EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Marilyn Allison
(" Allison ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 2000/015

DATE OF DECISION: March 31, 2000

DECISION

OVERVIEW

This is an appeal filed by Marilyn Allison ("Allison") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 17th, 1999 under file number ER 087875 (the "Determination"). Allison appeals the delegate's dismissal of her complaint that her employer contravened section 21 of the *Act* (unlawful wage deductions).

Quite apart from the section 21 issue, this appeal also raises a question regarding this Tribunal's authority (and that of the Employment Standards Branch) to substantively address a complaint that necessitates an interpretation of a collective bargaining agreement. As will be seen, I am of the view that neither this Tribunal, nor the Director of Employment Standards (and her delegates), has any jurisdiction to adjudicate the merits of Allison's complaint; in my view, this dispute lies exclusively within the jurisdiction of a grievance arbitrator.

BACKGROUND

On December 1st, 1997, Allison filed a complaint with the Employment Standards Branch (Victoria office) alleging that her employer, the province of British Columbia (Ministry for Children and Families), unlawfully proposed to deduct $2,316 from her wages; as noted above, her complaint alleged a contravention of section 21 of the *Act.*

Allison's employment is governed by a collective bargaining agreement between the province and the B.C. Government and Service Employees' Union; Allison is a member of that union. Appendix 4 of the collective agreement establishes both a "short-term" and a "long-term" disability plan. Pursuant to the Short Term Illness and Injury Plan ("STIIP"), regular employees with more than 6 months' active service are entitled to a benefit equivalent to 75% of their regular pay if they are "unable to work because of illness or injury". The STIIP benefits may continue for up to 7 months. These benefits may be "topped up" by drawing funds from other sources such as accumulated sick leave or a time bank. Of particular concern here is Article 1.6 of Appendix 4 which states that: "Benefits will not be paid when an employee is: ...(b) engaged in an occupation for wage or profit".

Allison was away from work for several months in 1997 during which time she received STIIP benefits. According to a medical report prepared by her physician, Dr. A. Hoffer, and dated May 27th, 1997, Allison was away from work for about six months because "she has not been able to work because of factors within the work environment, and secondly because of the relationship with many of the people within that same environment, especially the co-workers". During the period from January 1st to May 31st, 1997, when she was receiving STIIP benefits, Allison apparently earned $2,316 as a result of providing some 42 hours of private counselling and consulting services.

Once these "outside" earnings came to her employer's attention, the employer took the position that it intended to "recover" $2,316 from Allison's future wages. The employer's position is set out in a letter to Allison dated October 30th, 1997, which specifically refers to the collective agreement and, in particular, Appendix 4, Article 1.6(b), and continues: "You may repay this amount in full immediately or by payroll deduction at $50 bi-weekly until the full amount is recovered."

In a November 3rd, 1997 reply to her employer's October 30th letter, Allison took the position that she was not obliged to repay the monies in question. Allison alleged that: "The moneys were earned outside working hours and I consider the employer has no jurisdiction over activities outside working hours." Further, she alleged that her employer had previously agreed to forgo recovering the funds and that she was only able to continue with her private practice because it was away from her stressful and unpleasant normal work environment. By way of a reply dated February 25th, 1998, her employer rejected Allison's assertion that it had agreed not pursue her for recovery and, in addition, stated that it intended to commence $50 per payroll period deductions as of March 20th, 1998--once again, the employer referred to the collective agreement and Article 1.6(b) of Appendix 4, in particular.

I should parenthetically note at this point, given the foregoing circumstances, it would appear that on December 1st, 1997, when Allison filed her complaint, there had not been, in fact, any attempt--lawful or otherwise--to recover an overpayment of STIIP benefits by way of a deduction (or series of deductions) from Allison's pay. On that basis alone, the complaint ought to have been dismissed for want of a contravention [see section 76(2)(d)].

In any event, the material before me indicates that the employer did, in fact, deduct the full $2,316 from Allison's wages through bi-weekly payroll deductions commencing March 20th, 1998. The employer's right to make these latter wage deductions was never challenged by way of a grievance filed in accordance with the provisions of Article 8 of the collective bargaining agreement and thus, obviously, this dispute has never been arbitrated pursuant to Article 9 of the collective agreement.

A circular ("No. 5") issued by the Public Service Employee Relations Commission sets out the provincial government's policy as it relates to "wage overpayments". This policy reads, in part, as follows:

> **Recovery of Wage Overpayments**
>
> Where an employee has been overpaid wages, the employee must repay the overpayment in full. The recovery of the overpayment should be discussed with the employee and a mutually agreeable schedule for repayment should be established. The period of repayment should not exceed the period during which the overpayment took place. In demonstrated circumstances of hardship, a longer period of repayment may be established.
>
> Where the employee will not agree to a reasonable schedule for repayment, deductions from pay should still be initiated, based on the time period during

> which the overpayment occurred. *However, if a grievance is filed under a collective agreement* or a dispute submitted under the policy directive Dispute Resolution--Excluded Employees, *recovery should cease pending review and/or resolution of the matter.* (*italics* added)

In light of the above policy, it seems clear that if a grievance had been filed, Allison's employer would not have proceeded with any wage deductions until its entitlement to do so was confirmed by a grievance arbitrator.

THE DETERMINATION

In the Determination, the delegate addressed the fact that a grievance was never filed, and the consequences flowing from that fact (at page 3):

> "Ms. Allison is covered by a collective agreement. Disputes respecting the application and interpretation of STIIP are subject to the grievance and arbitration process of the collective agreement. The various processes are outlined in articles 8 and 9. A grievance could have been filed by Ms. Allison with respect to the applicability of Appendix 4, Article 1.6(b) to the subject dispute. No grievance was filed regarding this matter...
>
> The employer advised Ms. Allison of their decision that $2,316.00 was overpaid and would be recovered. This appears to be supported by the collective agreement provisions. A grievance was not filed.
>
> This type of issue is subject to the provisions of the collective agreement. The grievance and arbitration provisions of the collective agreement are the avenues to resolve these types of disputes. The Employment Standards Act is not the forum for an adjudication of this issue."

The foregoing passage from the Determination squarely raises, and at the same time purports to answer, the jurisdictional question regarding whether disputes that can be grieved and arbitrated under a collective agreement can also be adjudicated under the *Act.* I am of the view that the delegate correctly held that this particular dispute could not be adjudicated under the *Act.*

However, the delegate does not appear to have rested his decision on a jurisdictional footing. Rather, the delegate, having made the above-quoted observations about jurisdiction, nevertheless proceeded to address the merits of the complaint and concluded that the employer had not, in fact, contravened section 21:

> "It is my finding that the STIIP paid in the amount of $2,316 was an 'overpayment' in these circumstances. Therefore, these wages could be deducted from future wage payments. The employer took a reasonable position to spread the repayment over a number of pay periods.

> **Determination**
>
> **I have determined that the Act has not been contravened. Investigation has ceased and we have closed the file. No further action will be taken." (boldface in original)**

While I agree, for the reasons set out below, with the delegate's observation that Allison's complaint was not one that could be adjudicated under the *Act*, I am also of the view--given the absence of jurisdiction--that the delegate erred in proceeding to do the very thing that he suggested he ought not do, namely, adjudicate the complaint on its merits.

ANALYSIS

The Jurisdictional Issue

The range of disputes that fall within the jurisdiction of grievance arbitrators has dramatically expanded over the last several decades. As grievance arbitration was originally conceived, the arbitrator's jurisdiction was limited to interpreting and applying the express terms of the collective bargaining agreement. That is no longer the case. In 1974, the Supreme Court of Canada held that arbitrators must take into account relevant legislation when interpreting collective agreements and must override the express language of a collective agreement when it conflicts with external legislation [*McLeod v. Egan* (1974), 46 D.L.R. (3d) 150]. In 1986, the Supreme Court of Canada clearly stated that legislatively-mandated grievance arbitration procedures effectively ousted the courts' general jurisdiction to deal with disputes that might otherwise be the subject of a court action. Thus, a employer's civil suit against its union for damages suffered as a result of an illegal strike was dismissed on the ground that the employer was obliged to proceed with its claim through the grievance arbitration process [see *St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219* [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1]. Of particular note is the court's observation in *St. Anne-Nackawic* (at pp. 13-14, D.L.R.) that "*the grievance and arbitration procedures* provided for in the [labour relations] Act and embodied by legislative prescription in the terms of a collective agreement *provide the exclusive recourse open to parties to the collective agreement* for enforcement." (*italics* added).

In 1990 the Supreme Court ruled that arbitrators were empowered to apply the *Canadian Charter of Rights and Freedoms*, say, for example, to declare a collective bargaining provision null and void because it conflicted with a *Charter* right [*Douglas/Kwantlen Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4th) 94]. In 1995, this trend was extended still further--the Supreme Court held that an arbitrator is a "court of competent jurisdiction" for purposes of granting constitutional remedies (for example, awarding compensation) for a breach of a *Charter* (as opposed to a collective agreement) right [*Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583; *New Brunswick v. O'Leary* (1995), 125 D.L.R. (4th) 609)].

The current state of the law, as expressed by the Supreme Court of Canada in the *Weber* and *O'Leary* decisions, is that any dispute that "arises from the collective agreement" can now *only* be adjudicated through arbitration. Madam Justice (now Chief Justice) McLachlin, speaking for

the entire 7-justice panel on this point, adopted the so-called "exclusive jurisdiction model" with respect to disputes that "arise out of the collective agreement"--*i.e.,* arbitrators have *exclusive* jurisdiction over such disputes.

Although in *Weber* and *O'Leary* the disputes in question were said to fall within an arbitrator's--rather than the courts'--exclusive jurisdiction, in my view, the exclusivity principle equally applies when the "other" adjudicative body is not a court but, rather, is an administrative tribunal such as the Employment Standards Branch or this Tribunal. In *Weber* (as in *St. Anne-Nackawic*), the Supreme Court rejected the notion that there is "concurrent" or "overlapping" jurisdiction as between an arbitrator and the courts in favour of the "exclusivity" model (at p. 599, D.L.R.) :

> "The issue is not whether the *action,* defined legally, is independent of the collective agreement, but rather whether the dispute is one 'arising under [the] collective agreement'. Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it." (*italics* in original; my underlining)

A dispute is said to "arise" from a collective bargaining agreement if the "essential character" of the dispute involves the interpretation, application, administration or an alleged violation of the collective agreement. Section 82 of the *Labour Relations Code* provides that *all* such disputes must be determined by arbitration or by some other similar dispute resolution procedure agreed to by the parties and set out in their collective bargaining agreement.

In adopting the "exclusive jurisdiction" model, the court noted the advantages of having such disputes decided by a "single tribunal deciding all issues arising from the dispute in the first instance" (*Weber* at p. 603, D.L.R.). The court continued:

> "[I]n dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter...
>
> [Arbitrators have] the power and duty...to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes."

In my view, Allison's complaint falls within the exclusive jurisdiction of a grievance arbitrator. The employer's position is that it was not obliged to pay Allison the STIIP benefits in question because, during the relevant period, she was "engaged in an occupation for wage or profit". This latter threshold question involves an interpretation of Appendix 4, Article 1.6(b) of the collective agreement. Allison and her employer obviously disagree about the meaning of this latter provision of the collective agreement; the employer proceeded--as employers usually do when there are competing views about the parties' respective rights under collective agreements--to impose its view of the provision in question. Accordingly, the proper response on Allison's part was to file a grievance under Article 8 of the collective agreement. Had her union improperly

refused to file a grievance (say, for example, it had a discriminatory motive), her remedy would have been to file a complaint against her union under section 12 of the *Labour Relations Code.*

However, it was not legally open to Allison to file a complaint under the *Employment Standards Act.* That is not to say that the *Act* is necessarily irrelevant to the issue; rather, if the *Act* is relevant, it will fall to the arbitrator to apply section 21 (or any other provision of the *Act*) in adjudicating the grievance. Indeed, an arbitrator may well have to consider the effect of section 21 of the *Act* regardless of whether or not the employer was entitled, under the collective agreement, to recoup the STIIP benefits in question. In the event an arbitrator misconstrues the *Act*, that error can be corrected through judicial review (see *McLeod v. Egan, supra.*).

Summary

In my view, the essential character of Allison's complaint involves an interpretation of Appendix 4, Article 1.6 of the collective agreement. As such, this dispute falls within the exclusive jurisdiction of a grievance arbitrator. Allison did not have the legal right to file a complaint under the *Act* and, having nonetheless done so, the delegate ought to have dismissed the complaint for want of jurisdiction.

As previously noted, the delegate appeared to be cognizant of the jurisdictional issue and seemingly held that Allison's complaint was not properly before him. Notwithstanding that finding, however, the delegate proceeded to make a decision on the merits of the complaint--*i.e.*, whether the employer contravened section 21 of the *Act*--and dismissed the complaint on the merits. In my view, the delegate had no authority to consider the merits; that power lies solely with a grievance arbitrator.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be varied by deleting the delegate's findings with respect to section 21 of the *Act.* Accordingly, the Determination is confirmed only as to the delegate's finding that Allison's complaint should be dismissed for lack of jurisdiction.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal