judicial intervention in labour relations disputes, nonetheless acknowledged that Ontario arbitrators do not have any power to prohibit an employer from taking such an action pending a final determination of the issue. Nor was there any process available under the collective agreement to temporarily bar the employer's action pending a final determination of the legality of the new schedule.

Accordingly, the Court held that it had the jurisdiction to grant the union's injunction, citing the 1996 decision of the Supreme Court of Canada in *B.M.W.E. v. Canadian Pacific Ltd.* that, if "no adequate alternative remedy exists" under a statutory arbitration scheme, the courts retain a residual discretionary power to grant interlocutory relief such as an injunction. (For more on the *B.M.W.E.* decision, see "[Court has no jurisdiction to block hospital layoffs](#)")

TEST FOR INJUNCTION MET

The Court then applied the three-part test for granting temporary injunctive relief pending the outcome of a dispute:

- *Serious issue to be tried.* The Court held that the union had a reasonable chance of success and that, despite the employer's arguments, there was evidence to support the union's contention that implementation of the new schedule might constitute a serious breach of the collective agreement.
- *Irreparable harm.* Noting that some of the grievors had based their positions on the welfare of their children, the Court found that the young children's lives could be drastically and irreparably affected for a substantial period of time. Such harm could not be quantified in monetary terms or be remedied adequately by the arbitrator in the final disposition of the case.
- *Balance of convenience.* The Court noted that the employer had already agreed to one postponement and held that the harm of immediate implementation for the grievors would outweigh the harm of another relatively short postponement for the employer.

As a result, the Court granted the injunction.

In Our View

This case is an exception to the well-known principle of "obey now, grieve later". The outcome of a Court's assessment of both jurisdiction and merit may depend on whether it finds that an arbitrator's power to make an order retroactive constitutes an adequate alternative remedy. (For more on the application of *Weber*, see "["Remedial loose threads": Court rules arbitrators can award aggravated and punitive damages](#)", "[Jurisdiction of courts and arbitrators: the Supreme Court of Canada applies *Weber*](#)", and "[Court rules former police officer must arbitrate dispute with supervisor](#)" and "[Fine-tuning *Weber*: unionized employee can sue for malicious prosecution](#)")

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