

Case In Point

Appellate Court Finds Labour Arbitrator has Jurisdiction in EI Premium Reduction Case

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In a recent decision, the Ontario Court of Appeal underscored the importance of judicial deference to the arbitration and grievance process.

In [Brown v University of Windsor](#), the president of the University's faculty association had commenced an action against the University claiming that it had failed to satisfy the requirements of the Employment Insurance Premium Reduction Program (EIPRP). The EIPRP is governed by the *Employment Insurance Act* and its regulations and allows employers to reduce their employment insurance premiums if they have acceptable wage loss plans in place. If the employer qualifies for the EIPRP, it needs to provide part of the reduction to employees either through a payment or through added benefits. The collective agreement between the parties did not deal explicitly with the EIPRP.

The University brought a motion for dismissal on the basis that the court lacked jurisdiction to entertain the matter, arguing that exclusive jurisdiction belonged to a labour arbitrator.

The motion judge held that the matter was a claim outside the jurisdiction of a labour arbitrator and dismissed the motion. In reaching his decision, the motion judge gave considerable weight to the *Hershey/Rathwell* line of cases that involved a nearly identical claim by unionized employees that the employer had failed to remit the statutorily required portion of the premium reduction under the EIPRP to employees. However, in the *Hershey/Rathwell* cases, the decision-maker had failed to conduct a *Weber* analysis to determine "whether the dispute, in its essential character, [arose] from the interpretation, application, administration, or violation of the collective agreement." Furthermore, those cases pre-dated the Supreme Court of Canada's decision in *Parry Sound*.

The motion judge stated the *Weber* test and concluded that the University's failure to comply with the provisions of the EIPRP was not within the ambit of the collective agreement, relying on the legal characterization of the dispute in the *Hershey/Rathwell* cases. He concluded that the claim was within the jurisdiction of the Court. The motion judge also held that it was unnecessary to deal with s.48(12)(j) of the *Labour Relations Act, 1995* (LRA) in light of his conclusion that the court had jurisdiction.

The University appealed. The Court of the Appeal held:

- The motion judge erred in conducting his *Weber* analysis. Although he correctly stated the test, his conclusion that the EIPRP dispute (its "essential character") was not within the ambit of the collective agreement was heavily informed by the legal characterization in the *Hershey/Rathwell* line of cases. The legal characterization of a dispute is not a deciding factor in the *Weber* analysis; rather, the "nature of the dispute is based upon the factual context in which it arises."
- The motion judge failed to properly consider the importance of s. 48(12)(j) of the LRA, which provides labour arbitrators exclusive jurisdiction to interpret and apply employment-related statutes. The Court noted that "an alleged contravention of an express provision of a collective agreement is not a condition precedent to an arbitrator's jurisdiction to interpret and apply the substantive rights and obligations of employment-related statutes."

The Court held that s. 48(12)(j) of the LRA sets forth a "one-step approach". The test to determine whether that section applies is to consider "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." While the



collective agreement did not specifically deal with the EIPRP, it did deal with pay and benefits. There was a real contextual connection between the EIPRP and the collective agreement and the essential character of the dispute arose from the interpretation, application, administration or violation of the collective agreement.

The Court of Appeal stayed the action. This decision confirms that it is within the exclusive jurisdiction of labour arbitrators to interpret employment statutes where they create substantive rights and obligations that inform the interpretation and the application of collective agreements.

The University of Windsor was represented in this case by Hicks Morley's Michael Kennedy.