Case In Point

Receipt of WSIB Benefits Bars Claim for Additional Monetary Damages at Arbitration

Date: December 21, 2012

An arbitrator recently affirmed that a grievor is not entitled to monetary damages under a collective agreement where that grievor has received benefits from the Workplace Safety and Insurance Board ("WSIB") in respect of the accident for which damages are claimed.

Arbitrator Howe considered section 26(2) of the *Workplace Safety and Insurance Act* ("WSIA") and its predecessor provision in the context of a TTC employee who suffered a compensable workplace accident during a TTC repair operation. As a result of that accident, the employee received various benefits under the WSIA, and the Ministry of Labour conducted an investigation and issued orders against the employer under the *Occupational Health and Safety Act* ("OHSA"). The employee grieved that he was entitled to additional remedial relief under the collective agreement.

Section 26(2) of the WSIA states that benefits received under the WSIA are in lieu of **all rights of action** against an employer (among others) where the worker has suffered a compensable accident or has contracted an occupational disease. The predecessor provision to section 26(2) of WSIA stated that WSIB benefits would be in lieu of "**all rights and rights of action** " against the employer (among others). (emphasis added)

This section of the WSIA reflects the "historic trade-off" fashioned in 1914 with the introduction of workers' compensation legislation. Pursuant to this historic trade-off, a worker is entitled to benefits regardless of whether the worker or the employer was wholly or partly responsible for the accident. In exchange for this no-fault system, a worker who receives workers' compensation benefits is precluded from suing his or her employer (among others). This was a fundamental point argued by counsel for the TTC, Hicks Morley's Dolores Barbini.

The union argued that the deletion of the term "all rights" in the amended section 26(2) permits arbitrators to award remedies to employees who suffer losses arising from workplace injuries. In particular, such remedies may be awarded where an injury is suffered as a result of an employer's failure to provide a safe workplace and to take every reasonable precaution for a worker's protection as required by OHSA. The grievance, the union said, was based on the violations of OHSA and the collective agreement, and not the accident itself, and that damages could be awarded for such violations regardless of the fact that the employee had received WSIB benefits.

Arbitrator Howe disagreed that a substantive change had resulted from the amendment to section 26(2) of the WSIA. He reviewed the legislative history of the change to section 26(2) and the deletion of the words "all rights", and found that nothing in the Minister's commentary suggested that the substantive meaning of the provision had changed. The Arbitrator also embarked on a review of the jurisprudence and adopted the reasoning of a recent Ontario Grievance Settlement Board ("GSB") decision. The GSB concluded that the deletion of the term was to correct a redundancy, and that if a fundamental change to the legislation and the historical trade-off had been intended, there would have been some record of that change. Moreover, there was no reason why workers governed by a collective agreement should be treated any differently under the WSIA than those who are not. The GSB decision was upheld at Divisional Court.

In concluding that no arbitral damages could be awarded, Arbitrator Howe left open the possibility that non-monetary remedial relief might be available.

Based on this decision and those considered by Arbitrator Howe, it is important that employers understand the interplay between the WSIA, OHSA and their collective agreements. It should be noted that these decisions do not preclude

entitlement to monetary relief if the collective agreement expressly provides for it. Accordingly, we recommend that employers carefully consider any proposed changes to workplace safety provisions in their collective agreements that might affect their workplace safety obligations and corresponding liabilities.

Amalgamated Transit Union Local 113 and Toronto Transit Commission (5 November 2012, Howe)