

Discrimination at work: Grievance Arbitrator or Human Rights Tribunal of Quebec... The debate rages on!

By **Véronique Morin**

On November 30, 2006, the Human Rights Tribunal of Quebec released a judgment in which it concluded that a grievance arbitrator did not have jurisdiction over litigation stemming from allegations of employment discrimination.

*In the case of *Commission des droits de la personne et des droits de la jeunesse v. Procureur général du Québec*¹, the Human Rights Tribunal (hereinafter, the "HRT") held that it (the Tribunal) "constitutes a more appropriate forum for the dispute" and that, accordingly, the jurisdiction of the grievance arbitrator could not take precedence.*

This interlocutory judgment of the HRT was the subject of an application for leave to appeal, which was dismissed by a Judge of the Quebec Court of Appeal.

An employer who is the subject of an investigation by the Human Rights Commission should, therefore, remain vigilant if the Commission intends to assert jurisdiction over litigation concerning employment discrimination involving a unionized employee.

Indeed, the conclusion of this recent judgment of the HRT is based on certain specific circumstances and may not exclude the general principles established by the courts of justice with respect to the specialized jurisdiction of grievance arbitrators.



The context

The complainant was employed by the Ministère de la Sécurité publique. He lost his employment in a detention facility in July 2001 following an assessment of his probationary period.

While the complainant asserted that he was the victim of discriminatory actions during his probationary period, sexual harassment complaints had been made against him.

In September 2001, the complainant commenced a probationary period in another detention facility and was again the subject of complaints. On September 24, 2001, the complainant was temporarily relieved of his duties and on September 27, 2001, his probationary period was terminated.

The complainant was a unionized employee, covered by a collective agreement.

On September 25, 2001, the complainant filed a complaint with the Human Rights Commission, which, in March 2005, recommended certain remedial measures.

A motion to institute proceedings was filed before the HRT on March 30, 2006, which basically sought the issuance of a reinstatement order and the payment of material, moral and punitive damages.

Summary of the analysis of the grievance arbitrator's jurisdiction

The judgment refers to certain decisions dealing with the respective jurisdictions of the HRT and the grievance arbitrator.

On the one hand, the HRT recognizes the exclusive jurisdiction of the grievance arbitrator, which excludes jurisdiction of the Courts.

On the other hand, the HRT refers to the judgment of the Supreme Court of Canada in the *Parry Sound*² case, which held that all provisions pertaining to human rights and freedoms, or those of public order respecting labour law, implicitly form part of all collective agreements. Thus, grievance arbitrators have jurisdiction to deal with such issues.

¹ D.T.E. 2007T-61, paragraph 61.

² *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157.



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The HRT then reviews various judgments regarding the dividing line between the jurisdiction of the HRT and that of the grievance arbitrator and, in particular, in the light of the judgment of the Supreme Court of Canada's judgment in the case of *CDPDJ c. Procureur général du Québec*³ (commonly referred to as the *Morin* case).

In that case, the Supreme Court of Canada opted for the jurisdiction of the HRT over that of the grievance arbitrator for various reasons, explaining, among other things, that “*the dispute ... engages matters which pertain more to alleged discrimination in the formation and validity of the agreement, than to its “interpretation or application”, which is the source of the arbitrator’s jurisdiction under the Labour Code, s. 1(f).*”⁴

Lastly, relying upon certain other judgments of the Supreme Court of Canada and the Quebec Court of Appeal, the HRT states that the jurisdiction of the grievance arbitrator does not appear to exclude that of the HRT in all circumstances.

Also relying on more recent judgments of the Quebec Court of Appeal (in matters of pay equity and with regards to a policy of sexualizing jobs in health care institutions), the HRT emphasizes the necessity of determining whether all the remedies sought in a complaint may be granted by the grievance arbitrator.

³ [2004] 2 S.C.R. 185.

⁴ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, paragraph 25.

⁵ D.T.E. 2007T-61, paragraph 41.

The specific facts of the case

Firstly, the HRT establishes that the termination of the complainant's employment occurred prior to the issuance of the judgment in the *Parry Sound* case and, therefore, the complainant did not have access to the grievance process before the findings of the Supreme Court in that case⁵:

[Translation]

“[41] Indeed, notwithstanding stipulations to the contrary in a collective agreement, the right of a probationary employee to the grievance process cannot be doubted today, since the *Parry Sound* case, when the dispute relates to a law pertaining to human rights or other laws pertaining to employment, the contents of which are implicitly incorporated in the collective agreement [...]”

The HRT recognizes that a grievance arbitrator has jurisdiction to issue a reinstatement order and award compensation for material, moral and punitive damages.

However, the HRT finds that the arbitrator would be expressly precluded from awarding damages to the complainant in view of a specific clause in the collective agreement.

In response to an argument of the attorney general on that last issue, the HRT agrees that a grievance arbitrator could set aside a particular provision of a collective agreement precluding him from awarding damages to the extent that such provision would be contrary to the provisions of the *Civil Code of Quebec* or the *Charter of Human Rights and Freedoms*.

The HRT nevertheless concludes that it is the appropriate forum to provide complete redress for the damages suffered by the complainant in this case and therefore has jurisdiction.

Some thoughts

This judgment of the HRT may appear to be an extension of the jurisdiction that it has in matters of discrimination in a unionized environment, while the Supreme Court of Canada, in the above-mentioned *Parry Sound* case, confirmed that a grievance arbitrator is implicitly required to enforce collective agreements in compliance with legislation pertaining to fundamental rights and freedoms.

It cannot be denied that the particular circumstances of the case seem to constitute the decisive factor in this recent judgment of the HRT.

Following this judgment, the Human Rights Commission may be tempted to assert jurisdiction over disputes that should normally be within the jurisdiction of a grievance arbitrator. It will then be appropriate to challenge the position of the Commission should it wish to ignore the particular circumstances of the dispute submitted to the HRT and claim jurisdiction over all issues of employment discrimination in a unionized environment.

From this perspective, prudent employers will be watchful and assert their rights in situations where the Human Rights Commission lacks jurisdiction with respect to litigation that should, under principles inherent to labour relations, be heard by a grievance arbitrator. Where appropriate, the employer will analyze the situation and adopt a position as soon as the complaint is filed and during the investigation.

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