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Labour and Employment Law for Employers
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Supreme Court of Canada extends *Weber* approach to "run-of-the-mill" non-arbitrable disputes under *PSSRA*

The Supreme Court of Canada has once again considered the scope of its landmark 1995 decision, Weber v. Ontario Hydro. In the Weber case, the Court considered the extent to which a unionized employee can have access to the courts – as opposed to arbitration – to pursue a claim against the employer. The Court opted for an "exclusive jurisdiction" model, which denies access to the courts if the essential character of the dispute arises from the interpretation, application, administration or violation of the collective agreement. However, in interpreting *Weber*, some courts have held that, even if a matter does arise under a collective agreement, courts may take jurisdiction if there is no adequate remedy available from arbitration (see ""No adequate alternative remedy": Ontario Court orders hospital not to adjust schedules pending outcome of grievance")

In *Vaughan v. Canada*, a decision issued on March 18, 2005, the Supreme Court ruled that courts may decline to hear cases in which the procedures for resolving the disputes at issue preclude independent third-party adjudication. The *Vaughan* case dealt with the issue of a federal public servant's entitlement to early retirement benefits, which are conferred not by a collective agreement but by regulations made under the *Public Service Staff Relations Act* (*PSSRA*).

Under the Act, employees affected by a decision with respect to benefits that are conferred by statute or regulation may grieve the decision up to the level of Deputy Minister but have no access to arbitration. The issue before the Court was whether the absence of access to independent adjudication in the statutory labour scheme meant that courts could take jurisdiction of the dispute. A majority of the Court held that, while deference to the statutory scheme was not mandatory, judicial restraint was necessary to avoid undermining Parliament's intent as expressed in the Act.

DOOR TO COURT LEFT OPEN, BUT NOT FOR "GARDEN VARIETY" CASES

In its analysis, the Court considered a series of "whistle-blower" cases under the Act. Those cases concerned employees who had complained of employer retaliation or harassment by their superiors after the employees had exposed government waste or abuse. For various reasons, those complaints were grievable but not arbitrable under the *PSSRA*. In those cases, courts generally took jurisdiction because, as the Supreme Court put it, "courts were understandably reluctant to hold that in such cases the employees' only recourse was to grieve in a procedure internal to the very department they blew the whistle on, with the final decision resting in the hands of the person ultimately responsible for the running of the department under attack, namely the Deputy Minister". However, the Court observed, while the alleged harassment of whistle-blowers raised serious questions of conflicting interests within the employer department, there were no similar issues in "an ordinary garden variety employment benefit case".

The Court stated that, when considering whether to take jurisdiction of disputes arising under statutory labour schemes, courts should consider whether the scheme in question offers effective redress. But, while this was a factor for consideration, the Court did not agree that the absence of independent adjudication in the scheme was conclusive. The task for the Court was still to determine whether Parliament had intended that workplace disputes be decided by the courts or in accordance with the grievance procedure established under the *PSSRA*.

"A NEW DIMENSION TO 'FLOODGATES'"

The Court noted that the language of the *PSSRA* was not strong enough to bar a court from hearing matters that were grievable but not arbitrable. However, this still left open the question of how courts should exercise their discretion to intervene when a scheme clearly demonstrates that Parliament intended that disputes involving benefits conferred by regulation not be eligible for third-party adjudication. The majority of the Court held, for the following reasons, that this was not a situation in which courts should get involved:

- The language of the Act was clear that, for "run-of-the-mill" benefits cases conferred by regulation, the decision of the Deputy Minister was final.
- The dispute that arose from the employment relationship fell within the Act's dispute resolution scheme.
- The dispute could have been remedied by following the procedure in the Act.
- The plaintiff's legal position should not be improved by his failure to use the procedure in the Act.
- The fact that there was no access to third-party adjudication did not mean that courts should intervene.
- A comprehensive dispute resolution scheme created by Parliament should not be jeopardized by allowing routine access to the courts.
- The dispute resolution scheme in the Act was faster, cheaper and more effective than litigation.

Finally, the Court stated, by deciding to intervene, courts could become overwhelmed with disputes that are best dealt with by the procedures set out under the Act:

> "[T]he dispute in question is entirely straightforward. … Whether or not he should have been given the alternative of [early retirement] benefits under a program adopted by the federal government to manage the size of its workforce by shedding surplus employees was essentially an administrative matter best left to the administrators. If this simple [benefits] issue can be litigated in the courts, so can every other regulation-conferred benefit applicable to over a quarter of a million employees of the federal public service. The outcome could give a new dimension to the concept of "floodgates"."

In Our View

The result in this case is consistent with that of the Ontario Superior Court in *Brunet v. Ottawa Police Assn.* but may seem to be somewhat at odds with *Aranas v. Toronto East General & Orthopaedic Hospital Inc.* (see "Court rules former police officer must arbitrate dispute with supervisor" and ""No adequate alternative remedy": Ontario Court orders hospital not to adjust schedules pending outcome of grievance"). The difficulties of applying *Weber* are underscored by the fact that two justices of the Supreme Court of Canada – including the Chief Justice – held that, under the scheme of the *PSSRA*, employees

involved in non-arbitrable disputes should not be prevented from going to court. The dissenting justices held that, although the *PSSRA* did create a comprehensive dispute resolution regime, the unavailability of independent adjudication, the fact that the Act did not completely exclude the jurisdiction of courts for non-arbitrable matters, and the lack of expertise of the employer-appointed decision maker militated against a finding of exclusive jurisdiction along the lines of *Weber*.

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