Borden Ladner Gervais

Case Law Update: Brown v. University of Windsor (2016 ONCA 431)

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The Ontario Court of Appeal has recently determined that in a unionized workplace, a dispute about whether the employer has complied with its obligations under the Employment Insurance Premium Reduction Program under the *Employment Insurance Act*, must be determined by an arbitrator appointed under the collective agreement, and not by a court.

This decision reinforces the now well-developed jurisprudence with respect to the exclusive jurisdiction of a labour arbitrator to interpret employment statutes (notably *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, and *Parry Sound (District) Social Services Administration Board v. OPSEU Local 324,* 2003 SCC 42 (CanLII), [2003] 2 S.C.R. 157), and it also overturns existing jurisprudence with respect to the Employment Insurance Premium Reduction Program. Previous court and arbitrator decisions in Ontario had determined that court actions could be brought in disputes about an employer's administration of the Program in unionized environments (*Rathwell v. Hershey Canada* (2001), 152 O.A.C. 1 2001 CanLII 8598 (C.A.), leave to appeal to the S.C.C. denied, (2002) 164 O.A.C. 279, and *Hershey Canada Inc. v. United Steelworkers of Canada, Local 461* (1997), 50 C.L A.S. 249, 1997 CarswellOnt 6984 (Thorne). The Court of Appeal has now clarified this question.

In this case, the Court of Appeal overturned an order by Justice Scott K. Campbell of the Superior Court of Justice who had applied the well-known *Weber* principle, and determined that the essential character of the claim was the employer's alleged misappropriation of, or failure to account for, employment insurance premiums belonging to its employees. Justice Campbell rejected the University's position that the dispute was essentially about compensation, and relied on the previous jurisprudence on point.

In overturning Justice Campbell's decision, the Court of Appeal also applied the *Weber* principle, and adopted the British Columbia Court of Appeal's articulation of the legal test (*Parry Sound* in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2005 BCCA 92 (CanLII), 136 L.A.C. (4th) 225, leave to appeal to SCC refused, [2005] S.C.C.A. No. 180):

[The question is] whether there is a real contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement.

The Ontario Court of Appeal found that the *Employment Insurance Act* provisions at play are employment related under section 48(12(j) of the *Labour Relations Act*, since under the scheme of the Employment Insurance Premium Reduction Program, the employer is obliged to remit to employees a share of the premium reduction in the form of cash or enhanced benefits. It found that, although the collective agreement did not mention the Program, it does deal with pay and benefits and it would violate the collective agreement to fail to provide employees with the pay or benefits to which they are entitled. It held that the essential nature of the dispute is whether employees have received the full amount of pay or benefits to which they were entitled, as informed by the *Employment Insurance Act*. The

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matter was therefore found to be within the exclusive jurisdiction of an arbitrator appointed pursuant to the collective agreement and the *Labour Relations Act*.

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