Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

PATRICK J. EYERLEY

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
SEASPAN INTERNATIONAL LIMITED

Respondent

RULING ON JURISDICTION

Ruling No. 2
2000/08/02

PANEL: Anne Mactavish, Tribunal Chairperson

[1] Mr. Eyerley's complaint alleges that Seaspan International Limited discriminated against him by failing to accommodate his disability and by terminating his employment, contrary to section 7 of the ***Canadian Human Rights Act.*** At the time of the incidents giving rise to his human rights complaint, Mr. Eyerley was a member of the International Longshoremen's and Warehousemen's Union. In accordance with the collective agreement in force between the Union and Seaspan, a grievance was filed with respect to the termination of Mr. Eyerley's employment, and an arbitration hearing scheduled for November 3, 1997. The grievance was not pursued. On May 7, 1998, Mr. Eyerley filed his complaint with the Canadian Human Rights Commission. Mr. Eyerley's complaint has now been referred to the Canadian Human Rights Tribunal for a hearing.

[2] Seaspan has raised preliminary objections to the jurisdiction of the Tribunal, submitting that:

i) The Commission and the Tribunal do not have jurisdiction to hear and decide this complaint because it concerns the dismissal of Mr. Eyerley under the provisions of the collective agreement. As a result, the matter is within the exclusive jurisdiction of an arbitrator appointed in accordance with the collective agreement; and

ii) The Commission and the Tribunal do not have jurisdiction to hear and decide this complaint because it deals with Mr. Eyerley's disability, which disability occurred in the workplace. Workplace disabilities, and the accommodation thereof, are the exclusive jurisdiction of the British Columbia Workers' Compensation Board.

[3] Seaspan also advises that it will be commencing proceedings in the Federal Court to set aside the decisions of the Canadian Human Rights Commission not to decline to deal with the complaint pursuant to Section 41 of the ***Canadian Human Rights Act***, and to refer the matter to the Tribunal. Seaspan does not appear to be asking for any relief from the Tribunal in this regard.

[4] It is not for this Tribunal to review either the jurisdiction or the conduct of the Canadian Human Rights Commission. These are matters within the exclusive purview of the Trial Division of the Federal Court.[(1)] Accordingly, I do not intend to deal with Seaspan's challenges as they relate to the jurisdiction of the Commission. I will deal with each of Seaspan's challenges to the jurisdiction of the Canadian Human Rights Tribunal in turn.

i) <u>Exclusive Jurisdiction of an Arbitrator under the Collective Agreement</u>

[5] Mr. Eyerley was employed by Seaspan as a Cook - Deckhand for approximately seven years, during which time he sustained a series of injuries. In 1991, Mr. Eyerley fell off of a rail car and injured his right arm. As a result of this injury, he was away from

work for several lengthy periods. On November 8, 1996, Seaspan terminated his employment, contending that Mr. Eyerley's employment contract had been frustrated by reason of his inability to perform his part of the bargain.

[6] On November 29, 1996, the Union filed a grievance on Mr. Eyerley's behalf. The grievance states that the termination of Mr. Eyerley's employment '... is in conflict with recent court decisions and is discrimination on a prohibited grounds (sic) - disability.'

[7] Although a hearing was scheduled, Mr. Eyerley's grievance never actually went to arbitration. It seems that the Union obtained two legal opinions from counsel, each suggesting that the grievance had little chance of success. One of the opinions suggested that Mr. Eyerley file a human rights complaint, opining that Mr. Eyerley would have a much higher likelihood of success with such a complaint. Mr. Eyerley's complaint was filed shortly after the delivery of this second legal opinion.

[8] Seaspan contends that both the grievance and Mr. Eyerley's human rights complaint deal with the same subject matter. Having agreed in the collective agreement that all workplace disputes are to be resolved through arbitration, the Union is now attempting to 'forum shop'.

[9] Seaspan submits that an arbitrator appointed under the collective agreement has exclusive jurisdiction over the issues raised by the grievance filed with respect to the termination of Mr. Eyerley's employment. In this regard, Seaspan relies upon the decisions of the Supreme Court of Canada in *Weber v. Ontario Hydro* [(2)] and *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*.[(3)]

[10] In *Weber*, the Supreme Court of Canada determined that where the essential character of a dispute arises under a collective agreement, the claimant must proceed by way of arbitration. The courts have no power to entertain a civil action in respect of that dispute. In reaching this conclusion, the Court relied on the wording of the Ontario ***Labour Relations Act*** , which stipulates that every collective agreement 'shall provide for the final and binding settlement by arbitration ... of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement.'[(4)] The ***Canada Labour Code*** contains a comparable provision.[(5)]

[11] At issue in *Weber* was whether an employee could bring a civil action based on tort and breach of the employee's rights under the ***Canadian Charter of Rights and Freedoms***. Counsel for Seaspan contends that even if the ***Canadian Human Rights Act*** has quasi-constitutional status, such status cannot prevail over the arbitration process agreed to by the Union and the employer any more than could the Constitutional status of the ***Charter*** prevail over the arbitration process in *Weber*. The existence of a dispute resolution scheme as required by the ***Canada Labour Code*** is sufficient to deprive the Tribunal of jurisdiction where the essential character of the human rights complaint arises out of the collective agreement.

[12] It is noteworthy that, unlike the ***Canadian Human Rights Act***, the ***Charter*** does not create a discrete statutory scheme for the resolution of complaints arising thereunder. Rather, the ***Charter*** provides that anyone whose rights have been infringed may apply to a 'court of competent jurisdiction' to obtain such remedy as may be appropriate in all of the circumstances. As a consequence, much of the analysis in *Weber* was taken up with a consideration of whether or not an arbitration board was a 'court of competent jurisdiction' for the purposes of granting ***Charter*** relief.

[13] *Weber* does not address the issue of concurrent jurisdiction between two statutory tribunals operating under separate legislative schemes.[(6)] Assuming, for the moment, that the essential nature of Mr. Eyerley's complaint arises out of the collective agreement, I do not read *Weber* to say that concurrent jurisdiction may not exist between labour arbitrators and statutory human rights adjudication processes.

[14] This conclusion is consistent with the decision of the Trial Division of the Federal Court in *Canadian Broadcasting Corp. v. Paul*.[(7)] The facts in *Paul* were similar to those in the present case in that Ms. Paul was a member of a union, and as a result had access to a grievance arbitration process, but chose instead to file a human rights complaint with respect to her workplace dispute. Madam Justice Tremblay-Lamer noted that Section 41 of the ***Canadian Human Rights Act*** gives the Commission the discretion to decline to deal with matters where it appears to the Commission that the alleged victim ought to exhaust the grievance process. This clearly gives the Commission (and thereby, implicitly, the Canadian Human Rights Tribunal) jurisdiction to deal with any complaint arising from a collective agreement, unless the Commission decides that the grievance procedure ought to be exhausted.[(8)] In distinguishing *Weber*, she noted that it did not deal with the situation where Parliament has specifically granted concurrent jurisdiction to another forum. Tremblay-Lamer J. further noted that Section 41 of the ***Canadian Human Rights Act*** is a subsequent enactment to Section 57 of the ***Canada Labour Code***, and that Section 57 of the ***Code*** is therefore impliedly repealed insofar as it confers exclusive jurisdiction on an arbitrator.

[15] Tremblay-Lamer J. also made reference to the Supreme Court of Canada jurisprudence establishing that where a conflict arises between human rights acts and other laws, human rights legislation is paramount,[(9)] and that parties may not contract out of human rights legislation because of the public nature of the rights in question.[(10)]

[16] Tremblay-Lamer concluded that interpreting Section 57 of the ***Canada Labour Code*** to give exclusive jurisdiction to a labour arbitrator would, in effect, suspend the operation of Section 41 of the ***Canadian Human Rights Act***, a result not contemplated by *Weber*. She therefore concluded that the Canadian Human Rights Commission has jurisdiction over discriminatory practices occurring in unionized workplaces.

[17] Seaspan also relies on the recent decision of the Supreme Court of Canada in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, for the proposition that the test in *Weber* applies equally when deciding which of two competing statutory regimes should govern a dispute.

[18] *Regina Police* involved the refusal of a Chief of Police to accept the withdrawal of an officer's resignation. The officer's resignation had been offered so as to avoid charges of discreditable conduct under ***The Municipal Police Discipline Regulations, 1991***[(11)] and possible dismissal proceedings under ***The Police Act, 1990***.[(12)] Following the refusal of the Chief of Police to accept the withdrawal of the officer's resignation, the officer's union filed a grievance. The arbitrator noted that the collective agreement provided that the grievance procedure was not to be used in any circumstances where the provisions of ***The Police Act*** and Regulations apply. ***The Police Act*** and Regulations provide a procedural scheme for the resolution of complaints relating to disciplinary action and dismissal for breach of discipline. The arbitrator concluded that the Legislature intended that the discipline and discharge of police officers for cause be dealt with in accordance with the procedures set out in ***The Police Act*** and Regulations, and that the grievance provisions of the collective agreement did not apply.

[19] In *Regina Police*, the Supreme Court of Canada noted that the rationale for the adoption of the exclusive jurisdiction model in *Weber* was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction over a dispute on an adjudicative body that was not intended by the Legislature. Having concluded that the essential nature of the dispute between the officer and his employer was disciplinary, the Court concluded that the Legislature intended that the discipline and discharge of police officers for cause be dealt with in accordance with the procedures set out in ***The Police Act*** and Regulations. As a consequence, the arbitrator did not have jurisdiction to hear and decide the matter.

[20] In my view, the decision in *Regina Police* is readily distinguishable from the present situation. The competing statutory schemes under consideration in *Regina Police* appear to contemplate matters being either arbitrable, or dealt with under the statutory disciplinary process. The legislative intent appears to have been that the two processes were to be mutually exclusive: indeed the collective agreement in issue specifically excluded disciplinary matters from the ambit of the agreement. In this case, a review of the ***Canadian Human Rights Act*** makes it clear that Parliament intended that the Commission and the Tribunal have jurisdiction to deal with complaints of workplace discrimination, notwithstanding the existence of a collective agreement. In addition to Section 41 of the ***Act*** referred to by Tremblay-Lamer J. in *Paul* and discussed above, Section 44 (2) (a) of the ***Act*** also reflects a legislative intent that the human rights complaints process co-exist with the grievance process.

[21] For these reasons I am of the view that even if the essential nature of Mr. Eyerley's human rights complaint arises out of the collective agreement, the Canadian Human Rights Tribunal has jurisdiction to deal with the matter.

Essential Nature of the Dispute

[22] I am not satisfied, however, that the essential nature of Mr. Eyerley's human rights complaint does in fact arise out of the collective agreement. It is clear that in order to

determine the essential nature of a dispute, we must look to the factual context in which it arose, and not its legal characterization.[(13)]

[23] In examining the factual context in which Mr. Eyerley's complaint arose, I should note that I have not been provided with any information with respect to the terms of the collective agreement, beyond the fact that the agreement contains an arbitration clause. I do not know, for example if the agreement contains a 'no discrimination' clause.

[24] Even if the collective agreement in issue does specifically prohibit discrimination in the workplace, I agree with the Saskatchewan Court of Appeal that the mere inclusion of a covenant not to discriminate does not in and of itself transform the dispute from an alleged human rights violation to a breach of the collective agreement.[(14)]

[25] The right allegedly infringed in this case, that is the right to be free from adverse differential treatment in employment because of a disability, is a fundamental right, and one which the parties cannot contract out of. The public nature of the right is evident from a review of the statutory scheme as a whole, and in particular, the representation of the public interest before the Tribunal through the involvement of the Canadian Human Rights Commission.[(15)]

[26] I am satisfied that the essential nature of Mr. Eyerley's complaint is an alleged violation of the right to be free from discrimination on the basis of disability. While it may well be that Mr. Eyerley had the option of having his dispute with his employer resolved through arbitration, this does not, in my view alter the essential nature of the complaint.

ii) Exclusive Jurisdiction of the Workers' Compensation Board

[27] Seaspan also submits that the Tribunal does not have jurisdiction to hear and decide this complaint because it deals with Mr. Eyerley's disability, which disability occurred in the workplace. Workplace disabilities, and the accommodation thereof, are the exclusive jurisdiction of the British Columbia Workers' Compensation Board. According to Seaspan, the Workers' Compensation Board has already dealt with Mr. Eyerley's case, has examined the issue of accommodation and has determined that Mr. Eyerley should be accommodated by the granting of a permanent partial disability award and an extensive retraining program, all at the expense of Seaspan.

[28] Seaspan refers to a number of provisions in the British Columbia ***Workers' Compensation Act*** [(16)] in support of its argument. Two sections are of particular relevance. Section 10 provides, in part that:

'The provisions of this part are in lieu of any right and rights of action, statutory or otherwise, founded on any breach of duty of care or other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker ... is or may be entitled against the employer of the worker ...

in respect of any personal injury, disablement, or death arising out of or in the course of employment and no action in respect of it lies.'

Section 96 (1) of the ***Act*** states:

'The [Workers' Compensation] board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the board is final and conclusive and is not open to question or review in any court ... and ... the board has exclusive jurisdiction to inquire into, hear and determine ...

b) the existence and degree of disability by reason of an injury;

c) the permanence of disability by reason of an injury ...'

[29] As I have noted earlier in this decision, human rights legislation is of a special nature. It is fundamental law which declares public policy, with quasi-constitutional status. To the extent that the ***Canadian Human Rights Act*** conflicts with other legislative enactments, the ***Canadian Human Rights Act*** must prevail.[(17)] As a consequence, I do not believe that the privative clauses in the British Columbia ***Workers' Compensation Act*** operate to preclude the exercise of jurisdiction by the Tribunal under the ***Canadian Human Rights Act*** .

[30] I should note that the principle of the primacy of human rights legislation has generally been applied where the conflicting statutes both emanate from the same legislature. In this case, I am being asked to consider the interaction of federal human rights law with provincial workers' compensation legislation. In my view, this duality of legislative jurisdiction creates an additional difficulty with Seaspan's argument.

[31] If I were to accept Seaspan's argument that the effect of the privative clauses in the British Columbia Workers' Compensation Act is to oust the jurisdiction of the Canadian Human Rights Tribunal, this would suggest that the Province of British Columbia has the power to legislate with respect to working conditions within federally regulated enterprises. Such a conclusion would have obvious constitutional implications. It is, however, important to keep in mind the function and purpose of workers' compensation legislation. Workers' compensation legislation does not relate to working conditions, but represents instead a statutory regime of no-fault liability.[(18)] Were it otherwise, such a legislative scheme would offend the constitutional division of powers.

[32] Seaspan also relies upon the decision of the Supreme Court of Canada in *Louisette Beliveau St-Jacques v. Fédération des employées et employés de services publics incs.*[(19)] to support its contention that the fact that Mr. Eyerley's workplace injury has been fully dealt with by provincial workers' compensation authorities precludes the bringing of a complaint before the Canadian Human Rights Tribunal.

[33] *Beliveau St-Jacques* is a case involving the interaction between the Quebec ***Act Respecting Industrial Accidents and Occupational Diseases*** and the Quebec ***Charter of Human Rights and Freedoms***. Writing for the majority, Gonthier J. examined the provisions of the Quebec ***Charter*** and concluded that the violation of a ***Charter*** right was the equivalent of a civil fault. In his analysis, Mr. Justice Gonthier expressly rejected any analogy between the Quebec ***Charter*** and the ***Canadian Human Rights Act***, noting that '... the relationship between instruments that protect fundamental rights and the general law is not entirely the same in the common law provinces as in Quebec'.

[34] This difference is evident from the wording of the ***Canadian Human Rights Act*** and the Quebec ***Charter***. Section 2 of the ***Canadian Human Rights Act*** states that the purpose of the ***Act***

is to extend the laws in Canada whereas Section 51 of the Quebec ***Charter*** specifically states that it is not meant to extend or amend any provision of law.

[35] In my view, the decision in *Beliveau St-Jacques* does not assist Seaspan. The decision is largely anchored in civil law concepts and contemplates human rights legislation fundamentally different in nature and scope to that at the federal level.

[36] There is one final argument raised by Seaspan that bears comment. Seaspan contends that the Tribunal does not have, or alternatively, should decline jurisdiction to hear this complaint because the Tribunal does not have the expertise to determine whether Mr. Eyerley is disabled, the extent of any disability, and whether Mr. Eyerley could have been accommodated within the workplace. According to counsel for Seaspan, this expertise is confined to the parties, the Workers' Compensation Board and arbitration boards appointed under collective agreements. With respect, I do not agree. Disability is a proscribed ground under the ***Canadian Human Rights Act***. The notion of reasonable accommodation is a fundamental concept in human rights jurisprudence. The Canadian Human Rights Tribunal is an expert tribunal,[(20)] whose expertise in fact finding and adjudication in the human rights context has been recognized by the Supreme Court of Canada.[(21)] As a result, I view the issues raised by Mr. Eyerley's complaint as coming squarely within the expertise of the Tribunal, and see no reason to decline jurisdiction.

[37] For the foregoing reasons Seaspan's motion is dismissed.

Anne Mactavish, Tribunal Chairperson

OTTAWA, Ontario

August 2, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T565/2300

STYLE OF CAUSE: Patrick J. Eyerley v. Seaspan International Limited

RULING OF THE TRIBUNAL DATED: August 2, 2000

APPEARANCES:

Patrick Eyerley For himself

Odette Lalumière For the Canadian Human Rights Commission

Michael Hunter For Seaspan International Limited

Terry Engler For International Longshoremen's and Warehousemen's Union, Local 400

1. *Vermette v. Canadian Broadcasting Corporation*, (1994), 94 C.L.L.C. 17,034 aff'd [1996] F.C.J. No. 1274, (1996) 120 F.T.R. 81

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

3. [2000] 1 S.C.R. 360

4. ***Labour Relations Act***, R.S.O. 1990, c. L.2, s.45(1)

5. Section 57 of the ***Canada Labour Code*** provides: ' Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or

otherwise, of all differences between the parties, or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.'

6. *British Columbia v. Tozer* (1998), 33 C.H.R.R. D/327 at para. 74

7. [1999] 2 F.C. 3, [1998] F.C.J. No. 1823

8. In this regard, see also *Canada Post Corporation v. Barrette and Nolan* (1998), 34 C.H.R.R. D/353 at para. 80 (rev'd on other grounds [2000] F.C.J. No. 539)

9. *Insurance Corporation of British Columbia v. Heerspink et al.*, [1982] 2 S.C.R. 145, and *Winnipeg School District No. 1 v. Craton* et al., [1985] 2 S.C.R. 150

10. Ibid.

11. R.R.S., c. P-15.01, Reg. 4

12. S.S. 1990-91, c. P-15.01

13. *Regina Police*, supra. See also *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)* [1999] S.J. No. 217 at para. 24

14. *Cadillac Fairview Corp. v. Saskatchewan (Human Rights Commission)* at para. 17

15. Section 51, ***Canadian Human Rights Act***

16. R.S.B.C. 1996, Ch. 492

17. *Heerspink* and *Craton*, supra., footnote 8. See also *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (F.C.A.) and *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (F.C.T.D.)

18. *Alltrans Express Ltd. v. British Columbia (Workers'/Workmen's Compensation Board),* [1988] 1 S.C.R. 897

19. [1996] 2 S.C.R. 345

20. Section 48.1 (2), ***Canadian Human Rights Act***

21. *Canada (Attorney General) v. Mossop* (1993), 17 C.H.R.R. D/349 at para. 43