



Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

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### **Employer may not rely on "private deal" to fire probationer**

The Ontario Court of Appeal has confirmed that unionized employers may not lawfully bargain conditions of employment with individual employees.

In *Loyalist College v. OPSEU*, this finding meant that the employer had no right to dismiss a probationary employee for failing to meet a condition of employment that had been negotiated (without the knowledge or support of the union) prior to commencing work. The Court confirmed that the "private" condition was illegal or invalid because it collided with the union's exclusive bargaining authority under the collective agreement and the statute. And it upheld the arbitration board's decision to reinstate the fired employee.

In this case, a community college had offered the grievor a job as a full-time teacher on the condition that she pursue a graduate program in her field of study. She agreed to the condition and took the job. However, 10 months into her probationary period she still had not enrolled in a graduate program. The College fired her for breaching a condition of her employment.

The College argued that the condition accompanying the job offer was fair, that the prohibition on individual bargaining did not apply to pre-employment agreements, and that its actions were proper as an exercise of "management rights". The Court rejected all these arguments.

The College also argued that the arbitration board had no jurisdiction to deal with the grievance because the collective agreement explicitly provided that the dismissal of a probationer "shall not be the subject of a grievance". The Court acknowledged that a probationer could be dismissed without "just cause", but it did not accept that it had "an unfettered right to dismiss probationary employees". For many years, arbitrators have said that probationers may challenge their dismissal if the employer acted in bad faith or in a discriminatory fashion. In this case, the Court expanded on that line of cases. It ruled that it was an implied term of the collective agreement that the employer could not dismiss a probationer by relying on a condition of employment that was illegal or conflicted with the collective

agreement.

### **Supreme Court confirms labour arbitrators' exclusive jurisdiction**

In a 1995 decision called *Weber v. Ontario Hydro*, the Supreme Court of Canada announced that workplace disputes should be determined by labour arbitrators - not the courts - if the "essential character" of the dispute arises from the interpretation, application, administration or alleged violation of the collective agreement. Over the last 8 years, in dozens of cases decided throughout the country, courts and arbitrators have struggled to make sense of this rule in different situations.

In two recent cases, the Supreme Court of Canada has again endorsed the rule in the *Weber* case, but has provided little help in determining its reach or application.

In *Allen v. Alberta*, a group of workers sued their former employer for severance pay owing under their former collective agreement. They pointed to a letter of intent, which was explicitly not part of the collective agreement and not subject to its grievance procedure, as effectively conferring jurisdiction on the court. But the Supreme Court disagreed. It noted that the severance pay entitlement was based exclusively on the collective agreement and, applying *Weber*, only an arbitrator had jurisdiction to deal with it.

In *Goudie v. Ottawa*, a group of employees sued their municipal employer in court for failing to comply with what they alleged was a pre-employment agreement with the city. They said that that agreement guaranteed them certain terms of employment more advantageous than those contained in the collective agreement and claimed damages. The Supreme Court ruled that in these circumstances, *Weber* did not apply. The employees' claim to enforce the pre-employment contract could not be said to arise from the interpretation, application, administration or violation of the collective agreement. The court - and not labour arbitration - was the proper forum for adjudicating the dispute.

### **CIRB prohibits employer from implementing voluntary severance program**

The Canada Industrial Relations Board ("CIRB") has ruled that an employer's unilateral implementation of a "voluntary severance program" ("VSP") interferes with the union's representation of employees and is an unfair labour practice.

In *CEP v. Bell*, the employer wished to reduce its workforce by more than 100 bargaining unit members and it proposed to accomplish this goal by means of a VSP that included: pension plan enhancements, salary continuance, termination allowance, extended benefit plan coverage and paid leave of absence prior to pension. Bell offered the VSP directly to union members and refused to negotiate its terms with the union. It claimed that it was entitled to do so because the

VSP "operated beyond the realm of the collective agreement" and was merely an exercise of its residual management rights. The Board disagreed.

The CIRB held that the payment of severance allowance to an employee in exchange for a resignation in itself alters the existing terms and conditions of employment of that employee. A VSP is "demonstrably bargainable". So, by offering the VSP, Bell was negotiating terms and conditions of employment directly with employees contrary to the *Canada Labour Code*.

The CIRB also specifically rejected Bell's residual management rights theory. It ruled that matters that affect the terms and conditions of employment or the legal framework of the relationship between the employees and employer must be negotiated or approved by the trade union as exclusive bargaining agent. The absence of a separation package in the collective agreement does not translate into an employer's right to implement such a package when it affects matters covered by the collective agreement. Furthermore, the silence of a collective agreement on an issue does not give the employer *carte blanche* to negotiate with employees on that issue.

This decision strongly affirms the importance of exclusive bargaining agency status in the statutory scheme. The Board appears to recognize that that status must be protected, outside of the collective agreement negotiation context, in order to reinforce employees' freedom of association.

### **Union was obliged to provide grievor with "fully prepared advocate"**

When a trade union decides to take a discharge grievance to arbitration, it has a duty to ensure that the case is "properly presented by a fully prepared advocate." So says the British Columbia Supreme Court.

In *Budgel v. CUPE*, the union appointed counsel to act of behalf of a discharged employee 48 hours prior to the arbitration hearing. When the employee's grievance was dismissed, he filed a complaint with the labour board alleging that the union had violated its duty of fair representation. He argued that, regardless of counsel's competence, it was simply too late in the day for counsel to properly prepare for the arbitration hearing. The board dismissed his complaint for failure to establish even a prima facie case.

On judicial review, the Court disagreed. It held that to appoint counsel at such late date, in the circumstances of that case, was the equivalent of providing no representation at all. The Court wrote that "no counsel, on such short notice, could properly and fully represent the petitioner's interest". It quashed the decision and returned the matter to the labour board so that that the union could be called upon to explain its conduct and, in particular, its decision to "wait until the last minute to appoint counsel."

## WHAT'S NEW

### LONDON CONFERENCE:

Koskie Minsky is pleased to be one of the sponsors of the **Fourth Annual Southwestern Ontario Labour and Employment Law Conference** to be held this year on Wednesday, May 28, 2003 in London, Ontario.

The Conference is titled "The Changing Workplace 2003: The Cutting Edge in Labour and Employment Law" and is presented by the Law Faculty of the University of Western Ontario and the Human Resources Professionals of London & District.

The full-day conference will feature leading arbitrators and presentations by expert labour relations counsel, including Koskie Minsky lawyers **Craig Flood** on violence in the workplace, **Elizabeth Mitchell** on trade unions and **Graham Williamson** on human rights in the workplace.

For more information, call (519) 661-2111, ext. 88442 or e-mail [nlove@uwo.ca](mailto:nlove@uwo.ca) or visit [www.law.uwo.ca/mainSite/conferences/labour](http://www.law.uwo.ca/mainSite/conferences/labour).

### OTTAWA CONFERENCE:

Koskie Minsky lawyer **Susan Philpott** will be speaking on "The Challenges of an Aging Workforce" at the Federal Labour and Employment Law Conference being held on April 10 - 11 in Ottawa, Ontario.

### AT KOSKIE MINSKY:

**New Law Clerk:** Ronen Zamdvaiz has joined KM as a law clerk filling in for Mary DaRosa during her maternity leave. He can be reached at (416) 595-2118.

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