CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

ROBERT COULTER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

PUROLATOR COURIER LIMITED

Respondent

REASONS FOR DECISION
ON THE PRELIMINARY OBJECTIONS

2004 CHRT 1
2004/01/06

MEMBER: Michel Doucet

[TRANSLATION]

I. INQUIRY

[1] There are two preliminary objections under inquiry by the Tribunal, one raised by the Canadian Human Rights Commission ("the Commission") and the other by Purolator Courier Limited ("the Respondent"), in respect of a complaint filed September 13, 2000, by Robert Coulter ("the Complainant").

[2] In his complaint, the Complainant alleges that the Respondent discriminated against him by failing to [translation] "treat him differently, by refusing to accommodate [him] and by dismissing [him], because of [his] disability, Steinert myopathy," contrary to section 7 of the *Canadian Human Rights Act* ("the *Act* ").

[3] In its preliminary objection, the Respondent argues that the Tribunal does not have jurisdiction to hear the complaint since the issue raised in it is the subject matter of grievances and that the grievance arbitrator is therefore the competent forum to hear and dispose of any alleged contravention.

[4] The Commission, for its part, argues that the Tribunal is not the appropriate body to consider the Respondent's preliminary objection and that it falls to the Trial Division of the Federal Court of Canada to conduct the judicial review of the Commission's decision to refer the matter to the Tribunal.

[5] I will deal first with the objection raised by the Commission.

II. JURISDICTION OF THE TRIBUNAL TO HEAR THE RESPONDENT'S APPLICATION

[6] To dispute the Tribunal's jurisdiction to hear the Respondent's application, the Commission relies notably on the ruling of Mr. Justice Gibson in *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster.*[1]

[7] While it has been clearly established in *Oster* that the Tribunal does not have the power to oversee measures and decisions of the Commission, as only the Trial Division of the Federal Court has this power, I do not believe that *Oster* supports the Commission's position in the case at bar.

[8] According to the Commission, the application submitted by the Respondent is an *ex post facto* challenge of the Commission's decision to investigate and refer the complaint to the Tribunal. By means of this application, the Respondent is in point of fact challenging the Commission's exercise of its discretionary power conferred by section 41 of the *Act*, specifically, in this case, by paragraph (1)(*a*)[2] of that section. If this were the case, such a challenge should in fact have been submitted to the Trial Division of the Federal Court as provided for in the *Oster* ruling.

[9] However, the Respondent's application does not constitute an application for judicial review by the Tribunal of the Commission's decision to refer the Complainant's case to the Tribunal. On the contrary, the Respondent is disputing the Tribunal's jurisdiction to hear the complaint, arguing that the issue raised in it is the subject matter of grievances and that the grievance arbitrator is therefore the only forum competent to hear and dispose of it.

[10] As Chairperson Mactavish (as she was at the time) pointed out:

While the Tribunal may not purport to review Commission decisions, it does not follow from *Oster* that once a discretionary decision is made by the Commission pursuant to sections 41 or 44 of the Act, the Tribunal is absolutely without jurisdiction to deal with the underlying facts giving rise to that decision.

[...]

It is instructive to keep in mind the powers of the Commission at the investigatory stage. The Commission is a screening body rather than an adjudicative one, and, unlike the Tribunal, is not empowered to decide general questions of law.[3]

[11] Pursuant to subsection 50(2) of the *Act*, in the course of hearing and determining any matter under inquiry, the Tribunal may decide all questions of law or fact necessary to determining the matter. The matter raised by the Respondent in the case in point is a question of law, which the Tribunal may hear and determine. It clearly falls to the Tribunal to determine the limits of its own jurisdiction. Accordingly, I am satisfied that I have jurisdiction to hear the Respondent's application.

III. EXCLUSIVE JURISDICTION OF THE ARBITRATOR

[12] According to the facts submitted by the Respondent in its application, at the time of the events giving rise to this dispute, the Complainant was a unionized employee, subject to a collective agreement between the Canada Council of Teamsters and the Respondent. It appears that the Complainant has filed at least three grievances disputing the action taken by the Respondent against him. These grievances concern, notably, the alleged refusals of the Respondent to accommodate the Complainant. At the present time, these grievances are still pending.

[13] The Respondent maintains that it is aware of the existence of a line of authorities that tend to confer on the Tribunal the jurisdiction necessary to decide on the merits of this dispute. It adds, however, that this line of authorities ought to be revisited in light of

the decision of the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* ("*Parry Sound*").[4]

[14] In *Parry Sound*, the Supreme Court of Canada had to rule on the application of human rights and other employment-related statutes within the ambit of a collective agreement. Specifically, it had to determine whether grievance arbitrators have the power to enforce the rights and obligations of these statutes.

[15] In that case, Ms. O'Brien, a probationary employee, was dismissed by her employer soon after her return from maternity leave. Convinced that she had been discharged without justification in an arbitrary, discriminatory and unfair manner, she immediately reacted by filing a grievance against her former employer. Before the Board of Arbitration established pursuant to the *Labour Relations Act*,[5] the employer claimed that the Board did not have jurisdiction over the subject matter of the grievance since Article 8.06(a) of the collective agreement stated that "*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.*"

[16] Despite the wording of the collective agreement, the Board found that the grievance was arbitrable on the ground that the substantive rights recognized by the *Human Rights Code*[6] were imported into the collective agreement over which the grievance arbitrator had jurisdiction. It was this ruling that was taken to the Supreme Court of Canada.

[17] The Supreme Court, in a majority decision, recognized that a grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement. Thus, the grievance filed by Ms. O'Brien was arbitrable, regardless of the contrary intention expressed by the parties in Article 8.06(a) of the collective agreement.

[18] In its written argument, the Respondent essentially goes on at length about the Supreme Court's analysis of section 48 of the *Labour Relations Act, 1995*,[7] notably paragraph 48(12)(*j*), and its similarities with paragraph 60(1)(*a*.1) of the *Canada Labour Code*.[8] According to the Respondent, these provisions confer on the grievance arbitrator or the arbitration board, as the case may be, the power to interpret, apply and give relief in accordance with a statute relating to employment matters.

[19] It therefore concludes that the ruling in *Parry Sound* confirms the power given to grievance arbitrators and arbitration boards to interpret and apply human rights statutes such as the *Canadian Human Rights Act*. In light of this, it then wonders whether it is the grievance arbitrator or the Tribunal that has jurisdiction to resolve the dispute between the Complainant and the Respondent in the case in point.

[20] In my opinion, Mr. Justice Iacobucci, writing for the majority of the Court, clearly answers this question in *Parry Sound*:

I also note that the Ontario Human Rights Commission has intervened in this appeal for the purpose of ensuring that its jurisdiction is not ousted because the aggrieved employee is a party to a collective agreement over which the Board has jurisdiction. The Commission submits that if the Court finds that the grievance is arbitrable, the Board and the Commission have concurrent jurisdiction. In my view, it is unnecessary to determine this matter at the present time. Consequently, in concluding that a grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of the

Human Rights Code in this case, I make no holding on whether the jurisdiction of the Human Rights Commission is ousted by that of the Board.[9] (My emphasis.)

[21] It is therefore my opinion that the decision of the Supreme Court in *Parry Sound* has in no way altered the line of authorities that has governed this issue until today. I will therefore deal with the Respondent's application by relying on this jurisprudence.

[22] In *Weber v. Ontario Hydro*[10] ("*Weber*"), the Supreme Court of Canada was asked to determine in what instances a labour statute that makes provision for binding arbitration clauses prevents employers and employees from instituting legal proceedings against each other. Mr. Weber, an Ontario Hydro employee suffering from back problems, had initially filed a grievance against his employer, who he blamed for violating the collective agreement by hiring private investigators to investigate the seriousness of his illness. He had then commenced a court action based on tort and breach of his rights under the *Canadian Charter of Rights and Freedoms*.

[23] In *Weber*, the Supreme Court determined that when a dispute arises essentially out of a collective agreement, the plaintiff must submit it to the arbitration process. The courts have no power to hear a civil remedy in respect of such a dispute.

[24] The application of *Weber* to proceedings instituted pursuant to the *Act* has been taken up in a number of subsequent rulings. In *Canadian Broadcasting Corporation v. Paul,*[11] the Trial Division of the Federal Court dealt with a situation in which an employee chose to file a human rights complaint with the Commission rather than file a grievance with her union. The Court ruled that it was appropriate to distinguish from the *Weber* case since that decision did not address the situation of concurrent jurisdiction given by the legislator to another forum. The Court also analysed the relation between the *Canada Labour Code* and the *Act* and determined that giving exclusive jurisdiction to the arbitrator would in effect suspend the discretionary power to deal with a complaint that section 41 of the *Act* expressly confers on the Commission. The Court therefore ruled that the Commission retains its jurisdiction to deal with discriminatory practices in unionized workplaces.

[25] In *Canadian Broadcasting Corporation v. Syndicat des Communications de Radio-Canada (FCN-CSN),* the Trial Division of the Federal Court of Canada ruled that the amendments to the *Canada Labour Code*, adopted since the *Paul* decision, including, notably, the amendment to section 60 of the *Code*, did not have the effect of depriving the Commission of concurrent jurisdiction.

Unfortunately, I cannot concur in the view of the plaintiff, as I feel that if Parliament had intended to exclude the Commission's jurisdiction it would have done so expressly and would have indicated this in its amendment to s. 60 of the Code. In the case at bar, I cannot draw this conclusion as the amendment to s. 60 of the Code makes absolutely no reference to withdrawing the jurisdiction from the Commission. [12]

[26] The Federal Court therefore subscribes, in this case, to the conclusion formulated in *Paul* to the effect that there must be a clear and unequivocal legal provision in order to deprive the Commission of its concurrent jurisdiction under the terms of paragraph 41(1)(*a*) of the *Act*.

[27] The Trial Division of the Federal Court, in *Canada Post Corporation v. Barrette,* a case concerning an application for judicial review of the decision of the Canadian Human Rights Commission to investigate complaints of discrimination on the ground of the disability of the complainant, a unionized employee, stated:

I do not find these cases [the *Weber* decision, among others] compelling on the issue before me. While they certainly indicate a judicial concern with avoiding the dangers of overlapping jurisdictions and duplicative litigation, they deal with a possible overlap between the jurisdiction of a court and an administrative agency, whereas this case concerns two administrative agencies. The effect of *Weber* is not, of course, to preclude a court from determining the Charter issue, but merely to route access to the court through the arbitrator, where the arbitrator's ruling would be reviewed on a standard of correctness. But to apply *Weber* by analogy to the cases at bar would have the effect of excluding the Commission from ever investigating a complaint that had been decided by an arbitrator, and referring it to a Tribunal for adjudication. Such a result would seem contrary to the statutory scheme, not least because the Commission has investigative powers and an experience in the area of human rights that arbitrators do not possess, as well as a quasi-constitutional statutory mandate to advance the public interest in combatting discrimination.[13]

[28] The Tribunal has also had occasion to tackle this issue. In *Eyerley*,[14] the complainant was employed in a unionized workplace. He had decided to file a human rights complaint, even though his union had already filed a grievance on his behalf. The Tribunal's finding was the same as in *Paul*, namely, that it was necessary to distinguish from *Weber* with regard to human rights complaints filed under the *Act*. The Tribunal therefore retained its concurrent jurisdiction to hear the complaint. Similar conclusions have been drawn in subsequent rulings of the Tribunal in *Quigley, Parisien, Desormeaux*, *Leonardis* and *Thompson*.[15]

[29] The Respondent also relies on the decision of the Supreme Court of Canada in *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*[16] ("*Regina Police*") to argue that the criterion expressed in *Weber* applies when, in cases where a statute makes provision for two competing regimes, it must be determined which one should govern a dispute.

[30] The *Regina Police* decision concerns the refusal of a chief of police to accept an officer's withdrawal of his resignation. The officer had resigned to avoid being charged with discreditable conduct pursuant to the *Municipal Police Discipline Regulations, 1991* and possibly being dismissed under the *Police Act, 1990*.[17] When the chief of police refused to allow the officer to withdraw his resignation, the union filed a grievance. The arbitrator noted that the collective agreement stated that the grievance provisions were not intended to be used in any circumstances where the provisions of the *Police Act* and its regulations apply. The *Police Act* and its regulations provide a procedural scheme for both disciplinary action and dismissal for breach of discipline. The arbitrator concluded that the legislature intended that discipline (including dismissal) of a police officer for cause would be governed in accordance with the procedures set out in the *Police Act* and its regulations, and that the grievance provisions of the collective agreement did not apply.

[31] In *Regina Police*, the Supreme Court of Canada pointed out that the rationale for adopting the exclusive jurisdiction model in *Weber* was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction upon an adjudicative body, in a dispute, that was not intended by the legislature. Having decided that the essential character of the dispute between the officer and his employer was disciplinary, the court concluded that the legislature intended that discipline (including dismissal) of a

police officer for cause would be dealt with in accordance with the procedures set out in the *Police Act* and its regulations. Consequently, the arbitrator did not have jurisdiction to hear and decide the matter.

[32] In my opinion, it is easy to distinguish the situation in *Regina Police* from the present situation. The competing legislative regimes in issue in that case had to do, it seems, with matters that were arbitrable or liable to be dealt with in accordance with the disciplinary procedures set out in the statute. It seems that the legislator's intention was to ensure that the two regimes were mutually exclusive: in fact, the contentious collective agreement expressly excluded matters of discipline from its ambit. In the present case, a study of the *Act* clearly shows that Parliament intended to give the Commission and the Tribunal the power to settle complaints of discrimination in the workplace, the existence of a collective agreement notwithstanding. This intention is revealed in two provisions of the *Act*. Paragraphs 41(1)(*a*) and 44(2)(*a*) of the *Act* reflect the legislator's intention to ensure that procedures for settling human rights complaints coexist with grievance procedures.[18]

[33] For the foregoing reasons, the Tribunal therefore finds that the Respondent's arguments relating to its preliminary objection are unfounded.

IV. CONCLUSION

[34] The Respondent's preliminary objection having been dismissed, the hearing of the complaint will therefore proceed as scheduled from January 12 to 15 and from January 19 to 22, 2004, in Laval, Quebec.

Michel Doucet

OTTAWA, Ontario
January 6, 2004

[1] [2001] F.C.J. No. 1533. See also *Francine Desormeaux and Canadian Human Rights Commission v. Ottawa-Carleton Regional Transit Commission*, handed down 19 July 2002 and *Alain Parisien and Canadian Human Rights Commission v. Ottawa-Carleton Regional Transit Commission*, handed down 15 July 2002.

[2] 41(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

[2] (*a*) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

[3] *Desormeaux*, supra, at para. 13 and 14 and *Parisien*, supra, at para. 12 and 13.

[4] 2003 SCJ 42.

[5] R.S.O. 1990, c. L.2.

[6] R.S.O. 1990, c. H.19.

[7] S.O. 1995, c. 1, Sch. A.

[8] R.S.C. 1985, c. L-2.

[9] *Parry Sound*, supra, para. 15.

[10] [1995] 2 S.C.R. 929.

[11] [1999] 2 F.C. 3 (T.D.), overturned for other reasons [2001] F.C.J. No. 542 (F.C.A.).

[12] 2002 FCT 793, at para. 50.

[13] *Canada Post Corporation v. Barrette*, [1999] 2 F.C. 250 (T.D.), at para. 76, overturned for other reasons 2000] 4 F.C. 145.

[14] *Eyerley v. Seaspan International Limited (Ruling No. 2)*, Canadian Human Rights Tribunal, 8 August 2000.

[15] *Parisien v. Ottawa-Carleton Regional Transit Commission (Ruling No. 1)* (15 July 2002), T699/0402 (C.H.R.T.); *Desormeaux v. Ottawa-Carleton Regional Transit Commission (Ruling No. 1)* (19 July 2002), T701/0602 (C.H.R.T.); *Quigley* v. *Ocean Construction Supplies*, [2000] C.H.R.D. No. 46 (C.H.R.T.); *Leonardis v. Canada Post Corporation and Kordoban*, decision on preliminary issues, (30 July 2002) (C.H.R.T.); *Thompson v. Rivtow Marine Ltd (Ruling No. 1)*, (28 November 2001), (C.H.R.T.).

[16] [2000] 1 S.C.R. 360.

[17] S.S. 1990-91, c. P-15.01.

[18] *Eyerley*, supra.

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