Re Leeming[1]: Is A Statutory Provision For Adjudication a Substantive or Procedural Right?

CASE SUMMARY

Mary Leeming was employed as a Secretary I at the District #20 School Board Office by the New Brunswick Department of Education. Without warning she was discharged. As a probationary employee under the Collective Agreement, Mrs. Leeming was specifically excluded from recourse to the grievance procedure. She lodged a grievance under Section 91(1) of the *Public Service Labour Relations Act* which provides for a grievance process where no administrative procedure for redress is provided. The adjudicator found her dismissal was a disciplinary action. He held the collective agreement could not remove the grievor's statutory right to take the discharge to arbitration and ordered the grievor reinstated. On appeal, the New Brunswick Court of Appeal affirmed the adjudicator's decision that the grievor was wrongly dismissed but allowed in part that the adjudicator had exceeded his jurisdiction in ordering her reinstatement. On appeal, the Supreme Court of Canada held, reversing New Brunswick Court of Appeal, that the *Public Service Labour Relations Act* does not confer substantive rights upon employees in addition to their rights as defined in the collective agreement.

HISTORICAL BACKGROUND

Public Service employees were accorded the statutory right to take a grievance to adjudication in the *Public Service Labour Act.* From its inception in 1968, the Act included the provision in section 91 which entitled the employee to grieve a matter in dispute and in section 92 to refer an unsatisfactory resolution of the matter to adjudication. Sections 91(b) and 92(1)(b) read as follows:

> 91(1)(b) Where any employee feels himself to be aggrieved
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> > (b) as a result of any occurrence or matter affecting his terms and conditions of employment, other than a provision described in subclause (i) or (ii) of clause (a),
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> in respect of which no administrative procedure for redress is provided in or under an Act of the Legislative Assembly, he is entitled, subject to subsection (2), to prevent the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

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[1]*Re Leeming* (1981), 118 D.L.R. (3d) 202, (S.C.C.)

> 92(1)(b) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
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> > (b) disciplinary action resulting in discharge, suspension or a financial penalty,
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> and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.[2]

The right of an aggrieved employee to be adjudicated by a third party implies a basic right, the substantive right to have a hearing. Some collective agreements, however, have singled out probationary employees for separate treatment. It has not been unusual for unions to bargain away a probationary employee's right to a hearing in the event of a dismissal. The following clause in the collective agreement was at odds with the statutory provision in s. 91:

> 22.01(e) A "probationary" employee may be employed either full-time or part-time. Newly hired employees shall be considered on a probationary basis for a period of one hundred (100) working days. During the probationary period, employees shall be entitled to all rights and privileges of the Agreement, except with respect to discharge. The employment of such employees may be terminated at any time during the probationary period without recourse to the Grievance Procedure.[3]

At issue was whether the provision in the collective agreement could stand, given the provision in the labour legislation. Cases in the early Seventies favored the management position. The probationary period was merely an extension of the hiring process, an on-the-job assessment, which resulted in acceptance or non-acceptance. Non-acceptance concluded the assessment and was not to be seen as a discharge.[4] Employers argued that a job interview often did not give them the appropriate information to make a proper decision. Only efforts put forth within the work environment could afford the necessary basis from which to judge.

Trutschler C.J. expressed a similar position in *Pioneer Electric Manitoba Ltd.*:

> A probationary employee can have many grievances requiring resolution but that is not to say that he may grieve against the decision of management not to admit him to the status of a permanent employee. It would require very plain words to thus negate the whole concept of probation.[5]

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[2]R.S.N.B. 1973, c. P-25.

[3]*Collective Agreement between the New Brunswick Treasury Board and CUPE, New Brunswick Council of School Board Employees,* Article 22.01 (e).

[4]*Forest Industrial Relations and the International Woodworkers of America* (unreported) a B.C. Arbitration award of then Chief Justice Sloan.

[5]*Pioneer Electric Manitoba Ltd.*, [1971] CLLC 14,071 (Man. QB) at 316.

Tritschler CJQB (as he then was) made the statement following dismissal of a probationary employee under an article in the collective agreement which provided for a 70 day probationary period before a newly-hired employee was put on the seniority list.[6] The decision defends the right of management to make such recommendations regarding the denial of seniority and the decision defines such management functions as being beyond the prerogative of the Labor Relations Board.

The Labor Relations Board of British Columbia examined a similar clause in the Collective Agreement under consideration in *Cassiar Asbestos*[7]:

> The Company may at any time during his period of probation terminate the employment of a probationary employee. Such employee shall have the right to grieve in respect of any matter other than his discharge or seniority.[8]

The issue was whether such a provision could stand given Section 93 in the Labour Code providing for resolution of all disputes by arbitration. After discussing the "right to manage" position from *Forest Industrial Relations* and *Pioneer Electric,* the Board viewed the conflict from the employee's position. The very origin of the arbitration provision in the statute was the result of an attempt to provide "a satisfactory alternative to direct job action by employees."[9] While termination without just cause during probation may be a management prerogative, the practical side of the issue is that employees will indeed react to what they perceive as unjust treatment.

> "There is no single greater cause of wildcat strikes than group reaction to what is believed, rightly or wrongly, to be the unfair dismissal or discipline of a fellow employee . . . Whatever be the proper legal characterization, the practical reality is that some employees react very differently to the loss of a job by someone who may have worked alongside them for a month or two than they would to the refusal to hire an applicant in the personnel office.[10]

The *Cassiar* case determined that the issue was not freedom to contract, but the fact that "the legislature deliberately withheld that kind of freedom from the parties."[11] Freedom to contract here is used in the context of stipulating that a probationary employee does not have the right to grieve dismissal. It is for reasons of public policy stated below that this case suggests the legislation should prevail. Freedom to contract away the right to adjudication is denied because the adjudication is seen

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[6] *Ibid.*, p. 315.

[7] *Cassiar Asbestos Corporation and United Steelworkers of America* Local 6536, [1975] 1 CLRBR 212.

[8] *Ibid.*, p. 213.

[9] *Ibid.*, p. 216.

[10] *Ibid.*, p. 216-217.

[11] *Ibid.*, p. 217.

as the screening process through which abuse might be detected. It is quite possible that a probationary employee could be dropped for reasons other than a hiring assessment. An employer could be motivated by discrimination, by incomplete information, or by a desire to punish. There are all elements lying outside the purpose of the probationary provision. "The effect of a ban on arbitrability, such as is contained in the Collective Agreement, is to put a blanket immunity around errors or abuses of the latter kind."[12]

The B.C. Board said the statute prohibited the parties in violation thereof from ensuring that the grievances of probationary employees did not see the light of day. The statute only stipulates that the grievor appear before an arbitrator.

> . . . Our interpretation of s.93(1)(b) is that once the parties inserted such provisions into their agreement, they were then required to allow disputes about their operation to be dealt with under the arbitration procedure which was adopted under this agreement as the method for setting disputes without stoppage of work.
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> That conclusion still leaves it up to the parties to turn their minds to defining the specific standards which they wish the arbitrator to apply to disputes.[13]

Exactly what is intended by the parties who are defining the specific standards is unclear. It seems it would enable an adjudicator to hear the circumstances of the dispute and from that decide whether the guidelines in the collective agreement extended him jurisdiction. The adjudicator is in a position to filter out arbitrary abuses which were not intended to be protected by the collective agreement.

Jacmain v. *A.G. (Canada) et al* was argued by the respondents before the Supreme Court of Canada. While the issue directly raised is not the right to grieve, the jurisdiction of the adjudicator vis a vis the probationer is addressed. Pigeon J. held the adjudicator in *Jacmain* had the jurisdiction to determine whether the dismissal was a disciplinary action or whether it was merely termination at the probationary stage. In the former instance the adjudicator could proceed to hear the merits of the case, in the latter instance he could not retain jurisdiction. *Jacmain* reinforces the right to appear before an adjudicator and defines the circumstances under which he can act.

Re Paasche, when argued before the New Brunswick Court of Appeal, discussed two articles in the collective agreement. Article 17 containing

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[12] *Ibid.*, p. 218.

[13] *Ibid.*

[14] *Jacmain* v. *A.G. (Canada) et al.*, [1978] 2 S.C.R. 15 at 41-42.

the grievance procedure had been denied to probationary employees. This position was reversed by the Court of Appeal subject to Article 5.02 which created an exception for grievances for dismissal or suspension. Limerick J. A. indicates that "the purpose of the exception was merely to affirm the employer's right to terminate the employment of a probationary employee without just cause where the employer is of the opinion that the employee's performance is, or may later prove to be, unsatisfactory."[15] He points out that the wording in the collective agreement goes beyond this and denies grievance and adjudication procedures "in case of suspension or dismissal".[16] Given this circumstance the employee has recourse through the grievance procedure in the Act. While the Queen's Bench Division held that the collective agreement could not remove the substantive right of the employee to grieve, the Court of Appeal allowed the appeal and held the chairman of the Public Service Labor Relations Board could not expand upon provisions made in the collective agreement.

In April of 1980 the Ontario High Court analyzed two provisions of a collective agreement in *Toronto Hydro.*[17] One article in the collective agreement provided for grievance procedures and stipulated that no employee be dismissed without just cause. A separate article denied the grievance procedure in respect of dismissal to probationary employees. The court dubbed the former provision as a "substantive right" and the latter as "procedural." They found the article denying the grievance procedure was at odds with both the substantive right and with a statutory provision that all differences arising from the collective agreement are subject to arbitration and they declared it void. The Ontario Court of Appeal affirmed the decision[18] just before the Supreme Court of Canada handed down the decision in *Re Leeming.*

THE PRINCIPAL CASE

The Supreme Court of Canada after hearing *Re Leeming,* held Sections 91 and 92 of the Act did not confer substantive rights upon employees in addition to their rights as defined in the collective agreement. The greater part of the decision is devoted to recounting the case at the lower court level. There are three significant statements of Martland J. which lend themselves to thoughtful interpretation.

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[15]*Re Paasche* (1979), 26 NBR (2d) 199 at 208 (NBCA).

[16]*Ibid.*

[17]*Re Toronto Hydro-Electric System and Canadian Union of Public Employees, Local 1,* (1981), 29 OR (2d) 18 (Ont. High Ct.).

[18]*Re Toronto Hydro-Electric System and Canadian Union of Public Employees, Local 1,* (1981), 20 OR (2d) 64 Ont. C.A.

> . . . it is my opinion that the employer was entitled to terminate the respondent's employment without cause. At the time of the termination of her employment, the respondent was a probationary employee. The requirement contained in 10.01 for the employer to show just cause for the suspension or discharge of an employee applied only to an employee who had completed his probationary period.[19]

This is not a difficult position to accept since there is *no* statutory provision requiring dismissal be *only* for just cause. Hence, such a provision in a collective agreement is not at odds with public policy. The reasons an employer should be able to dismiss a probationary employee at will are mentioned above.[20] The legislature has not seen fit to deny that freedom by stipulating dismissal must only be for just cause.

After distinguishing and dismissing *Re Paasche,* Martland J. discusses Sec. 65 of the *Public Service Labour Relations Act* which provides that "a collective agreement is subject to and for the purpose of this act binding upon employees in the bargaining unit. The respondent was therefore bound by the Provisions of Articles 10.01 and 22.01 (e) unless there can be found in the Act some provision which dismissed their impact on her."[21] The court has stipulated this right is contained in the Collective Agreement. As a right for probationary employees, unions may chose to defend it or bargain it away.

Martland J. does not define a substantive right in the context in which he uses it. Neither does he define a procedural right. This failure to amplify the meanings of these key words, leaves them open to iterpretation.

A distinction is made between them in *Blacks Dictionary* under the definition of Procedural law:

> As a general rule, laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are 'substantive laws' in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in court are 'procedural laws.'[22]

And so it may be argued that the right to grieve is procedural but the right to relate the merits of the case is substantive or perhaps it is the converse. It can be argued that both aspects are substantive. It may even be suggested that the right to appear before an adjudicator is both

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[19]*Supra,* footnote 1, at 205.

[20]These reasons are put forth in both *Forest Industrial Relations* and *Pioneer Electric* supra.

[21]*Supra,* footnote 1, at 206.

[22]Black, Henry Campbell, *Black's Law Dictionary 5th Edition,* West Publishing Co., St. Paul, Minn., 1979, 1083.

procedural and substantive. The debate over semantics has perhaps clouded the issue as was expressed by Reid, J. in his dissenting judgement in *Toronto Hydro:*

> . . . I do not find it edifying to label one provision in an agreement as conferring a "substantive right" and labelling another as "procedural." If that device is to be used it is equally appropriate to reverse the labels, or to label both articles as procedural or both in terms of rights. What is to prevent one from saying that both deal with rights and that the right conferred on the employees at large was specifically withheld from certain probationers? Why, on the language of this agreement, is that not as valid as the reverse?[23]

In what must be considered the most significant paragraph of the *Leeming* decision Martland, J. states:

> In my opinion, sections 91 and 92 of the Act do not purport to confer substantive rights upon employees in addition to their rights as defined in the Collective Agreement. They define the circumstances in which an employee who feels himself to be aggrieved may present his grievance at each level up to the final level in the grievance procedure (S. 91) and in which, *after having presented his grievance up to that level, he may refer it to adjudication (s. 92). However, the grievance submitted must be determined* in accordance with the provisions of the Collective Agreement.[24]

The emphasized words envision a right to the grievance process. By assuming the grievor is entitled to present his position, Martland J. has put the statutory right to adjudication ahead of the prohibitive provision in the collective agreement. It is clear from the emphasized words that Martland J. intends that all employees, probationary, management or otherwise, are entitled to appear before an adjudicator.

The adjudicator's first task is to determine whether the employee is entitled to a hearing on the merits of the case. What determines the employee's entitlement?

The unionized employee will have his rights determined in accordance with the Collective Agreement. The terms of the Agreement will dictate to the adjudicator whether he has the jurisdiction to hear the merits of the case.

The rights of the non-unionized or management employee are to be found in the individual contract of employment, itself subject to provisions of the Financial Administration Act (Sec. 6), and such other statutes as govern the setting of terms and working conditions in the public sector.

Confusion arises with the statement of Martland J. ". . . and Article 22.01 (e) enables the employer to terminate the employment of a pro-

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[23]*Supra*, footnote 17, at 23-24.

[24]*Supra*, footnote 1, at 207.

bationary employee without recourse to the grievance".[25] In light of his previous statement which confers precedence to the statute, article 22.01(e) should have been struck down as void unless the arbitrator determines that what the parties intended by Article 22.01(e) was that the employer need not show just cause to dismiss a probationary employee.

THE ANALYSIS

Labor law principles need not suffer greatly from the decision in *Re Leeming*. There is a dearth of appropriately applied precedent within the decision. Of the two cases considered, one was distinguished and dismissed. The more notable of the cases presented in the Respondent's factum, *Jacmain* v. *A.G. (Canada)*, was not considered by the court at all.

The brevity of the decision is a serious deficiency and has permitted the import of the case to be misconstrued. There are two steps to the grievance procedure, the first of which is the right to appear before an adjudicator. This right is provided by statute and is defined by the principal case as a procedural right. Therefore, by statute, everyone has a right to appear before an adjudicator. The second step is the grievor's right to tell his story once he is before the adjudicator, that is, the right to a hearing on the merits of the case and to a decision from the adjudicator. This right is defined by the instant court as a right that is governed by the collective agreement. The parties are free to bargain this right away if they wish. It is important to note that if an Agreement prohibits a probationary employee from grieving a discharge, it is not the Supreme Court in *Leeming* which removed the right. It is the Union and the Company at the bargaining table.

Re Leeming has been perceived in a rather negative light. The basic Canadian practice of third party arbitration and the ability to turn to a neutral third party affords a great protection in our system. Without such a right the employee can be subject to the very arbitrary decision of an employer, with no available remedy. At a time when expansion of access to a neutral third party is seen as a good thing, the *Leeming* decision has been interpreted by many to cut off that access.

A useful application of *Re Leeming* in argument is on the narrow aspect that it does in fact ensure the right to appear before a neutral adjudicator. A careful examination of the words of Martland J. reveals that regardless of the "procedural" label, he sees that grievance procedure as essential. The case can serve in this narrow perspective as well as in its currently prevalent role as a broad authority for denying rights to employees.

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[25] *Ibid.*

THE CONCLUSION

Re Leeming is authority for a statutory provision to grieve being a procedural right. Access to an adjudicator is available to all.

The adjudicator must then determine if the employee has a right to be heard on the merits of the case. The Collective Agreement will govern these rights. If there is no prohibition, the union's right to contract out of those rights will prevail. It may be possible to get around the prohibitive clause. As in *Jacmain* the wording *may* allow for distinction between rejection at the probationary stage and disciplinary dismissal. In the latter instance the adjudicator may retain jurisdiction to hear the merits. It may also be possible to argue that the wording is intended to prohibit only a grievance against probationary termination, not wrongful dismissal.

There is a lesson in the *Leeming* case for employers who wish to terminate the employment of an unsatisfactory probationary employee. Basic rules of fairness require that an employee know why he is being discharged. An employer should give an explanation to the employee verbally and in writing outlining why the employee doesn't meet the standard required by the job. An employee should have the opportunity to improve. An employer should defend his position before an adjudicator if the adjudicator assumes jurisdiction to hear the merits; had this been done in *Leeming,* the case might never have gone beyond the grievance hearing.

The lesson for employees, on the other hand, is that they must be very aware of which of their interests are being sacrificed in the Collective Agreement. Unions can't contract out of protection for probationary employees and still expect the probationary employee to be protected from another source.

As an interesting aside to this case, after *Leeming* the New Brunswick Treasury Board renegotiated with CUPE's New Brunswick Council of School Board Employees, dropping from the Agreement the restrictive article about probationary employees.

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