

**ONTARIO COURT OF APPEAL FINDS THAT GRIEVANCE DOES NOT AUTOMATICALLY
SUCCEED WHERE EMPLOYER FAILS TO DISCLOSE EVIDENCE**

Ontario v. Crown Employees Grievance Settlement Board (June 26, 2006) (Ontario Court of Appeal)

By Cynthia K. Kontra

The Ontario Court of Appeal recently quashed the award of an arbitrator who upheld a union's grievance after hearing that some of the evidence had been lost by the employer. The Court found that the arbitrator was not entitled to allow the employee's grievance without hearing evidence on its merits even though the employer breached its duty to disclose. It held that such a remedy was extreme, unusual and not in keeping with the jurisprudence, especially where the non-disclosure was inadvertent.

Facts

Don Larman, a parole and probation officer in St. Catharines employed by the Ontario Government's Ministry of Family and Children's Services, had been before the grievance settlement board many times. In 1999 and 2001, grievances involving Larman were settled on terms requiring the employer to remove documents from his file and prohibiting the Employer from relying on the documents in the future. In 2002, grievances were settled that required the Employer to hire an outside workplace review consultant to assess the situation at the office. The Employer also agreed as part of the settlement not to discipline Larman on the basis of allegations found in an investigative report from 2001 and not to give the consultant a copy of the report.

The Employer entered into a contract with Mediated Solutions Incorporated ("Mediated Solutions") to conduct the review. The contract stipulated that Mediated Solutions was to maintain confidentiality of all documents provided by the Employer and not to destroy any documents without the Employer's prior written permission. The Mediated Solutions report recommended that the Grievor be relocated to another office in light of his history of conflicts in his home office. As a result of the report, Larman was transferred.

Larman, through his Union, grieved that the transfer was a violation of the 2002 settlement. The Union argued that the Employer had given the investigative report to Mediated Solutions, and disciplined Larman on the basis of the investigative report contrary to the terms of the settlement. The Union demanded disclosure of the documents provided to Mediated Solutions. The Employer refused, and Larman filed a second grievance, alleging breach of the collective agreement for non-disclosure. The Employer then advised the Union that, contrary to its contractual duty, Mediated Solutions had destroyed all the documents it received and all notes made; it also advised that there was no record of the documents given to Mediated Solutions by the Employer.

The Union moved to have the grievances granted because of the non-disclosure, arguing that it could not advance its case, it was denied natural justice, and to proceed would constitute an abuse of process. The arbitrator allowed both grievances, holding that while the Employer did not intentionally disregard its duty to disclose, the destruction of the documents irreparably damaged the Union's ability to advance its case and precluded the possibility of a full and fair hearing. The Employer applied for judicial review, arguing that the arbitrator had denied its right to natural justice by refusing to hear evidence on the merits of the case. The Ontario Divisional Court dismissed the application by applying the standard of reasonableness. The Employer appealed the Divisional Court's decision.

Decision

In a majority (2-1) decision, the Ontario Court of Appeal held that the arbitrator erred in allowing the grievance without hearing all the evidence that was available. Mr. Justice Robert Sharpe (Justice Eileen Gillese concurring) stated:

“Inadvertent destruction of evidence can be remedied in a variety of ways. An adverse inference can be drawn against the party who bears the obligation to produce the document or evidence in question... Similarly, the party failing to produce relevant material may be precluded from relying on that or related documents or evidence... No case was cited to us for the proposition that a claim or grievance can be allowed, without hearing all the evidence that is available, on the ground that the responding party inadvertently failed to produce relevant documents or evidence.”

The Court found that this was not a case of deliberate failure to comply with an order amounting to a bad faith attempt to thwart the arbitration process. “Allowing the grievance on the ground that evidence had been lost was, in my view, an unusual and extreme remedy that cannot be supported on the basis of [the] jurisprudence,” Justice Sharpe stated. The result, in the majority's view, was to deny the employer's “natural justice right to present [its] case and have it considered fairly.”

Instead, Justice Sharpe observed, the Union could have cross-examined Ministry employees and the consultants to determine what documents had been provided to the consultants, and the extent to which they relied on prohibited information, if they did so at all. In the end, if there remained any significant doubt about whether or not the Employer had violated the terms of the settlement by providing Mediated Solutions with forbidden information, the arbitrator could have drawn an adverse inference against the Employer on the ground that the documents had been destroyed and allowed the grievance on that basis. Justice Sharpe stated that, in his view, it was an error meriting the intervention of judicial review for the arbitrator to leap to the conclusion that the grievance had to be allowed on the basis of lost evidence without hearing all the evidence that was available.

Dissent

Justice Stephen Goudge disagreed. In his view, the award was in fact reasonable in the sense that it was supported by reasons that could stand up to a “somewhat probing examination.” The Employer was legally responsible for the consultants' destruction of notes and documents, the destroyed material was central to the union's case, there were no other remedies that would cure the prejudice since the material was a critical tool in cross-examination, and it was not unreasonable for the arbitrator to conclude that the alternative of drawing adverse inferences would not completely cure the prejudice to the union.

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