Employment Standards TRIBUNAL

An appeal

- by -

Vancouver Firefighters Union, Local 18
("Local 18")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2003A/190

DATE OF DECISION: September 12, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by the Vancouver Firefighters Union, Local 18 ("Local 18") of a Determination that was issued on May 26, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that the *Act* did not apply to the complaint, which was filed by Local 18 on behalf of its members against the City of Vancouver Fire & Rescue Services Division (the "Employer"), ceased investigating and closed the file.

Local 18 says the Director failed to observe principles of natural justice in making the Determination and erred by refusing to assume a jurisdiction over the complaint.

The Tribunal has decided an oral hearing is not necessary in order to adjudicate this appeal.

ISSUE

The issues are whether the Director failed to comply with principles of natural justice in making the Determination and whether the director erred in concluding the complaint did not fall within the jurisdiction of the *Act*.

FACTS

Local 18 filed a complaint on behalf of those of its members employed by the Employer alleging its members were entitled to regular and overtime wages, at the applicable rates of pay set out in the collective agreement between Local 18 and the Employer, for the time spent attending and sitting the exams related to the "Company Officer" and/or the "Battalion Chief" courses. The Determination sets out the following background:

> The Employer operates the Vancouver Fire & Rescue Division. The Complainant is employed by this division of the Employer. The attendance and successful passing of the above noted courses are required by the Employer for those firefighters wishing to achieve advancement to "Company Officer" and/or "Battalion Chief" status.
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> The Employer and Complainant are parties to a collective agreement.
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> The complaint was filed September 24, 2001.

The Determination was issued on May 26, 2003.

The Director found that the collective agreement between Local 18 and the Employer contained provisions relating to hours of work and overtime.

ARGUMENT

The appeal challenges the Determination on two levels, arguing the process and procedure that culminated in the Determination contravened principles of natural justice in three respects and arguing the Director erred in law in deciding the complaint fell outside the jurisdiction of the *Act*. Under the natural justice ground, Local 18 says the Director failed to comply with principles of natural justice by issuing an untimely decision, ignoring the principal argument raised by Local 18 during the investigation and making findings of fact not supported by the evidence. On the merits of the appeal, Local 18 says the decision is inconsistent with previous decisions of the Tribunal and is an absurd result that discriminates against unionized workers, violating values protected in the *Canadian Charter of Rights and Freedoms*, and which will cause undue hardship to unionized employees, unions and employers whose employees are represented by unions.

Local 18 says the delay between the filing of the complaint on September 24, 2001 and the issuing of the Determination, "containing sparse reasons", on May 26, 2003, without having held an oral hearing, caused the complainants general and specific prejudice – general in the sense that the delay undermines the credibility of the Director in the "labour relations community" and is inconsistent with the stated purpose of the *Act* to resolve complaints in a timely and efficient manner; specific in the sense that the Union may be out of time in pursuing grievances under the collective agreement.

Local 18 says the Director owes a general duty of fairness to parties coming before it with a complaint and that duty includes the obligation to consider the arguments presented by that party in support of the complaint. Local 18 alleges the Director failed to consider its principal argument, that the subject matter of the complaint did not "fall directly or implicitly within the Collective Agreement", or the authorities referred to in support of that argument. Lastly, Local 18 says the Director made findings of fact that were unsupported by the evidence, accepting that Local 18 had initially pursued the issue of payment for attending and sitting the exams through the grievance procedure but had found that forum "not to its liking". Local 18 says that this error, which flows from a breach of principles of natural justice, is an error of law.

In respect of the merits of the Determination, Local 18 says the Director took a mistaken view of the Labour Relations Board decision, *Nicholas James and another –and- University of Victoria*, BCLRB Decision No. B330/2001, and of the Tribunal decision, *Director of Employment Standards (Re Walker)*, BC EST #RD048/01 (Reconsideration of BC EST #D275/00), in reaching the conclusion that the matter of the complaint fell outside the jurisdiction of the *Act*. Additionally, Local 18 says the Director's decision discriminates against unionized employees and leads to an absurd result because it denies unionized workers access to basic standards of compensation and relief and will cause undue hardship on trade unions and employers in the province.

Local 18 submits that as a result of the breaches of natural justice and the errors, the Determination should be set aside and the complaint remitted to "a new panel" to be heard on its merits.

The Employer and the Director have filed submissions on the appeal.

The Employer rejects the notion that there was any contravention of principles of natural justice by the Director. While accepting there was a delay in processing the complaint and issuing the Determination, the Employer says that does not constitute either "undue delay" or "abuse of process". In any event, the Employer says the remedy sought by Local 18 does not flow logically from the alleged delay. The employer says there is no general duty on the Director to identify and address every argument or point

raised by the parties during the investigation and decision making process and it cannot be inferred that the Director has failed to consider an argument only because it is not discussed in the Determination. It is sufficient that the Determination indicated that the arguments and authorities provided by the parties had been considered and that the basis for the conclusion reached was adequately explained. The Employer says the Determination is not inconsistent with the authorities referred to and relied upon by the Director. The Employer says it is not apparent from the Determination that the Director misapprehended the evidence or made findings of fact not supported by the evidence. The Employer says there was no "evidence" admitted without a party having an opportunity to respond.

Similarly, the Director says there was no denial of natural justice arising from the delay in processing the complaint, responding that such delay emanated from matters which were not within the Director's control and that, in any event, there is no basis for suggesting Local 18 and its members have been materially prejudiced by the delay, as it was always open to them to pursue a remedy through the arbitration provisions in the collective agreement. There is no basis for concluding Local 18 relied on any conduct or communication from the Director in deciding not to file a grievance on the subject matter of the complaint.

In reply to the argument on the merits, the Employer says the decision of the Director is correct and consistent with the authorities, that there is no factual basis for a discrimination claim under the *Charter* and similarly no basis for the "absurdity" argument advanced by Local 18. The Director points out that she is a creature of statute with no authority outside the four corners of the *Act*. The Director says there is no inconsistency between the Determination and the *James* decision of the Labour Relations Board or the *Walker* reconsideration of the Tribunal. Those decisions "unequivocally" informed the Director that arbitrators were responsible for minimum standards issues arising in collective agreements.

Local 18 has filed a reply to the submissions of the Employer and the Director.

ANALYSIS

Fundamentally, the question to be decided in this appeal is one of statutory interpretation about the jurisdictional scope of the *Act*, and coincidentally, the scope of the Director's jurisdiction under the *Act*. The interpretation of a statute is a question of law. The argument of Local 18 asserts the Determination is "patently unreasonable" and should be set aside on that basis. In this case, however, where the answer to the question of statutory interpretation results in a relevant determination about the scope of the *Act* and the jurisdiction of the Director, I am satisfied that the standard of review is one of correctness. The Director cannot refuse a jurisdiction that she otherwise has by a reasonable but incorrect decision on the scope of the *Act* or her own jurisdiction.

In the same way, the Tribunal (even if I agreed there has been a denial of natural justice) cannot impose a jurisdiction on the Director that she does not otherwise have. Nor does a disposition of this appeal depend on any particular view of the facts, specifically, about whether Local 18 had sought to pursue the matter through the grievance procedure in the collective agreement but had abandoned that process in favour of the a complaint under the *Act*. Even accepting the Director committed such an error, that could not operate to give the Director a jurisdiction that she does not otherwise possess under the *Act*. On the other hand, if the Director was incorrect on the jurisdictional question, the Determination would be cancelled and the matter would have to be remitted to the Director for further consideration and decision and there would be an opportunity at that time to address and rectify any residual natural justice concerns.

In either event, I do not intend to specifically consider all elements of the natural justice arguments in this appeal for reasons which are explained later in this decision. I will, however, comment specifically on the third natural justice argument, in which Local 18 says the Director failed to comply with principles of natural justice and committed an error of law by misapprehending the facts and ignoring or misconstruing their arguments. Local 18 argues the misapprehension of the facts arises in the following the following comments from the Determination:

> ". . . **the parties have addressed the matter of the complaint through mediation and the collective agreement process.** However the issue of the complaint remains unresolved.

And:

> ". . . while the Complainant may find itself without a forum for redress, **at least to its liking**, based on the submissions before me the collective agreement appears to be the correct venue for the resolution of this complaint and for that matter any other disputes arising from the application or interpretation of the collective agreement.

Local 18 says that, ". . . nowhere in the submissions filed by either party is there any indication that the parties attempted to address the issue of payment for course training through the formal grievance administration process; . . . ". I reject that assertion and have two reasons for doing so. First, there is some evidence in the record that indicates Local 18 has pursued compensation for training. In a letter dated August 12, 1997, from then legal counsel for Local 18 to legal counsel for the Employer relating to what is referred to as the "Lieutenant Lectures Grievance", counsel states:

> At the arbitration hearing, we will be seeking the following remedies:
>
> 1. reimbursement of all firefighters for time spent attending the mandatory aspect of the Lieutenant Lectures in accordance with the collective agreement; . . .

Second, and in any event, the statement made by the Director does not refer specifically to seeking payment for course training. I agree with the submission of the Employer that reference to the "matter of the complaint" could have been used by the Director in a general sense. Accepting it is used in a general sense, there is more than enough evidence in the record to support it.

While I agree with Local 18 that making findings of fact without any evidence on matters which are material to the issue being decided constitutes an error of law and a denial of natural justice, there is no denial of natural justice or error of law as long as there is some evidence supporting the finding of facts. That is clearly the case in respect of the first statement set out above. In respect of the second statement, I do not perceive that statement to be much more than a statement of opinion based on an assessment of all the circumstances. I add that there is also some evidentiary support for the statement when the totality of the record is examined.

In any event, neither statement goes to the central issue, which is whether legislature intended the Director to have any jurisdiction over the subject matter of the complaint. A determination on that issue is not dependent on whether one or both parties have already used the grievance procedure to address other aspects relating to the subject matter of the complaint, but whether the matter is one that arises expressly or inferentially out of the collective agreement. I acknowledge that fact that the parties have used the grievance procedure to address issues related to the complaint is a factor, but reiterate that there is evidence to that effect.

Turning to the merits of the Determination.

There are sound policy reasons for the development of judicial and legislative deference to the arbitration process as the exclusive repository for addressing all issues that may arise under a collective agreement. The original decision *Rand Reinforcing Ltd.*, BC EST #D123/01, contained the following comments and analysis:

> From an analytical perspective, the central issue in this case is not significantly different from the issue considered in a recent Tribunal decision, *Re Director of Employment Standards (Re Walker),* EST #RD048/01 (Reconsideration of BC EST #D275/00). In that case, the Tribunal was required to consider the interface between the jurisdiction of the Director under the Act and the jurisdiction of an arbitrator in the context of a complaint by an individual under Part 2, Section 8 of the Act, who had alleged he was persuaded to go to work for his former employer by misrepresentations about the type of work and the conditions of employment. The employer was party to a collective agreement and the individual's employment generally was covered by the provisions of that collective agreement. The original decision, relying on the Supreme Court of Canada's judgments in *Weber v. Ontario Hydro*, (1995) 125 D.L.R. (4th) 583 (S.C.C.) and *Regina Police Association v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, concluded the grievance arbitration provisions in the collective agreement governed Walker's complaint and the Director had no jurisdiction over it. The Director sought reconsideration. In addressing the reconsideration application, the Tribunal noted that:
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> > Canada's legal system has grown to recognize many different sources of law relevant to employment-related disputes. For employees working in a unionized workplace, any single dispute may trigger claims under one or more of the common law, the *Charter*, the *Labour Code*, the *Human Rights Code*, the *Workers' Compensation Act* and the *Employment Standards Act*. *Weber v. Ontario* and its progeny have sought to establish a principled framework designed to limit the unnecessary proliferation of litigation in different forums. As we shall see however, they also seek to give maximum respect to the legislative intention to accord the citizen access to specialized regulatory codes designed precisely to ensure the vindication of the statutory rights they support.
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> When analyzing cases such as *Weber v. Ontario Hydro*, *supra*, and *Regina Police Association v. Regina (City) Board of Police Commissioners*, *supra*, the importance of the above statement should not be missed. The task is to give expression to the intention of the legislature as it is found in the legislative scheme that governs the matter in question. In *Weber v. Ontario Hydro*, *supra*, the Court referred to the comments of Estey, J. in *St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 at 721, which identified the rationale for judicial deference to a comprehensive and exclusive forum for resolving a difference arising from a collective agreement as follows:
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> > What is left is an attitude of judicial deference to the arbitration process. . . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting.
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> In the same vein, the Court in Regina Police Association v. Regina (City) Board of Police Commissioners, supra, stated:
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> > The rationale for rejecting these two models [of concurrent and overlapping jurisdiction] was expressed by Estey J., for the Court, in *St. Anne Nackawic*, *supra*, at pp. 718-19, and adopted by McLachlin J. in *Weber*, supra, at para. 41 as follows:
> >
> > > The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts

> at common law. . . . The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.
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> Therefore, in determining whether an adjudicative body has jurisdiction to hear a dispute, a decision-maker must adhere to the intention of the legislature as set out in the legislative scheme, or schemes, governing the parties.

In the reconsideration of the *Rand Reinforcing* decision, the panel noted that while the Supreme Court of Canada has endorsed the primacy of the jurisdiction of an arbitrator to adjudicate disputes that arise from a collective agreement, an arbitrator's exclusive jurisdiction may be overridden by express statutory language (see also *Regina Police Association*, p. 372). Notwithstanding the statement of purposes in Section 2 of the *Act* and the remedial nature of the *Act*, the Tribunal has recognized that the legislative scheme of the *Act* expresses no intention to override the exclusive jurisdiction of an arbitrator to adjudicate disputes arising from the collective bargaining relationship. Rather, the legislative policy is one of a separate regime for such matters. As noted in the Determination, that expression of legislative intent is reinforced in Section 89 of the *Labour Relations Code*.

Some reliance has been placed by Local 18 on the Tribunal's reconsideration decision, *Director of Employment Standards (Re Walker)*. That decision arose from a rather unique set of circumstances, where even though Walker was employed under a collective agreement once he was hired, the subject matter of the complaint arose during the hiring stage, where Walker alleged the employer had misrepresented the conditions of employment. The decision is summarized as follows:

> . . . we find the essential character of the dispute before us, in the way it has arisen, raises issues falling squarely within the public policy intent of the *Employment Standards Act* in relation to hiring practices, and was intended by the legislature to be vindicated primarily through the procedural machinery contained in the *Act*.

In reaching its decision, the Tribunal referred to, and relied on, comments made by the Court in *Regina Police Association* that:

> . . . the rationale for adopting the exclusive jurisdiction model was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction upon an adjudicative body that was not intended by the legislature. The question, therefore, is whether the legislature intended this dispute to be governed by the collective agreement or *The Police Act* and Regulations.

The *Walker* decision is not determinative of the position being taken by Local 18 in this appeal. In fact, it reinforces the exclusive jurisdictional model and the limited circumstances in which that jurisdiction might be overridden.

There is a reference in the appeal to a "trilogy" of cases that Local 18 says confirms a past practice by the Director of accepting wage claims by unionized firefighters for training. I agree with the reply of the Director and the Employer on this point. There is nothing in any of those decisions that indicate the complainants were "unionized" employees or that their claims (which were minimum wage claims) arose under a collective agreement. More to the point, none of those decisions compel a conclusion that, as a matter of law, the Director had jurisdiction to receive and process the complaint that is the subject of this appeal.

I agree with Local 18 that if the Determination indicated a "blanket refusal" by the Director to hear employment related complaints of unionized employees, that would be wrong. However, on review of the Determination, I can find no such indication. The Determination has, correctly in my view, accepted principles expressed the Supreme Court of Canada decisions, the *Rand Reinforcing Ltd.* decision and the reconsideration of that decision, the *Walker* reconsideration decision and the *James* decision of the Labour Relations Board and applied them to the circumstances of the complaint. I do not read the appeal as challenging the principles expressed in and drawn from the above referenced cases, only their application to the complaint. Those principles are expressed in the following excerpts from the Determination:

> . . . the Director lacks the jurisdiction to decide issues relating to the provisions of a collective agreement and that the jurisdiction to interpret legislation touching on the provisions of a collective agreement or to interpret the terms of a collective agreement itself, lies with an arbitrator . . .
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> . . . issues arising from a collective agreement [are] in the domain of an arbitrator. . . .
>
> . . . if the character of the issue between the parties arises explicitly or implicitly from the application, interpretation or contravention of the collective agreement, the matter should properly be within the jurisdiction of an arbitrator. . . .
>
> . . . matters of collective agreement interpretation and application are within the exclusive jurisdiction of labour arbitrators, unless a competing statutory regime has express powers in that regard. . . .
>
> The Labour Relations Code under section 89 provides for the authority of an arbitration Board. . . .
>
> . . . the Complainant and Employer are parties to a collective agreement which addresses both Hours of Work (Article 5) and Overtime (Article 8) . . .
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> I find that the legislative intention was that matters arising from a collective agreement . . . would be subject to the scrutiny of an arbitrator pursuant to the grievance procedure within that agreement. . . .

Local 18 says the essential character of the complaint is about getting paid for course training and is a matter not expressly or inferentially covered by the collective agreement. That takes too narrow a view of the matter in dispute. The essential character of the dispute is a claim for "wages" for hours worked. That is clear from the complaint itself, which was filed by Local 18 in September 2001, and concludes:

> . . . it is the submission of the Applicants and the Union that the City of Vancouver is the Employer of the Applicant firefighters who are participating in the Company Officer and Battalion Chief courses. The Applicants are "employees" under both the Collective Agreement and the *Act*. The Applicants are entitled to be paid "wages" at the applicable rate of pay under the Collective Agreement for those hours spent attending the pre-test exam, the 4 pre-module courses and either the Company Officer or Battalion Chief courses, and successfully completing the exams, while being trained by the Employer for the Employer's business.

The process for deciding whether a matter arises out of the collective agreement is described in the following excerpt from *Regina Police Assn.* (at p. 373):

> To determine whether a dispute arises out of the collective agreement, we must therefore consider two elements: the nature of the dispute and the ambit of the collective agreement. In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed: see *Weber*, *supra*, at para. 43. Simply, the decision-maker

> must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide: see, e.g., *Weber*, at para. 54; *New Brunswick v. O'Leary*, *supra*, at para. 6.

The complaint goes to matters that expressly fall under the collective agreement – hours of work and overtime. The nature of the dispute is about getting paid for hours worked. The facts surrounding the dispute need not be restated. The general issues arising from the complaints are whether firefighters attending training courses are covered by the collective agreement, if so, whether the hours spent at the training sessions are hours worked under the collective agreement and, if so, whether those hours should be paid at the applicable rates in the collective agreement, including overtime rates. The material on file indicates that Local 18 and the Employer have negotiated about and disputed (through arbitration) several aspects of the subject matter of this complaint, including the selection of candidates for training, scheduling of training, re-scheduling of vacations for employees affected by scheduled training and remuneration for training – an indication by both parties that the essential character of matters associated with training does arise, if not expressly then implicitly, out of the collective agreement. The collective agreement covers all employees of the Employer and purports to "constitute the wages and working conditions" for those employees.

Nor am I persuaded that the Determination offends any *Charter* values or discriminates against trade unions generally. The Determination does nothing more than give expression to the judicial and legislative deference to the arbitral process, which is based on an acceptance that all aspects of the relationship of the parties in a labour relations setting is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters arising under the collective agreement could be the subject of adjudication in other forums.

It follows that I agree with the decision reached by the Director on the issue of jurisdiction.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 26, 2003 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal