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 -

Leonard Walker

(" Walker ")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	2000/046
DATE OF HEARING:	June 13, 2000
WRITTEN SUBMISSIONS RECEIVED	June 30, 2000
DATE OF DECISION:	July 20, 2000

DECISION

APPEARANCES

Leonard Walker	on his own behalf
G. Stephen Hamilton, Barrister & Solicitor	on behalf of Lemare Lake Logging Ltd.
Robert D. Krell, I.R.O. & Martha Rans, Barrister & Solicitor	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Leonard Walker ("Walker") 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 January 10th, 2000 under file number ER 47874 (the "Determination").

THE DETERMINATION

As set out in the Determination (at p. 1), Walker:

> "...contends he accepted employment as a mechanic on the condition that [Lemare Lake Logging Ltd. ("Lemare")] agreed Mr. Walker's work would be confined to the employer's indoor shop. According to Mr. Walker, on his first day of employment [Lemare] reneged on its agreement by attempting to dispatch Mr. Walker to work in the field. Mr. Walker found this to be unacceptable and he left the employment relationship that day" [November 1st, 1999].

Section 8 of the *Act* states, *inter alia,* that an employer must not misrepresent the "type of work" or the "conditions of employment" in order to "induce, influence or persuade a person to become an employee".

The Director's delegate viewed the above-quoted circumstances as possibly raising a claim under section 8 of the *Act* but nonetheless dismissed Walker's complaint inasmuch as the delegate's investigation "...failed to reveal sufficient evidence to prove Mr. Walker's complaint under the Act." (Determination, p. 3).

REASONS FOR APPEAL

Walker appeals the Determination on, essentially, two grounds. First, Walker says that the delegate did not undertake a proper investigation inasmuch as the delegate did not interview certain witnesses whose names had been given by Walker to the delegate. Second, Walker says that the available evidence supports his position that it was agreed between himself and Lemare that his position with Lemare would not involve him having to attend "in the bush" to undertake

mechanical repair work. Walker's position is that the job that was offered to him, and accepted by him, involved doing engine "rebuild" work exclusively in a heated repair facility at the Lemare's main place of operations in Port McNeill, B.C.

THE JURISDICTIONAL ISSUE

During the course of Walker's evidence at the appeal hearing (given via teleconference), Walker referred to the fact that his position with Lemare was a "good union job". I then queried Lemare's representatives and learned for the first time--this point had never previously been noted in either the Determination or in any of the parties' submissions--that Lemare is a unionized employer. The I.W.A., Local 1-71 is the certified bargaining agent and the governing collective agreement is the Forest Industrial Relations Limited Master Agreement in effect from June 15th, 1997 until June 14th, 2000.

In light of the Supreme Court of Canada's decision in *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929, I raised the matter of whether Walker's dispute lies within the exclusive jurisdiction of a grievance arbitrator. At the appeal hearing, Mr. Walker expressed the view that, if possible, he would prefer his dispute to be arbitrated. Counsel for the employer took the position that the evidentiary phase of the appeal hearing should be held in abeyance pending a decision with respect to jurisdiction. Mr. Krell, on behalf of the Director, took the position that both the Employment Standards Branch and the Tribunal had jurisdiction in the matter but Mr. Krell candidly admitted that he was not familiar with the *Weber* decision and thus was not in a position to make detailed legal submissions on the point.

In light of the foregoing, the appeal hearing was adjourned so that the parties could file written submissions with respect to jurisdiction. I wish to thank counsel for both Lemare and the Director for their helpful submissions. Walker did not file a submission with respect to the jurisdictional issue nor did the I.W.A. on his behalf.

Legal counsel for Lemare submits that Walker's complaint lies within the exclusive jurisdiction of a grievance arbitrator. Legal counsel for the Director firstly submits that "a consideration of the question respecting the collective agreement ought to be referred back to the Delegate". Alternatively, counsel for the Director submits that the Employment Standards Branch and the Tribunal have jurisdiction to address, respectively, Walker's initial complaint and his subsequent appeal of the Determination.

ANALYSIS

Preliminary Issues

In my view, it would not be appropriate, as was suggested by counsel for the Director in her brief, to refer this jurisdictional issue back to the Director for further investigation. I say this for at least three reasons.

First, the essential facts touching on the jurisdictional issue are not disputed. Walker says that it was a term of his employment contract with Lemare that he would not be dispatched "into the

bush". The employer denies that there was such a term or condition of employment. However, notwithstanding this factual dispute (whether there was or was not such a term), the *nature* of the dispute is clear. It is conceded by all concerned that Walker's employment by Lemare was governed by the IWA master collective agreement; the key question is whether or not his complaint falls within the exclusive jurisdiction of a grievance arbitrator.

Second, given the Director's alternative position, it would seem that a referral back would be superfluous since the Director's position is that Walker's complaint does not lie within the exclusive jurisdiction of a grievance arbitrator. Thus, and this is my third concern, if Walker's complaint was referred back to the Director it would appear that the Director would perfunctorily confirm jurisdiction. In turn--depending on the Director's conclusion on the merits of the complaint--either Walker or Lemare might well appeal the Director's decision. I do not consider such a scenario to be consistent with the purposes of the *Act* (see section 2) which include fair and expeditious resolution of complaints.

I also wish to address another point raised by the Director's legal counsel in her brief, namely, the nature of Walker's complaint. Counsel for the Director characterized Walker's complaint as one that "raises pre-employment rights which are generally not covered by a collective agreement". I do not accept that characterization and, apparently, neither did the delegate. Walker, both in his (admittedly incomplete) *viva voce* evidence and in his various written submissions made it clear that he viewed the employer's actions as tantamount to a breach of contract. Walker's position is that is was a *term of his employment contract* that he would not be dispatched "into the bush" in order to undertake mechanical repairs. In the Determination, the delegate referred to Walker's assertion that Lemare "*reneged on its agreement* by attempting to dispatch [Walker] to work in the field". This is clearly not a case, such as, say, *Queen v. Cognos,* [1993] 1 S.C.R. 87, where the allegation related to a *precontractual* misrepresentation that induced the employee to enter into a subsequent employment contract. Here, Walker says that, in essence, the employer simply failed to live up to its contractual obligations. In short, Walker's case is that Lemare agreed to certain terms and conditions of employment that it had no intention of ever fulfilling--it only agreed to such terms as a "ruse" to induce him to relocate from the lower mainland to Port McNeill.

A Grievance Arbitrator's Jurisdiction

The *Weber* doctrine holds that any dispute "arising from the collective agreement" falls within the exclusive jurisdiction of a grievance arbitrator. In *Allison* (BC EST #D124/00), I endeavoured to summarize the historical development of the *Weber* doctrine:

> 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...

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. <u>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.</u>" (*italics* in original; my <u>underlining</u>)

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...

> 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 a decision issued on March 2nd of this year, the Supreme Court of Canada re-visited and clarified the *Weber* deferral doctrine--see *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners,* 2000 SCC 14. In the *Regina Police* case, a police sergeant, under threat of internal disciplinary action and possible dismissal, resigned his commission (which was formally accepted) but subsequently purported to withdraw his resignation. The police chief refused to accept the officer's withdrawal and, in due course, the matter came before a grievance arbitrator who ruled, following a preliminary objection regarding her jurisdiction to hear the grievance on its merits, that the dispute was not arbitratable. The Supreme Court of Canada ruled that the arbitrator correctly decided that she did not have jurisdiction to deal with the matter before her.

The decision of the 7-justice panel was written by Mr. Justice Bastarache. Bastarache, J. noted, as a preliminary matter, that although *Weber* involved a jurisdictional dispute between the courts and arbitration, the deferral principle also "applies when it is necessary to decide which of two competing statutory regimes should govern a dispute" (p. 9; see also p. 13: "The [*Weber*] analysis applies whether the choice of fora is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies.").

In the instant appeal, the issue is which of two competing dispute resolution statutory regimes--*i.e.,* the determination and adjudication provisions of the *Employment Standards Act* or the grievance arbitration provisions mandated by the *Labour Relations Code*--governs Walker's complaint.

Bastarache, J. observed that not all employment disputes that arise in a unionized setting are governed by the *Weber* deferral doctrine; the jurisdictional question must be answered through a two-step analysis:

> "While McLachlin, J. [in *Weber*] embraced the exclusive jurisdiction model, she emphasized that the existence of an employment relationship, *per se,* does not grant an arbitrator the jurisdiction to hear or decide a dispute. Only those disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts...
>
> 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.* 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.*" (my *italics*)

In the *Regina Police* case, the Supreme Court of Canada found that the essential character of the dispute related to a question of discipline and that disciplinary actions were explicitly excluded (by Article 8) from the ambit of the collective agreement--the collective agreement itself mandated that disciplinary matters could only be adjudicated under the provisions of the Saskatchewan *Police Act.* Bastarache, J. characterized the *Police Act* as a "complete code...for the resolution of disciplinary matters involving members of the police force" and, accordingly, the arbitrator had no jurisdiction to adjudicate the officer's grievance.

I now turn to the particular dispute before me.

The Nature of the Dispute

As previously noted, I conceive Walker's case to be a simple allegation of breach of contract. Walker says that he was engaged by Lemare on the condition that he would only be working in Lemare's "rebuild shop" and would not be dispatched "into the bush" to carry out on-site repairs. Walker says that Lemare failed to live up to this latter condition and thus he quit.

Walker's case might have appropriately been characterized as a "constructive dismissal" within section 66 of the *Act,* however, had it been so characterized by the delegate, Walker would have been without a remedy under the *Act* given his 1-day tenure (compensation for length of service is payable only after 3 months' service--see section 63). Of course, section 8 imposes a higher evidentiary threshold on a complainant in that the complainant must show not only a breach of a contractual condition, but also that the employer only agreed to that condition in order to induce the complainant to become an employee.

However, regardless of how Walker's complaint was *framed*--in this case an alleged violation of section 8 of the *Act*--an essential element of Walker's complaint is that Lemare breached a condition of the contract of employment.

The Ambit of the Collective Agreement

It is important to reiterate that the subject-matter of the dispute need not be explicitly addressed in the collective agreement in order for an arbitrator to have exclusive jurisdiction over the

dispute; it is enough if the dispute implicitly arises from the interpretation, application or violation of the collective agreement.

I think it also important to note, at this juncture, that unlike the factual situation in the *Regina Police* case, there is nothing in the *Act* which purports to devolve exclusive jurisdiction to the Director of Employment Standards and her delegates over all (or a particular category) of employment disputes that are encompassed by the *Act.* Indeed, several provisions of the *Act* suggest that, at best, there is concurrent jurisdiction between the Director and other other fora. For example, it would seem that there is concurrent jurisdiction between two statutory bodies--the Director and the Human Rights Tribunal--in the event of a dismissal due to pregnancy. In other instances, the dispute resolution procedures set out in the *Act* are specifically subordinated to the grievance arbitration process--see *e.g.,* sections 43, 49, 61 and 69. Section 118 of the *Act* preserves an employee's right of court action for breach of an employment contract. Section 76(2)(e) permits the Director to refuse to investigate a particular dispute that may be pending before some other adjudicative body. Unlike, say, the Labour Relations Board, the Director is not specifically given exclusive jurisdiction over a particular class of disputes (see section 136 of the *Labour Relations Code*). Decisions made by the Director and her delegates are not protected by any form of privative clause.

Counsel for the Director, in her submission, says that there is no provision in the collective agreement "capable of supporting a grievance on the basis of the complaint made by Mr. Walker" and that Walker's complaint "does not arise pursuant to the terms of the collective agreement but rather arises from an interpretation of s. 8 of the [*Act*]". I am unable to accept either submission.

First, and recalling that the dispute need not explicitly arise from the collective agreement, Article II vests authority over hiring, disciplining and discharging employees with Lemare as well as the right to direct its workforce. As I conceive this dispute, an arbitrator would have to direct his or her mind to Article II and the limits, if any, on Lemare's ability to "direct" Walker to undertake mechanical repair work "in the bush".

While it is generally true that individual contracts of employments are superseded by the collective agreement, such individual contracts are not wholly irrelevant in a unionized setting. Arbitrators have the authority, in certain instances, to enforce at least some of the terms and conditions contained in an individual contract of employment. The relevance of individual contracts of employment in a collective bargaining regime is summarized by Brown and Beatty (*Canadian Labour Arbitration*, 2nd ed., para. 2:1210) as follows:

> "...individual employment relationships have meaning only at the hiring stage...[and] the only scope for individual bargaining with regard to terms and conditions of employment would appear to be where it is sanctioned by the collective agreement, by the collective bargaining agent or where the terms fall outside the scope of the agreement...individual agreements, whether oral or in writing, may [also] give rise to an estoppel [or may be] valid and enforceable through the arbitration process in so far as [they contain] terms which are not incompatible with the collective agreement."

Second, although the issue here has been framed as an alleged contravention of section 8 of the *Act,* one cannot even turn to section 8 without first delineating the terms and conditions of Walker's hiring. It is this latter question, not section 8, that is, in my view, the essential element in this dispute. Furthermore, it may be that the analysis is clouded by the fact that Walker quit. If Walker had not quit, but rather, was fired for refusing to carry out some on-site repairs out in the bush, the central issue would still have been the terms and conditions of his hiring. Had Walker been fired and then filed a grievance, would anyone seriously contend that an arbitrator was without exclusive jurisdiction to address the matter?--the question of "just cause" would inevitably require a consideration of the terms and conditions of his initial hiring. In my view, and especially in this case, it is important to abide by the Supreme Court of Canada's admonition not to be unduly swayed by the manner in which a dispute is *framed.*

Finally, even if one accepts that the real issue in this case is the interpretation of section 8 of the *Act,* grievance arbitrators have been endowed with the specific statutory authority to interpret and apply relevant legislation [see section 89(g) of the *Labour Relations Code*] and, if need be, to override collective agreement provisions that conflict with such legislation. Accordingly, in my opinion, the Saskatchewan Court of Appeal's decision in *Dominion Bridge Inc. v. Routledge* (1998), 173 D.L.R. (4th) 624, relied on by the Director's legal counsel in her brief, is readily distinguishable from the case at hand.

In *Dominion Bridge,* the Saskatchewan Court of Appeal held that an adjudicator appointed pursuant to the province's employment standards legislation had jurisdiction to hear a dispute regarding two former employees' entitlement to termination pay in lieu of notice. The two employees received the notice called for in the collective agreement but not the more generous notice (or pay in lieu of notice) set out in Saskatchewan's employment standards legislation. It is not clear from the decision whether the court ruled that the adjudicator had concurrent jurisdiction with a grievance arbitrator or exclusive jurisdiction. In any event, there is no reference anywhere in the court's opinion to a provision equivalent to section 89(g) of the B.C. *Labour Relations Code* which would have enabled an arbitrator to award the employees the greater statutory notice (or pay) notwithstanding the express provisions of the collective agreement.

Further, and perhaps even more importantly, *Dominion Bridge* may have been wrongly decided even in the absence of a statutory equivalent to section 89(g)--certainly, that is my view. I note that the Saskatchewan Court of Appeal did not refer, in its opinion, to the Supreme Court of Canada's decision in *McLeod v. Egan, supra.* and Chief Justice Laskin's observation that it is an arbitrator's *duty* to construe a collective agreement in a manner consistent with relevant external legislation such as employment standards statutes.

To summarize, in my view, and consistent with the *Weber* doctrine, Walker's complaint ought to have been dismissed by the delegate because the matter fell within the exclusive jurisdiction of a grievance arbitrator. The appropriate mechanism to address Walker's dispute with Lemare is the grievance arbitration process established under the collective agreement. Accordingly, while I agree with the delegate that Walker's complaint should have been dismissed, I am of the view that it ought to have been dismissed solely on jurisdictional grounds.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be varied to indicate that Walker's complaint is dismissed for lack of jurisdiction.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal