
Supreme Court of Canada: arbitration board has jurisdiction over human rights grievance of probationary employee

On September 18, 2003, the Supreme Court of Canada dismissed the employer's appeal of the Ontario Court of Appeal's decision in *OPSEU, Local 324 v. Parry Sound Welfare Administration Board*. This case, which we reported in January 2000, October 2000 and January 2002 (see "[Collective agreement no bar to human rights grievance of probationary employee](#)", "[Divisional Court: arbitrator has no jurisdiction to hear probationary employee's grievance](#)" and "[Court of Appeal reverses Divisional Court ruling on arbitrability of probationary employee's grievance](#)"), concerned the grievance of a probationary employee who was discharged a few days after returning to work from maternity leave.

The issue in the case is whether a board of arbitration had jurisdiction to hear the employee's grievance, despite the fact that the collective agreement stipulated that the discharge of a probationary employee was not subject to the grievance procedure. The arbitration board held that it did have jurisdiction, based on its power under the *Labour Relations Act* "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement".

AWARD QUASHED BY DIVISIONAL COURT, RESTORED BY COURT OF APPEAL

This ruling was quashed by the Divisional Court, but then reinstated by the Court of Appeal. However, the Court of Appeal based its ruling, not on the provisions of the *Labour Relations Act* but rather, on two provisions of the *Employment Standards Act*: section 44, which bars reprisals against employees taking pregnancy or parental leave, and subsection 64.5(1), which provides that the *Employment Standards Act* is enforceable against the employer with respect to contraventions of the Act occurring when the collective agreement is in force, as if the Act were part of the collective agreement.

Therefore, the Court held, subsection 64.5(1) makes the prohibition of reprisals against employees who have taken pregnancy or parental leave a part of the collective agreement. These provisions in the Act apply to probationary employees, and they prevail over provisions of the collective agreement which make discharge grievances by probationary employees inarbitrable. The employer appealed to the Supreme Court of Canada, arguing both that the arbitration board had incorrectly taken jurisdiction over an inarbitrable grievance, and that the Court of Appeal had exceeded its jurisdiction by considering the issue of the *Employment Standards Act*, an issue which had not been raised during the arbitration proceedings.

COLLECTIVE AGREEMENT AND LEGISLATION

The employer had objected that the arbitration board lacked jurisdiction to hear the probationary employee's grievance based on the management rights and grievance

procedure provisions of the collective agreement:

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;

8.06(a)[...] 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.

The legislative provisions under consideration were as follows:

Labour Relations Act, 1995

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,

(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

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.

Employment Standards Act

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.

SUPREME COURT OF CANADA: RIGHTS AND OBLIGATIONS OF *HUMAN RIGHTS CODE* INCORPORATED INTO THE COLLECTIVE AGREEMENT

By a majority of seven to two, the Supreme Court of Canada dismissed the employer's appeal. The majority of the Court held both that the arbitration board had been correct to assume jurisdiction over the grievance, and that the Court of Appeal had not erred in considering the issue of the *Employment Standards Act*.

The Court began its analysis of the arbitration board's jurisdiction to hear the grievance with a discussion of the landmark 1975 decision of the Supreme Court of Canada in *McLeod v. Egan*. That case stands for the proposition that the rights and obligations of parties to a collective agreement are subject not only to the express provisions of the agreement itself, but also to the provisions of employment-related statutes. Therefore, under the approach established by *McLeod*, a collective agreement cannot give the employer the right to violate the statutory rights of its employees. In the Court's words, "human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract."

In *McLeod*, the issue had been the employer's reliance on a broad management rights clause to require employees to work more than 48 hours a week. This case differed from *McLeod*, in that the parties appeared to have turned their minds more specifically to the subject matter of the grievance (the dismissal of a probationary employee) and agreed that it was not arbitrable.

The Court expressed the view that it was not entirely comfortable in attributing to the parties the intention that a discriminatory discharge of a probationary employee would not be subject to arbitration. It was more likely, in the Court's view, that the intention was to affirm the right of the employer to discharge a probationary employee who did not perform to the employer's satisfaction. However, the Court went on to state that even if the intention had indeed been to make the discriminatory dismissal of a probationary employee inarbitrable, such a provision would be void:

"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 obligations 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."

The Court also rejected the employer's argument that the language of the *Labour Relations Act, 1995* restricted the principles set out in *McLeod*. The employer had argued that the scheme set out in s. 48(1) and s. 48(12)(j) of the Act meant that the 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. The employer asserted that 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.

The Court agreed that a dispute must be arbitrable before the arbitrator can interpret and apply legislation such as the *Human Rights Code*, but it denied that there must be an alleged contravention of an *express* provision of the collective agreement before an arbitrator takes jurisdiction over the dispute. An alleged breach of an employee's statutory rights is also sufficient to provide the arbitrator with jurisdiction:

"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."

COURT OF APPEAL CORRECT TO CONSIDER *EMPLOYMENT STANDARDS ACT*

The Court also rejected the argument that the Court of Appeal had erred in basing its ruling on the arbitrator's jurisdiction on the provisions of the *Employment Standards Act (ESA)*. The employer's argument was based on its view that the finding at issue in the dispute was the arbitration board's ruling that s. 5(1) of the *Human Rights Code* was enforceable against the employer in arbitration. On this view, the Court of Appeal should not have gone on to consider the effect of the *ESA*.

The Court disagreed with this characterization of the issue in dispute, holding instead that the issue was whether the grievance was arbitrable. As the arbitration board had concluded that it was arbitrable based on its view that s. 5(1) of the *Code* was incorporated into the collective agreement, the board had no reason to consider the impact of the *ESA*. But, had the arbitration board concluded that the s. 5(1) was not enforceable against the employer, it could not have ruled the grievance inarbitrable without next considering the effect of s. 44 and s. 64.5(1) of the *ESA*. Thus, it was not improper for the Court of Appeal to consider whether the substantive rights and obligations of the *ESA* were incorporated into the collective agreement.

In Our View

It is important to note that in addition to approving the approach taken by the arbitration board with respect to the arbitrability of an alleged breach s. 5(1) of the *Human Rights Code*, the Supreme Court of Canada also endorsed the substantive view of the Court of Appeal with respect to the effect of the *Employment Standards Act* provisions in this case:

"...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 [the] 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 [the] grievance clearly constitutes a dispute that arises under a collective agreement over which the Board has jurisdiction."

Therefore, the statutory restrictions on the parties' freedom to contract came from at least three directions in this case: from the effect of the *Human Rights Code* combined with either the principles enunciated in *McLeod* or s. 48 of the *Labour Relations Act*, and from the combined effect of ss. 44 and 64.5(1) of the *Employment Standards Act*. Moreover, the principles reiterated by the Court in this decision go beyond the simple and well-established proposition that illegal contract provisions are void. Rather, the Court is saying that collective agreements include not only their express provisions, but also the substantive rights and obligations of employment-related legislation, the alleged breach of which renders a dispute arbitrable.

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