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## Ontario Court of Appeal: claim of sexual assault at OC Transpo must be arbitrated despite lower damages ceiling

Once again, a superior court has had to consider how to apply the landmark decision by the Supreme Court of Canada in *Weber v. Ontario Hydro* concerning the exclusive jurisdiction of arbitrators to resolve disputes arising under a collective agreement. The plaintiffs in *K.A. v. Ottawa (City)* (May 9, 2006) were unionized employees of OC Transpo who alleged that they had been sexually harassed and assaulted by a fellow employee and that the City and OC Transpo had failed in their duty to provide a safe work place by failing to stop the harassment and assault. The sexual assault complained of included allegations of touching, grabbing and kissing without consent. Rather than arbitrate the matter, the employees opted to commence a tort action in court against the employer.

The employer brought a motion to dismiss the claim on the basis that the court did not have jurisdiction over the matter, based on the principles set out in *Weber*. The motions court judge struck the claim of sexual harassment, but allowed the claim based on sexual assault to proceed. The judge reasoned that there were instances in which other tribunals had overlapping jurisdiction along with arbitrators and that, because the alleged sexual assault related to the maintenance of public order and the criminal law, this was such an instance. The employer appealed the decision to allow the claim of sexual assault to proceed.

### COURT OF APPEAL: COMPLAINT A MATTER FOR ARBITRATION

The Court of Appeal unanimously allowed the employer's appeal. The Court noted that in order to determine who had jurisdiction, it was necessary to consider both the legislative framework for the arbitrator's jurisdiction and the nature of the dispute.

With respect to the legislative framework, the Court held that, pursuant to the *Canada Labour Code*, an arbitrator had jurisdiction to apply the provisions of the *Canada Human Rights Act (CHRA)*, and that as sexual harassment was a form of discrimination under the *CHRA*, the arbitrator did have jurisdiction to deal with a sexual harassment complaint. Further, the Court stated while it is true that acts of unwanted touching may constitute the tort of assault, the unwanted touching in the present case could also be dealt with as part and parcel of a sexual harassment complaint.

Turning to the nature of the dispute, the Court held that, in the end, it was a workplace dispute in which the employees alleged that the employer had failed to provide a safe environment for its employees. The Court disagreed with the plaintiffs' contention that where there is a tort claim of violent or criminal misconduct, a court could take jurisdiction:

“There is now a consistent line of authority interpreting the *Weber* principle to embrace jurisdiction over any tort claim that amounts to a dispute arising under the collective agreement [...] Where, as in the present case, the alleged wrong relates directly to conduct in the workplace and to the employer's obligation to provide a safe working environment, it would be inconsistent with the *Weber* principle [...] to carve out an exception for violent or criminal acts.”

## NO REMEDIAL GAP

The plaintiffs argued that the court should retain jurisdiction because under the *CHRA*, they were limited to a maximum of \$40,000 in damages, plus compensation for lost wages and expenses, whereas there was no such limit for damages for the tort of sexual assault. The Court acknowledged that in some cases, the lack of an effective remedy from an arbitrator can justify the exercise of jurisdiction by a court. However, the Court expressed the view that the potential difference in the amount of damages that could be awarded in an arbitration in the present case did not amount to a remedial gap sufficient to justify the exercise of the Superior Court's jurisdiction. So long as the arbitrator is empowered to remedy the wrong, there was no effective deprivation of a remedy for the plaintiffs.

The Court concluded by expressing sympathy for the plaintiffs' plight, while noting that it was bound by the precedent flowing from *Weber*:

"I have considerable sympathy for the result reached by the motion judge and for the respondents' assertion that they should be permitted to pursue their claims for sexual assault in the courts. The claims arise from allegations of criminal misconduct that affront the respondents' personal dignity and physical integrity, yet they are compelled to pursue them under the collective agreement's arbitration procedure, where they will not have personal carriage of the proceedings. However, *Weber* and its progeny deprive them of the right to prosecute their claim in the courts and we must give effect to the jurisprudence that is binding on this court."

## In Our View

For an example of where the *Weber* principle was not applied because of the lack of an effective remedy at arbitration, despite the fact that the matter is properly characterized as a dispute arising out of the collective agreement, see "["No adequate alternative remedy": Ontario Court orders hospital not to adjust schedules pending outcome of grievance"](#)" on our Publications page.

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