Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

The Director of Employment Standards
(The "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATORS: Frank A.V. Falzon
Fern Jeffries
David B. Stevenson

FILE No.: 2000/677

DATE OF DECISION: January 29, 2001

DECISION

OVERVIEW

The *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("the Act") confers an express reconsideration power on the Tribunal. Section 116 provides:

> s. 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
>
> (b) cancel or vary the order or decision or refer the matter back to the original panel.

This reconsideration application is brought by the Director of Employment Standards ("the Director"). The factual context is set out in the Director's January 10, 2000 Determination (p. 1):

> Mr. Walker contends that he accepted employment as a mechanic on the condition that Mr. David Dutcyvich, Director of Lemare Lake Logging Ltd., 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 Lake Logging Ltd. 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.
>
> In terms of the Act, Mr. Walker's claim is that Mr. Dutcyvich persuaded him to come to work for Lemare Lake Logging Ltd. by falsely representing conditions of employment to him (section 8). Mr. Walker seeks reimbursement of those expenses he incurred in connection with travel and setting up residence in Port McNeill, BC (reference section 79(4)).

After conducting an investigation, the Director dismissed the complaint (p. 3):

> Under the Act, it is necessary for a person asserting a claim, in this case Mr. Walker, to prove their claim on a balance of evidence. Quite simply, in this case investigation has failed to reveal sufficient evidence to prove Mr. Walker's complaint under the Act.

For convenient reference, section 8 of the *Act* is reproduced below:

> 8. An employer must not induce, influence or persuade a person to become an employee, or to work or be available for work, by misrepresenting any of the following:
> (a) the availability of the position;
> (b) the type of work;
> (c) the wages;
> (d) the conditions of employment.

Walker appealed the Determination on two grounds: first that the delegate's decision was deficient for failure to interview certain witnesses, and second that the evidence supports his position that he moved to Port McNeill on the understanding that he would be working solely in the engine rebuild shop.

The employee's appeal was dismissed by the adjudicator. On the surface, this makes the Director's reconsideration application appear unusual. What the Director objects to, however, is the basis on which the adjudicator dismissed the appeal. The adjudicator held that based on the collective agreement applicable to the employer, the Director had no jurisdiction even to consider the complaint (p. 9):

> 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.

The Director's submission is underscored by the concern that if the adjudicator was wrong about jurisdiction, the employee has been deprived of the benefit of a proper Tribunal appeal on the merits. It is a concern magnified by the reality that the Director's delegate evidently attended the hearing prepared to question the factual conclusions he had earlier made:

> …the Director's delegate had made arrangements to attend the hearing to explain that two possible witnesses for the complainant Walker had not been interviewed. He wished to provide a full disclosure on appeal.

The Director also argues that the adjudicator, having raised the issue on his own motion, issued his decision on jurisdiction without first giving the relevant Union (IWA Canada, Local 1-2171) notice and an opportunity to be heard. The Union subsequently wrote to the Tribunal expressing "deep concern" with the ramifications of the adjudicator's decision. On

October 13, 2000, the Union was granted party status on this application. The Union has, through counsel, filed a submission in support of the Director.

II. ISSUE

Should the Panel reconsider the adjudicator's decision, and if so, should the decision be set aside?

III. ANALYSIS

a. Decision to reconsider

The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BCEST #D313/98. Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both the parties and the system generally. An assessment must also be made of the merits of the Adjudicator's decision.

The present case involves a jurisdictional question with significant implications. This is clearly an appropriate case for the exercise of the reconsideration power.

As set out below, we have concluded that the adjudicator erred. We find that the Director did have jurisdiction to investigate and address this complaint.

b. The Adjudicator's decision

Relying on *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.), the adjudicator noted that any dispute "arising from the collective agreement" falls within the exclusive jurisdiction of a grievance arbitrator. Relying on *Regina Police Assn. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, the adjudicator cited the Court's statement that "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". At page 6 of his decision, he framed the issue as follows:

> 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 Code* – governs Walker's complaint.

The adjudicator held that the essential element of Walker's complaint was "breach of contract" – that Lemare failed to live up the condition that he would only be working in the rebuild shop. After noting that the subject matter of the dispute "need not be explicitly addressed" in the collective agreement, he held that the collective agreement, viewed in light

of the arbitral jurisprudence, was broad enough to encompass this dispute. At page 9 of his decision, the adjudicator stated as follows:

> ...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*. [emphasis in original]

The adjudicator distinguished *Regina Police*, holding that unlike the scheme there concerning police discipline, "there is nothing in the *Act* which purports to devolve exclusive jurisdiction to the Director … over all (or a particular category) of employment disputes that are covered by the Act": p. 8. He also distinguished *Dominion Bridge Inc. v. Routledge* (1998), 173 D.L.R. (4th) 624 (Sask. C.A.), holding that the Court's preference in that case for the employment standards legislation over an arbitrator's jurisdiction was either wrong in principle, or distinguishable based on the absence of a statutory equivalent to s. 89(g) of the *BC Labour Code*, which provides as follows:

> 89. For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may:
>
> (g) interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act's provisions conflict with the term of the collective agreement….

c. Discussion

While we take a different view from the Adjudicator on the law, we emphasize at the outset that it was entirely appropriate for him to have raised this issue once it came to his attention that there existed a collective agreement.

The Director submits that addressing an issue she had not considered was wrong and tantamount to conducting an "appeal de novo". We disagree. The adjudicator had a duty to ensure that he had jurisdiction to embark upon the appeal before him, whether or not anyone else had identified the issue. This having been clarified, we turn to the issue at hand.

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.

The jurisprudence makes clear that, in a workplace governed by a collective agreement, grievance arbitration will often, but not always, be the repository for the vindication of employment-related rights. As the Adjudicator properly noted, when a matter is otherwise properly before a grievance arbitrator under a collective agreement, the arbitrator has broad authority to apply any statute law (*Labour Code*, s. 89(g)) or constitutional law (*Weber v. Ontario*, *supra*) necessary to resolve the dispute.

The fact that a grievance arbitrator may apply "any law" when a dispute is properly before him or her does <u>not</u>, however, answer the critical question whether the dispute is in fact properly before the arbitrator in the first place. To resolve this question depends less on an analysis of the collective agreement than it does on discerning the intention of the Legislature. This is particularly so when the choice of forum is a choice between two competing statutory regimes.

It is one thing to say that, in a contest between a common law court and a grievance arbitrator, the latter forum must prevail to the exclusion of the former. The fundamental tenet of obedience to legislative intent dictates that when the Legislature has clearly signalled its intention to create a statutory forum for the final and comprehensive resolution of a dispute, a "concurrent" tort or contract action in a common law court would defeat that intention.[1] As noted in *St. Anne-Nackawic Pulp & Paper v. CPU, Local 219*, (1986), 28 D.L.R. (4th) 1 (S.C.C.), cited in *Weber* at p. 599:

> The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it

[1] It perhaps goes without saying that this "exclusive jurisdiction" approach does not encroach on the citizen's constitutional right of access to the courts for prerogative relief. If an arbitrator commits fundamental error then, subject to statutory remedies included within the governing legislation, the citizen has access to judicial review: *Crevier v. AG Quebec*, [1981] 2 S.C.R. 220.

> 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….
>
> 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 to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting….

In a contest between a common law action and a statutory code, it is often relatively easy to see where fidelity to legislative intent leads. However, even in those types of cases, arbitral exclusivity is not automatic because the employment relationship does not define the character of the dispute. As noted by Bauman J. in *Johnston v. Anderson*, [1996] B.C.J. No. 1782 (S.C.) at para. 24:

> I do not conceive that *Weber* creates workplaces which are governed by collective agreements, as enclaves where disputes, in or about which, are forever beyond the jurisdiction of the courts. To reiterate: the exclusive jurisdiction model extends to oust the court's jurisdiction where the dispute between the parties arises out of the collective agreement.
>
> See also Fording Coal Ltd. v. United Steelworkers of America, [1999] B.C.J. No. 11 (C.A.) and Toffiq v. Canadian Workers Union, [2000] B.C.J. No. 139 (S.C.)

The situation is obviously more complex when the relevant "choice" is between two competing statutory regimes. In a contest between the comprehensive investigative, appellate and enforcement regulatory framework in the *Employment Standards Act* - the very design and purpose of which was to vindicate employment standards - and grievance arbitration, a legislative intention to defer generally and automatically to arbitration is more elusive. As noted by the Court in *Regina Police*, *supra*, at para. 26:

> Before proceeding to an analysis of the ambit of the collective agreement, it is important to recognize that in *Weber* this Court was asked to choose between arbitration and the courts as the two possible forums for hearing the dispute. In the case at bar, the *Police Act* and Regulations form an intervening statutory regime which also governs the relationship between the parties. As I have stated above, 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…. [emphasis added]

The litmus test is not whether an arbitrator's powers are broad enough to consider employment standards statutes. It is whether the legislature *intended* to suspend the administrative mechanisms of the *Act* in favour of grievance arbitration under the collective agreement to resolve the dispute in question.

The adjudicator attempted to distinguish *Regina Police* on the basis that the collective agreement in that case specifically excluded discipline matters: p. 7. The collective agreement, while relevant to one part of the analysis, cannot dictate statutory jurisdiction. A collective agreement between a union and employer can neither enlarge nor limit legislative intent. Fundamentally, the inquiry is about the legislature's intent regarding forum as reflected in the statutes. As noted in *Regina Police* at para. 26: "If neither the arbitrator nor the Commission have jurisdiction to hear the dispute, a court would possess residual jurisdiction to resolve the dispute. I agree with Vancise J.A. that the approach described in *Weber* applies when it is necessary to resolve which of the two competing statutory regimes should govern a dispute".

Vancise J.A., who dissented in the Saskatchewan Court of Appeal in *Regina Police*, authored that Court's unanimous decision in *Dominion Bridge Inc. v. Routledge*, [1999] S.J. No. 215 (C.A.). The issue in that case was very similar to the one before us (para. 7):

> … The Labour Standards Act … was specifically created to regulate such matters as hours of work and layoff notice. We must determine what model of dispute resolution applies in the case of competing statutory forums. The question is whether one of these statutes is paramount when one, the Labour Standards Act, specifically deals with the subject matter of the dispute, and the other, s. 25 of the Trade Union Act, mandates that all differences regarding the interpretation, violation or application of the collective agreement between the parties be resolved according to the grievance arbitration model.

Vancise J.A. observed that none of the cases, including *Weber*, had considered the circumstance of "a parallel competing statutory right of a public interest nature which arises out of the employment relationship": para. 19. In reasons we find to be both apposite and compelling, His Lordship stated:

> The rights under the Labour Standards Act are rights to which all employees are entitled and as such are minimum employment rights which must be given to an employee. This is clear when one examines s. 72 of the Labour Standards Act which provides that nothing in that Act affects any agreement which provide more favourable hours of work, more favourable rates of pay, or more favourable conditions than that

> provided for in the Labour Standards Act. It is the base and nothing less can be agreed upon except in accordance with the provisions of the statute…(para. 24)
>
> The Labour Standards Act contains a summary mechanism for ensuring that all employers pay their employees the wages to which they are entitled. It is designed to protect all workers. The fact that a collective agreement makes provision for layoff notice in accordance with the Labour Standards Act, or covenants to comply with the Act does not necessarily alter the character of the dispute. While the employee's employment rights under the collective agreement were inferentially affected, the essential character of the dispute was a violation of minimum labour standards. (para. 25)
>
> *Weber*, in my opinion, did not go so far as to state that any rights created by statute that affect employment rights must of necessity arise out of the collective agreement and can only be dealt with by arbitration….(para. 26)
>
> In my opinion, there is nothing in the ambit of the collective agreement which takes away from the finding that the essential nature of the dispute is a labour standards violation and not one which involves a dispute by the parties concerning the application, violation or interpretation of the collective agreement. This is particularly evident when one takes into account the public interest component of the complaint as well as the fact that only labour standards officers have the right to conduct an inquiry and to make assessments against the employer for violations of the Labour Standards Act. (para. 30)

Leave to appeal to the Supreme Court of Canada was dismissed: [1999] S.C.C.A. No. 305. At least one commentator has reasonably suggested that the denial of leave is, together with the Court's endorsement of the "Vancise approach" in *Regina Police,* an inference in favour of his decision in *Dominion Bridge* and its companion cases: Robertson, "Choice of Forum" (November, 2000), *Canadian Bar Association: Labour-Administrative Law in the New Millennium*, at pp. 1, 18. Whether or not an inference can be drawn from the denial of leave to appeal in *Dominion Bridge*, we agree that the approach in that case is compelling, and consistent with *Regina Police*.

At pages 7-8 of his decision, the adjudicator recognized 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". However, *Regina Police* makes clear that where a dispute might be resolved in either of two competing statutory forums, the "implicit"

jurisdiction of each of them must be considered in determining which forum ought to be preferred. As stated in *Regina Police* at para. 35:

> As I have stated above, this approach applies equally in determining whether the Commission has jurisdiction to hear the dispute in the case at bar. Therefore, even if the *Police Act* and Regulations do not expressly provide for the type of disciplinary action that was taken in the case at bar, the action may still arise inferentially from the disciplinary scheme which the legislature has provided.

The fact that the parties have included a grievance mechanism in a collective agreement does not alter the fundamental nature of the dispute or extend jurisdiction, but it may play a role in determining whether a tribunal would decide to hear the complaint or defer it to another forum. The essential issue remains: whether this complaint is a dispute between the parties with respect to the meaning, application or alleged violation of the collective agreement: *Dominion Bridge*, para. 28.

In our view, the essential character of the dispute in this case is whether the employer violated minimum public policy employment standards about honesty to a prospective employee during the hiring process. As such, the dispute is inextricably linked with the essential public policy character of the *Employment Standards Act* as a whole. Yes, they were employment discussions. Yes, it involves an allegation that there was a "deal" that was not honoured. But to label this a mere "contractual" dispute misses its true character. The fundamental character of the complaint – one which resonates throughout Mr. Wilson's submissions - is that he was misled during the hiring phase.

Whether that complaint is valid will, subject to what we say below about remedy, be for an adjudicator to decide. As properly noted by the adjudicator, a complainant's onus under section 8 is not just to prove there was a misunderstanding, or incomplete discussions. Misrepresentation must be shown. But as we read the complaint, that is the essential character of this dispute. This is clear from Mr. Walker's appeal submission to the Tribunal:

> I believe the company of Lemare Lake Logging (owner) was misrepresenting himself into hiring under false pretences.

The fundamental character of this complaint goes beyond the sort of "private matter, decided by mutually agreed to rules" that collective agreements are fundamentally addressed to: *Weber v. Ontario*, at pp. 590-91, per Iacobucci J. (dissenting but not on this point). Section 8 of the *Act* is a public policy section, expressly made applicable to union and non-union employees alike. It more akin to the tort of negligent misrepresentation than it is to breach of contract: *Queen v. Cognos*, [1993] S.C.J. No. 3. It is particularly focused on the conduct and intention of the employer leading up to the initial hiring. It has a public interest pedigree of longstanding. In our view, the character of the dispute falls squarely within the public policy intent of the *Employment Standards Act* and was intended by the Legislature to be vindicated

primarily through the investigative, decision-making and appellate machinery contained in the *Act*.

With respect to the collective agreement in this case, both the Director and the Union itself raise serious issue as to whether it could be framed as a grievance at all: *Wainright v. Vancouver Shipyards Co.*, [1987] B.C.J. No. 1169 (C.A.); leave to appeal dismissed [1987] S.C.C.A. No. 270. We have our doubts as well. However, even if the dispute could coincidentally be framed as a grievance, its essential character remains: it is a claim about honesty in the pre-employment context and as such lies at the heart of public policy values enshrined in section 8 of the *Act*. There is no reason to deprive the employee of the specialized statutory process for pursuing his complaint. Indeed, there is every reason to prefer it.

The adjudicator assumes that the arbitrator's jurisdiction would be obvious had Mr. Wilson had been fired and alleged dismissal "without cause", and therefore asks how the essential character of the dispute "changes" because he quit and relies on s. 8?

In our view, there is nothing unusual about confirming the primacy of the *Act* in the present case – where the *Act* so squarely applies and the application of the collective agreement is marginal at best – and recognizing that the balancing of factors relevant to legislative intent might be different in a dismissal situation where the collective agreement clearly applies.

Moreover, because the essential character of the dispute would, in either case, be the misrepresentation that was alleged, it is not obvious to us that the *Act*'s processes would necessarily be suspended in favour of arbitration in the case of a grievance being filed. Deeper analysis concerning legislative intent would then be necessary as reflected by Robertson, *supra*, at p. 19:

> Legislation is an expression of public policy. One must consider and understand the public policy of the legislators to give full expression to their intent. Statutory tribunals are created for a reason. The Court, in *St. Anne, Weber* and *O'Leary* recognized that it needed to protect the integrity of the exclusive jurisdiction of labour arbitration tribunals to give full expression to the statutory scheme. The same reasoning applies to these other tribunals, perhaps more so since they are generally more defined in jurisdiction and have the advantage of permanent boards appointed by the legislators to fulfill this policy intent. It is noteworthy that Justice Vancise, in the three judgments of 15 April 1999, repeatedly referred to the importance of "public policy".

A related point was made by MacKenzie J. (as he then was) in *British Columbia v. Tozer*, [1998] B.C.J. No. 2594 (S.C.) at para. 116: "The effect of accepting the petitioner's position that the *Labour Relations Code* confers exclusive jurisdiction upon arbitrators to determine all workplace disputes with human rights implications, would be similar to that achieved

where the parties contracted out of the protections of the *Human Rights Code*. But such contracting out is not permitted". In our view, the same may be said for the *Employment Standards Act*, where "contracting out" is expressly forbidden, subject only to the qualifications set out in s. 4 of the *Act*.

This is not a "just cause" case. Section 8 and the legislative machinery to enforce it are designed to address the very situation that presents itself here.

We are confirmed in our opinion as to the importance and priority given the *Employment Standards Act* in a case such as this by a review of section 76(2)(e) of the *Act*:

> 76(2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if
>
> (e) a proceeding related to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator.

As is the case with the *Human Rights Code* discussed in *Tozer*, the Legislature has in section 76(2) of the *Act* given the Director a discretion, not a prohibition, in the case of active concurrent proceedings. Where, as here, there are no actively concurrent proceedings, it appears obvious that the Legislature has contemplated no suspension of the *Act*'s enforcement machinery. Moreover, even where other proceedings have been commenced, the Legislature has imposed a discretion, not a prohibition, strongly suggesting a legislative intention to have the Director exercise a principled discretion to carry on even where "the subject matter of the complaint" is in another venue.[2] In light of s. 76(2), automatic "step asides" might well be properly attacked as a fettering of discretion. As noted in *Tozer* at para. 51:

> This provision clearly confers a discretion upon the Commissioner and does not, as suggested by the petitioner, direct the Commissioner not to proceed with the complaint where the Union can bring a grievance under the collective agreement. The discretion indicates that there is, in this case, concurrent jurisdiction between the Tribunal and Labour Arbitration Boards. There is no provision in the BC Labour Relations Code which overrides the jurisdiction of the Tribunal in cases arising under a collective agreement.

Choice of forum issues will clearly be more difficult where, in contrast to this case, there exists clear "concurrency" as between a collective agreement and the *Act*. It may be that, as in constitutional law cases where the Courts are often required to assign a law touching both

[2] By way of contrast, see s. 11 of the *Children's Commission Act*, S.B.C. 1997, c. 11, which directs the Children's Commission either to refuse a complaint whose "subject matter" is in progress elsewhere, or defer it until the other proceeding is completed.

federal and provincial "subject matters" to one head or another based on its "dominant characteristic", the same exercise may need to be undertaken in making the choice between co-equal and comprehensive labour statutes of the Province. The alternative may be to accept that in some instances the potential multiplicity of proceedings is the appropriate price to pay for adherence to legislative supremacy: *Canada Post Corporation v. Barrette*, [1999] 2 F.C. 250 (T.D.) at paras. 72-79.

To summarize, we find that 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*. No grievance has been initiated so as to even trigger the discretion in s. 76(2)(e), and even the ability to file a grievance is questionable in this case. In all these circumstances, we have no hesitation in concluding that the Director properly agreed to receive and investigate this complaint. It follows that the employee had the concomitant statutory right to an appeal on the merits before the Tribunal.

d. The Director's "bias" submission

While not strictly necessary in view of our conclusion above, we would be remiss if we did not comment briefly on that portion of the Director's submission headed "APPREHENSION OF BIAS". The Director has submitted as follows:

> In the course of researching this reconsideration request, the Director has become aware of a concern which arises in this type of case. If there is an overlap, or indeed a conflict between the Act and interest arbitration, then it may be perceived that those who both adjudicate for the Employment Standards Tribunal, and act as interest arbitrators under the British Columbia Labour Relations Code, may be perceived as having a bias toward the latter forum and process. It is also possible that expertise developed by adjudicators under the Act would place the adjudicator in a superior position for the assignment of interest arbitrations under the Code. It may be alleged that this could affect their neutrality and regard of the public policy purposes of the Act.
>
> While the Director, in no way, wishes to allege or even suggest such a concern arising in the facts of this matter, the relevance of the concern is certainly highlighted by the Appeal Panel Order.

Not a single authority is cited in support of the speculations asserted. No factual context is given to explain why a person who is both an adjudicator and an arbitrator would have a preference for one forum over another, let alone how that would affect their impartiality. The Director does not explain how an individual decision that the *Act* defer to grievance arbitration "would place the adjudicator in a superior position" for the assignment of *Code*

arbitrations. Nor does the Director explain how, by parity of her reasoning, adjudicators who are not grievance arbitrators (two of whom are sitting on the present panel) are not at risk of "bias" in accepting her submission that the *Act* prevails. As the Director is at pains to deny any attempt to allege bias on the facts here, we find ourselves genuinely perplexed about her point.

Aware as we are of the Director's unique role under the legislation, we are reminded of the Court of Appeal's wisdom in *Adams v. Workers Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at p. 231:

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide the rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

As these reasons disclose, situations may indeed arise where, as the Director puts it, there is "an overlap, or a conflict" between the *Act* and grievance arbitration. As this decision discloses, such cases may well raise difficult "choice of forum" issues in the future. Any party concerned about the ability of an adjudicator to determine those issues without bias should have the fortitude and the evidence to assert the allegation openly and at the outset of the hearing. To raise such issues indirectly and only after obtaining a result the party does not agree with, as has been done here, is inappropriate and unhelpful.

IV. ORDER

For the reasons we have given above, the circumstances of this case compellingly favour the *Act* as the appropriate forum for the resolution of this dispute.

By way of remedy, we have considered whether to remit the matter to the original arbitrator, or to vary the order to one remitting the matter back to the Director for further investigation.

In light of the Director's intended concession that the investigation was incomplete (p. 2, *supra*) and given our view that it would be preferable for the Director to issue findings based on a complete investigation before this matter returns to the Tribunal, we hereby vary the

adjudicator's order to an order remitting the matter to the Director for further investigation. Following that investigation, the Director will issue a fresh determination, from which both parties will have the right of appeal to this Tribunal if it is not otherwise resolved between them.

FRANK A.V. FALZON

Frank A.V. Falzon
Adjudicator, Panel Chair
Employment Standards Tribunal

FERN JEFFRIES

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