

Human Rights in the Workplace: The Case for A Specialized Workplace Tribunal

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I. Introduction

Human rights issues in the workplace have to be resolved by adjudicators who understand, not just the nature of human rights, but the workplace context in which such issues arise. Specialized human rights tribunals fulfilled an important function when the law respecting human rights was new, and few had the kind of expertise and sensitivity required for its development. That is no longer the case. Today, human rights principles are meant to be understood and applied in every aspect of law and, where they are not, the courts are prepared to intervene. The Human Rights Tribunal merely adds an additional, unnecessary and highly formalistic layer to the process of resolving those workplace disputes that include human rights issues. Instead of the present system, what is proposed here is the creation of an expanded workplace tribunal to deal with all workplace disputes, including those relating to human rights, in both the unionized and the non-unionized setting. Such a tribunal would eliminate the present procedural and policy problems created by concurrency of jurisdiction over human rights disputes in the unionized sector. More significantly, it would address the substantive concern that is highlighted by recent Human Rights Tribunal decisions affecting the workplace, which is that only a body with a specialized understanding of workplaces, whether in the union or the non-union sector, can provide a sufficiently sensitive, knowledgeable and effective resolution to workplace disputes.

II. Background

The history of human rights commissions and tribunals in Canada is one of constant evolution. Early legislation was quasi-criminal, usually providing a small fine for breaches. However, there was a high standard of proof, judges were unwilling to convict, and a conviction was of little help to the victim. In the 1950s and 60s, fair practices in accommodation and employment acts, modelled on American legislation, were introduced, which emphasized conciliation and settlement, based on methods and procedures used in labour relations. Complaints were made to administrative officials, usually in the Department of Labour, who investigated and, if unable to negotiate a settlement, referred the matter to a board of inquiry which used the civil standard of proof. The onus on the individual to pursue

human rights complaints, the reliance on civil servants who had other duties, and a lack of public awareness led to calls for the creation of separate human rights commissions. By the late 1970s, legislation, commissions and some form of adjudicative tribunal had been established in every province and at the federal level.¹

By the mid-1980's, courts had developed human rights expertise because of their supervisory role with respect to human rights legislation. No longer could the courts be considered as lacking the sensitivity, knowledge and expertise needed to deal with human rights concerns. Such decisions as *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (*O'Malley*), which introduced the concept of accommodation into a consideration of human rights legislation, and *Vriend v. Alberta*, [1998] 1 S.C.R. 493, which added sexual orientation as a prohibited ground of discrimination in the *Charter*, illustrate the courts' appreciation for the nature and importance of human rights. Moreover, the courts made it clear that all were to be cognizant of human rights. As Justice LaForest said in *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570:

The college makes a strong argument that the relatively informal arbitration process is not well suited to the volume or nature of evidence that would be led in *Charter* claims. While I agree that there is some merit to this argument, I cannot accept the college's contention that the interpretation and application of the *Charter* is vastly different from the application of ordinary statutes for which arbitrators are responsible. For example, there is little difference in certain provisions of the Human Rights Codes which arbitrators may hold to override provisions in collective agreements.

This view can be supported by *Taylor (David) & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.), where Lord Denning stated, at p. 847:

There is not one law for arbitrators and another for the court, but one law for all. If a contract is illegal, arbitrators must decline to award on it just as the court would do.

Arbitrators and labour relations boards were recognized as having not just the ability, but also the responsibility, to deal with human rights issues as they arose in the workplace. The provincial legislature specifically conferred such authority on labour arbitration boards, for example, in s. 89(g) of the B.C. *Labour Relations Code*. Following the 2007 amendments to the *Administrative Tribunals Act*, the Labour Relations Board was one of the few tribunals given full jurisdiction both to apply the *Human Rights Code* and to consider possible conflicts between the *Code* and other enactments. In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157 (*Parry Sound*), the Supreme Court of Canada dealt with the power of a grievance arbitrator to resolve the issue

¹ This account draws on several works that trace the history of human rights tribunals and commissions in Canada: *The Role of a Human Rights Commission: The Ontario Experience* by Daniel G. Hill (1969), 19 U.T.L.J., 390; *Restraining Equality: Human Rights Commissions in Canada* by R. Brian Howe and David Johnson (Toronto: Toronto University Press, 2000); and *Discrimination and the Law* by W.S. Tarnopolsky (Toronto: Richard de Boo Limited, 1982).

raised by the dismissal of a probationary employee who had taken maternity leave. Justice Iacobucci, writing for the majority, looked at the “countervailing consideration” that the human rights body responsible – in this case, the Ontario Commission – had greater expertise than grievance arbitrators in dealing with human rights violations. He said:

In my view, any concerns in respect of this matter are outweighed by the significant benefits associated with the availability of an accessible and informal forum for the prompt resolution of allegations of human rights violations in the workplace. It is of great importance that such disputes are resolved quickly and in a manner that allows for a continuing relationship between the parties. Moreover, expertise is not static, but, rather, is something that develops as a tribunal grapples with issues on a repeated basis (para. 53).

What is being argued here is that labour adjudicators should have not just the authority to deal with allegations of human rights violations in the workplace, but the exclusive jurisdiction to do so.

III. Labour Adjudicators and Not the Human Rights Tribunal Should Handle Human Rights Disputes in the Workplace

In the unionized sector, all the advantages of process, such as speed, reduced cost, accessibility and informality, lie as much, if not more, with labour adjudicators. Such advantages are undermined by the present recognition of concurrent jurisdiction with the Human Rights Tribunal, which results in forum shopping and protracted litigation. The B.C. Legislature’s attempt to deal with the problem by an amendment to the *Human Rights Code*, which provides for the deferral or dismissal of a human rights complaint where “the substance of the complaint has been appropriately dealt with in another proceeding” (s.27(1)(f)), has not proved successful. In early cases, such as *McKnight v. ICBC*, 2003 BCHRT 89, *Christopherson v. Victoria Shipyard*, 2005 BCHRT 193, and *Villela v. City of Vancouver and others (No.3)*, 2005 BCHRT 405, the Tribunal demonstrated an appropriate respect for the policy considerations underlying this legislative provision, such as the elimination of duplication and uncertainty in legal proceedings, the conservation of resources and, in relation to disputes arising in unionized workplaces, the role of a labour arbitrator in rendering conclusive and speedy resolutions to workplace disputes. In more recent decisions, however, the Tribunal has demonstrated an unduly protectionist and overly broad view of its own jurisdiction, a procedurally rigid and formal approach to decision-making, and a lack of appreciation for the realities and exigencies of the organized workplace.

A number of cases illustrate the point. In *Miller v. Northern Health Authority*, 2006 BCHRD 284, for example, the Tribunal denied an application to dismiss a human rights complaint

filed by Ms. Miller, even though her complaint had been submitted by the employer and the union to the Industry Troubleshooter provision of their collective agreement, a dispute resolution mechanism established to expedite the resolution of disputes. The provision provided for the appointment of a troubleshooter (in this instance, a labour arbitrator) to investigate the dispute and make recommendations for its resolution; failing settlement following the recommendations, the dispute was to be referred to arbitration. The troubleshooter who reviewed the grievance in issue found a violation of the collective agreement for which Ms. Miller was to be compensated and recommended that the parties seek to accommodate Ms. Miller; the employer accepted the recommendations. Nevertheless, the Tribunal declined to accept that this resolution procedure had appropriately dealt with the substance of Ms. Miller's complaint. Taking a highly technical and formalistic view of the matter, the Tribunal Member expressed her concern about the troubleshooter's failure to enunciate the relevant human rights principles, engage in a human rights analysis applicable to the dispute or address certain specific allegations in the complaint. She wanted a full oral hearing held.

The Tribunal either ignored or dismissed as irrelevant the benefits of the dispute resolution mechanism of the parties. In this case, the troubleshooters selected by the parties were all experienced adjudicators with extensive backgrounds in handling workplace disputes. Employing the informal process established by the parties, these individuals could render realistic and speedy resolutions to the parties' problems, resolutions that made sense for everyone in the workplace, including an aggrieved employee with a human rights complaint.

Similarly, in *Bates v. Overwaitea Food Group*, 2006 BCHRD 44, the Tribunal refused to defer a human rights complaint pending the conclusion of a grievance and arbitration process between the union and the employer. Once again, applying an unduly restrictive and formalistic approach to s. 27(1)(f) of the *Human Rights Code*, the Tribunal determined that the grievance process established by the union and the employer was "very different from the kind of public adjudicative process envisioned for the resolution of human rights complaints under the *Code*" (para. 24). The non-precedential nature of the grievance procedure did not, according to the Tribunal, "serve the public interest in the development and public elucidation of human rights principles" (para. 26). This, coupled with the fact that the grievance process removed each party's ability to have legal representation, formed the basis for the Tribunal Member's decision not to defer the complaint.

In these decisions, the Tribunal seems sceptical of the ability of any other body but itself to decide human rights complaints. The trouble is that other adjudicative bodies have developed their own expertise in human rights adjudication and may be able to combine this expertise with advantages that the Tribunal cannot offer, such as knowledge of the parties and their workplace, speed and informality, and consistency in outcome.

Apparent in both of the Tribunal's above-mentioned decisions is a failure to honour the legal principles underpinning statutory provisions like s. 27(1)(f), as well as the policy underlying the *Labour Relations Code* to provide for final, binding and expeditious decision-making by a labour relations expert. As Justice Iacobucci said in *Parry Sound*:

[T]his Court has repeatedly recognized [that] the prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole. See for example *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768, at p. 781; *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, at p. 489; and *Toronto Board of Education*, *supra*, at para. 36. It is essential that there exist a means of providing speedy decisions by experts in the field who are sensitive to the workplace environment, and which can be considered by both sides to be final and binding.

The grievance arbitration process is the means by which provincial governments have chosen to achieve this objective. As Professor P. Weiler puts it, grievance arbitration is both "an antidote to industrial unrest and ... an instrument of employment justice": *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at pp. 91-92. The primary advantage of the grievance arbitration process is that it provides for the prompt, informal and inexpensive resolution of workplace disputes by a tribunal that has substantial expertise in the resolution of such disputes. It has the advantage of both accessibility and expertise, each of which increases the likelihood that a just result will be obtained with minimal disruption to the employer-employee relationship. Recognizing the authority of arbitrators to enforce an employee's statutory rights substantially advances the dual objectives of: (i) ensuring peace [page187] in industrial relations; and (ii) protecting employees from the misuse of managerial power (paras 50-51).

The conflict between such policy considerations and the impact of the intervention of the Human Rights Tribunal in the workplace is patently evident in a decision like *Matuszewski v. B.C. (Ministry of Competition, Science and Enterprise) No. 2*, 2007 BCHRT 30, which involved two grievances filed in respect of the same complaint. Both Ms. Sheshka and Mr. Matuszewski had filed grievances alleging that certain seniority provisions of the collective agreement between the employer and union were discriminatory on the basis of disability because they denied employees on long term disability benefits (LTD) seniority accrual for the LTD period and any period of rehabilitation employment. The union decided to proceed with Ms. Sheshka's grievance first, holding Mr. Matuszewski's grievance in abeyance

pending the outcome. Arbitrator Lanyon heard the grievance. He interpreted the seniority provisions of the collective agreement and, applying well-settled human rights principles from *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital*, (1999), 169 D.L.R. (4th) 489, (*Orillia Soldiers*), a decision of the Ontario Court of Appeal, determined that it was not discrimination to deny employees seniority accrual while they were on LTD benefits and not working. He also determined, however, based again on *Orillia Soldiers*, that it was discriminatory to deny employees seniority accrual while they were performing rehabilitation employment and “amended” the collective agreement to this effect. All employees, including Mr. Matuszewski, received the benefit of Arbitrator Lanyon’s decision. Neither the employer nor the union appealed the decision.

Nevertheless, Mr. Matuszewski decided to file a human rights complaint with the Human Rights Tribunal, as he wanted seniority for the whole of the disability period (which he had, in fact, received on another basis as a result of a successful Workers’ Compensation Board appeal). The employer applied to have the complaint dismissed on several grounds, including issue estoppel, abuse of process and s. 27(1)(f) of the *Human Rights Code*. The Tribunal denied the employer’s application, its primary concern being the fact that the parties before it were not the same as the parties before the arbitrator. The Tribunal found that Mr. Matuszewski had not participated in the earlier arbitration proceedings and was not prepared to find that the union who took the grievance to arbitration was the privy of Mr. Matuszewski.

What this decision demonstrates is the danger of conferring on a body with no specialization in workplace dynamics, much less in organized workplaces, the authority to resolve disputes that emanate from those environments. The Tribunal’s decision in this instance shows no understanding of the statutory role of the union. To find, as the Tribunal did, that the union could not have been Mr. Matuszewski’s privy is entirely at odds with one of the most basic tenets of labour relations law in Canada, which is that the union is the sole bargaining agent of employees in the bargaining unit in respect of all matters arising in the workplace.

Paul Weiler, in his book *Reconcilable Differences* (Toronto: Carswell Company Limited, 1980), describes the exclusive agency of a trade union as follows:

2. The Union as the Exclusive Bargaining Agent

In order to appreciate the character of the legal relationship between the union and the individual employee, one must return to the central notion in Canadian (and

American) labour law: that the union is legally designated as the exclusive bargaining agent for employees in the unit ... What is entailed by this fundamental concept of exclusive bargaining rights?

First of all it means that it is the trade-union which legally exercises authority in collective bargaining. The employer must deal with only the trade-union about terms and conditions of employment, not directly with its individual employees (at least not without the tacit consent of the union). Next ... the union receives that legal bargaining authority only when it secures the support of the majority of the employees in the unit defined by the labour board. The trade-union has no right to engage in collective bargaining on behalf of just those employees who are its members, who want its representation, no matter how numerous they may be, until and unless it can establish that overall majority in an "appropriate" unit. Finally, once the union does prove its majority and obtain legal certification, it exercises bargaining authority in respect of all employees in that unit: not just its own members, but also those who belong to other unions and even those who want nothing to do with any union. The employer must deal with the trade-union about the conditions of employment of each and every one of its employees. That bargaining authority remains in effect until and unless the union is displaced or decertified in the same kind of formal board proceeding which produced the initial certification.

These notions of appropriate unit, majority rule, and exclusive bargaining rights have been central to North American labour law since the Thirties.

Part of the Tribunal's reasoning in support of its finding of no privity between the union and Mr. Matuszewski was that the union could have been added as a respondent to the complaint. Such an action may indeed have been appropriate had the union supported the employer's position in defending against the complaint arising under the collective agreement. In such circumstances, the union and the bargaining unit member would have conflicting interests with respect to the issue in dispute, and the union could not be said to be a proper representative of the member on that issue. However, that was certainly not the case with Mr. Matuszewski, whose interests were aligned with those of the union. The union had already argued Mr. Matuszewski's position for him before Arbitrator Lanyon, where the union sought a ruling on the legality of the seniority provision which would affect all bargaining unit employees, including Mr. Matuszewski. The reality in this case was that the union was the privy of Mr. Matuszewski and all bargaining unit members in bringing its challenge under the *Human Rights Code* to the seniority provision of the collective agreement in the *Sheska* proceedings. That is why all bargaining unit members, including Mr. Matuszewski, received the benefit of the *Sheska* award for the period of any LTD rehabilitative employment. As s. 95 of the *Labour Relations Code* provides, a decision of an arbitration board is binding "on the employees who are bound by the collective agreement and who are affected by the decision." This included Mr. Matuszewski.

The Tribunal's decision allows bargaining unit members an end-run around this legislative intent, by permitting them to file their own complaints and thereby avoid the otherwise binding effect of an arbitration award on the same issue. It allows a bargaining unit member to enjoy the benefits of the exclusive bargaining agency relationship with his or her union, but at the same time to avoid this relationship in pursuit of a better individual outcome when it suits him or her to do so. This undercuts the very foundation of the union's statutory role and the labour relations scheme premised upon it.

The Supreme Court of Canada discussed a union's exclusive bargaining agency in *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207. At issue was whether an employee had the right to force the union to bring a dismissal grievance, and whether he had standing to challenge the decision by way of judicial review. The Supreme Court upheld the employer's basic objection that the employee had no standing to bring any judicial proceedings and, in doing so, referred to some general principles concerning the effect of union representation on the right of all employees to challenge or settle any issue with the employer that has not already been raised – or has not been raised due to the union's preference – with the employer. Justice LeBel stated:

One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the *monopoly that the union is granted over representation* ... Once the collective agreement is concluded, it is binding on both the employees and the employer. For the purposes of administering the collective agreement, the *certified association exercises all the recourses of the employees whom it represents* without being required to prove that the interested party has assigned his or her claim...

(paras. 41-42, emphasis added)

And speaking particularly of how the exclusivity principle applies to grievance arbitration, Justice LeBel continued as follows:

In administering collective agreements, *the same rule will apply to the processing and disposition of grievances. Administering the collective agreement is one of the union's essential roles, and in this it acts as the employer's mandatory interlocutor. If the representation function is performed properly in this respect, the employer is entitled to compliance with the solutions agreed on.* Collective agreements may of course recognize the right of employees to file grievances and take them to certain levels, even to arbitration, or to participate directly in grievances as parties. That is not the case here. With that exception, the rule is that the grievance and arbitration process is controlled by the union, to which that control belongs (R. Blouin and F. Morin, *Droit de l'arbitrage de grief* (5th ed. 2000), at pp. 178-81). The union's power to control the process *includes the power to settle cases or bring cases to a conclusion in the course of the arbitration process*, or to work out a solution with the employer, subject to compliance with the parameters of the legal duty of representation.

(para. 45, emphasis added)

The Tribunal in *Matuszewski* clearly misapprehended the union's monopoly on representation in finding that the union was not representing Mr. Matuszewski's interests when it brought Ms. Sheshka's grievance to arbitration. Ms. Sheshka's grievance was in no way limited to Ms. Sheska's personal set of facts; rather, it raised the very same issue as that set out in Mr. Matuszewski's complaint. Having a second tribunal canvass the same issue a second time at the behest of a member of a bargaining unit seeking an individual advantage can not be a desirable outcome. Or what if one of the employees had first filed a complaint with the Human Rights Tribunal and lost? Faced with the grievance of another employee and a belief that the collective agreement supported the position of all employees in a like situation, should the union not still bring a grievance? What does that mean for the Tribunal decision? Is the employee who lost before the Tribunal precluded from enjoying the benefit of the union's win in arbitration? Such confusion results from the fact that human rights issues in the workplace are inextricably concerned with matters best dealt with by the labour adjudication process.

Moreover, the Tribunal's decision in *Matuszewski* ignores the express legislative intent that arbitration decisions result in final and binding determinations with respect to the interpretation and application of collective agreement provisions, including their compliance with the *Human Rights Code* and other statutory requirements. The resolution of the issue in *Matuszewski*, which involved the interpretation and application of the collective agreement, was problematic in more than one sense: in deciding to undertake its task, the Tribunal did not even have the benefit of the union's assistance, as the employer's application to have the union added as a respondent was unsuccessful.

In an early decision of the Labour Relations Board, *UBC and CUPE*, BCLRB No. 42/76, then Chairman Paul Weiler described the particular demands of collective agreement interpretation, as distinct from simple contract interpretation, and said:

In British Columbia labour law, arbitrators are no longer strictly bound by this common law approach, an approach which would keep out all evidence of negotiation history because of a well-founded distrust of such evidence upon occasion. In our view, whatever might be the merits of such a doctrine for commercial contracts – in which a battery of corporate lawyers may take months to fashion carefully-honed language to deal with just one business transaction – it simply makes no sense for the world of industrial relations. There are at least three reasons for that judgment. The first is the inevitable imprecision of the language of collective agreements. In the Simon Fraser University decision, the Board adverted to some of the special features

of collective bargaining which must in turn shape the legal approach to interpretation of its products:

What are these special features? Collective agreements deal with the entire range of employment terms and working conditions often in large, diverse bargaining units. The agreement lays down standards which will govern that industrial establishment for lengthy periods – one, two, even three years. The negotiators are often under heavy pressure to reach agreement at the eleventh hour to avoid a work stoppage, and their focus of attention is primarily on the economic content of the proposed settlement, not the precise contract language in which it will be expressed. Finally, the collective agreement, though the product of negotiations over many years, must remain a relatively concise and intelligible document to the members of the bargaining unit and the lower echelon of management whose actions are governed by it.

Any agreement which is the end-product of such a bargaining process must be approached by arbitrators with a very different set of mind than a judge construing a corporate indenture developed by batteries of lawyers for two large corporations. In particular, arbitrators have to appreciate the inability of written language to speak precisely to each of the innumerable real-life disputes which might arise in the lengthy life of clauses in a collective agreement.

Secondly, it is important in industrial relations that the arbitrator decipher the actual intent of the parties lurking behind the language which they used and not rely on the assumption that the parties intended the “natural” or “plain” meaning of their language considered from an external point of view. An employer and a trade-union don’t simply negotiate about an isolated transaction and then go their separate ways. They have to live together for a long time and resolve a great many problems which will arise over the course of their relationship. Suppose the parties do have a clear understanding about the bargain they have reached, but use language which poorly expresses their intended meaning: what will happen if the rule of law prevents the aggrieved party from establishing that intent? The likely result is an atmosphere of distrust between the parties and a potential for future industrial unrest, either during the contract term or at negotiations for its next renewal.

Finally, collective bargaining is a process which tends to produce a considerable body of evidence – much of it written – about the actual understanding of the parties. Earlier collective agreements and their administration form the background for negotiations; committees from each side may keep extensive notes of developments; a written memorandum of agreement sums up the items in the settlement, the negotiators often prepare explanations of the major settlement. Only at the end of these several stages, and occasionally not until long after the agreement has been put into effect, may the precise wording of the new clauses be drafted and incorporated into the formal contract. Properly analyzed, this body of material is often quite illuminating of the parties’ actual understanding of a provision whose meaning is murky on the face of its language.

Chairman Weiler highlighted the peculiar nature of a collective agreement document, and the importance of an understanding of the circumstances in which it was made to the interpretation of its provisions. It is not a simple task to interpret collective agreement

provisions, and it is for this reason that the Supreme Court of Canada has repeatedly expressed its preference to have experienced labour arbitrators handle it.

In *Matuszewski*, an experienced arbitrator had appropriately canvassed all of the issues central to the human rights complaint, as the Tribunal itself acknowledged, and referred to and applied the leading cases. In coming to a decision, he was also able to rely on his considerable expertise in labour relations, a significant advantage where questions relating to the interpretation of collective agreement provisions are concerned.

The foregoing decisions highlight how concurrency over human rights disputes in unionized workplaces leads to problems not only of process and policy, but also of substance. The failure to have workplace human rights disputes handled by a body with a specialized understanding of workplace dynamics severely hampers the ability to provide effective, practical and meaningful resolution to these disputes. This, however, is not just a problem in the unionized setting, but in respect of all disputes arising in the workplace context, organized or not. These decisions reveal that a sensitivity to workplace realities and demands is critical to the adjudication of workplace differences. This is perhaps most evident in human rights cases involving accommodation, where adjudicators are required to balance a number of considerations.

IV. The Role of Accommodation in the Human Rights Analysis

Once the Supreme Court of Canada introduced the concept of accommodation, beginning with its decision in *O'Malley*, it provided a gloss on the *bona fide* occupational requirement that requires the expertise of those who understand the workplace to appreciate. In the early days of human rights legislation, prohibiting discrimination meant that an employer had to exclude extraneous considerations, such as racial prejudice, from employment decisions: the employee still had to be able to perform the work as required. Then came decisions regarding pregnancy and gender and religious observances and attendance. In those cases, employers were required to make workplace adjustments in order to further broad equality goals, but the situations were readily defined, the adjustments relatively easily made, and the work itself was still capable of being performed as the employer considered necessary. Once accommodation was required with respect to physical and mental disability, however, the matter became a good deal more complex. What, for example, is the impact of the adjustments required on the enterprise and other employees? What meaning is left in the

bona fide occupational requirement if an individual is not able to perform the work as the employer considers necessary? These questions often require highly individualized assessments, not just of the individual bringing forward the complaint, but of the workplace, as the majority commented in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des Employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161:

The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made (para 22).

Labour adjudicators have the necessary understanding to perform this task with a full appreciation of the interests and concerns involved. With respect, the Human Rights Tribunal does not.

In *CAW v. Coast Mountain Bus Company (No. 9)*, 2008 BCHRT 52, the Human Rights Tribunal dealt with a complaint filed by the union with respect to the employer's Attendance Management Program (AMP), which the employer had instituted to deal with those in its large workforce with attendance problems. The employer had introduced the plan in response to a recommendation of the Auditor General, who had raised some issues related to the high rate of absenteeism among transit operators and management's failure to communicate the importance of regular attendance, provide consistent monitoring or establish a clear corporate policy. From the beginning, the union had concerns about the program, and filed a Policy Grievance which went to arbitration and resulted in a number of arbitrator-ordered changes. As well, there were individual grievances filed with respect to action taken under the AMP, leading to a series of arbitration awards. Nonetheless, the employer and union continued to disagree over certain issues, such as whether absences related to motor vehicle accidents should be taken into account in the AMP process, or only those accepted as WCB claims. As a result, the union filed its human rights complaint, which, in 2005, the Tribunal decided was not prevented from proceeding by the arbitrator's decision on the Policy Grievance.

The Human Rights Tribunal decision with respect to this complaint was based on 25 days of hearing, involving a number of witnesses. It gave rise to many preliminary and procedural rulings. It covered 150 pages and engaged in a detailed description and analysis of the collective agreement, insurance plans, the cost of benefits, negotiations and disagreements between the employer and union, job descriptions, management policy, and workplace

procedure. The result was a decision that the AMP was flawed in its formulation and application with respect to employees whose absenteeism was the product of what were characterized as chronic or recurring disabilities. The parties were ordered to engage in Tribunal-assisted mediation to discuss revisions to the AMP or its application, as well as the circumstances of any individuals with chronic or recurring disabilities who were currently in the program. Individual employees whose terminations had been dealt with through arbitration or as part of a settlement were not given any Tribunal remedy, while individuals, who had testified, had reached a formal letter stage in the AMP and had chronic and recurring disabilities that had contributed to such a status, were awarded sums in respect of injury to dignity, feelings and self-respect; other such individuals were to be identified prior to mediation.

As the Tribunal pointed out, the “ongoing human rights dispute over the AMP cannot be separated from the labour relations issues surrounding it” (p. 102), which is, of course, exactly the point. And, while there can be no question that those recognized by legislators and the courts as best able to understand and deal with questions relating to labour relations are labour adjudicators, there has been no such expertise recognized on the part of human rights tribunals. At the same time, as legislators and the courts have also recognized, labour adjudicators are well able to deal with human rights issues.

Decisions of the Human Rights Tribunal such as *Miller*, *Bates*, *Matuszewski* and *Coast Mountain Bus Company* raise real concerns about procedure and policy in the unionized context: they encourage case splitting and forum shopping; they allow bargaining unit members to file their own complaints when it suits them, thereby undercutting the very foundation of the union’s statutory role as collective bargaining agent, and the labour relations scheme premised upon it; they involve the interpretation and application of collective agreement provisions which the Tribunal adjudicators are in no position to undertake; and they undercut the prompt, final and binding resolution of workplace disputes. Moreover, the significant problem which is laid bare in these decisions is one which arises in both unionized and non-unionized settings, that is, an insufficient understanding of the workplace.

If the concern remains that, in the pursuit of labour objectives, informed by an understanding of human rights law, labour arbitrators fail to properly apply the latter, the remedy lies with the supervisory role performed by the courts. In *Weber v. Ontario Hydro*, [1995] 2 S.C.R.

929 (*Weber*), in response to the argument that jurisdiction over torts and *Charter* claims should not be conferred on labour arbitrators “because they lack expertise on the legal questions such claims raise,” Justice McLachlin, as she then was, said:

The answer to that concern is that arbitrators are subject to judicial review. Within the parameters of that review, their errors may be corrected by the courts. The procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the dispute in the first instance (para. 55).

There is simply no need, and much harm, in adding the time-consuming and complicating step of Tribunal proceedings.

One significant objection that does need further consideration is that raised by the Supreme Court of Canada in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Attorney General)*, [2004] 2 S.C.R. 185 (*Morin*). In that case, the Court considered the complaint of a minority group of teachers, composed mainly of the younger and less experienced, that there had been a violation of the Quebec *Charter* equality guarantee in a modification of a collective agreement which provided that experience acquired by teachers during the 1996/97 school year would not be credited towards their salary increments or seniority. The Human Rights Tribunal had refused to defer to an arbitrator in dealing with the issue. Chief Justice McLachlin, writing for the majority, noted that the unions were apparently opposed to the complainants’ interests and that in this dispute an arbitrator would not have jurisdiction over all the parties; she then quoted approvingly from an Ontario Court of Appeal decision, *Ontario (Human Rights Commission) v. Naraine* (2001), 209 D.L.R. (4th) 465, which said that “[a]pplying *Weber* so as to assign exclusive jurisdiction to labour arbitrators could therefore render chimerical the rights of individual unionized employees” (para.62).

Still, the concern that individuals will be left without redress for human rights violations could be met by providing access to labour adjudicators for individuals where human rights are in question and the union will not bring a grievance (just as, for instance, such access is provided under the New Brunswick *Public Service Labour Relations Act* to non-unionized public service employees where discharge, suspension or financial penalty is concerned). In that way, both the interests of the individual employees are respected and the goal of optimal decision-making is achieved. As Justice Bastarache, in his dissent in *Morin*, commented:

[R]eaching a collective agreement, with the intention of amending it through negotiations, raises a multitude of issues that an arbitrator is by far in the best position to handle on an informed basis. If, for example, one benefit under a collective agreement or its newly negotiated clauses is exchanged for another, or if a group is disadvantaged by one clause while being favoured by another, it is only by examining the collective agreement as a whole that a full assessment of the problem can be achieved. In the context of a collective agreement, it is not enough to examine the contested clause in isolation. Since arbitrators have exclusive jurisdiction to hear disputes related to collective agreements, only an arbitrator is competent to hear this case. On this point, I would also note that decisions of the Human Rights Tribunal and of arbitrators are all subject to judicial review, and that it is therefore not so much their legal expertise that should concern us here as their expertise in assessing facts (para. 69).

The issue, then, is simply whether labour adjudicators provide a better forum for dealing with human rights issues in the workplace. We think the case is clear that they do.

V. A New Workplace Tribunal

An expanded workplace tribunal given jurisdiction to deal with all disputes which arise in the workplace, including those involving human rights, would provide significant advantages in both the unionized and the non-unionized contexts. Such a tribunal would recognize that the workplace context within which any workplace dispute arises is inextricable from the dispute itself, and that disputes should not be artificially parsed into separate claims before different bodies. It could deal with the whole of a dispute at once, expeditiously, efficiently, fairly and economically. It would bring to the dispute a full understanding of the unique considerations and characteristics of the workplace environment and the ongoing relationships within that environment. It would also provide finality.

In the unionized workplace, such a tribunal would ensure union involvement, thereby giving full recognition to the union's exclusive bargaining agency and the role that the union must play in any proceedings involving the interpretation and application of the collective agreement. It would mean that the difficult task of interpreting and applying a collective agreement, a task that necessarily requires a contextualized approach, would be undertaken by those recognized by the legislature as having the expertise needed to perform it. It would avoid the absurdity that results from different union members obtaining conflicting decisions about the interpretation of the same collective agreement provision, as occurred in *Matuszewski*. It would prevent case splitting for strategic or other reasons. It would also give individual bargaining unit members who felt that their interests diverged from those of their union a forum in which to be heard.

Another distinct advantage is the simplification of the present appeal framework. All appeals from labour arbitrators would go to the workplace tribunal, which would avoid the present and cumbersome requirement that the substance of the dispute be determined in order to stream the appeal to either the Court of Appeal or the Labour Relations Board (as presently required by s. 100 of the *Labour Relations Code*). This existing model leads to protracted and complicated legal proceedings about the nature of the matter on appeal.

And, while a number of the advantages discussed relate specifically to the unionized workplace, many apply to the non-unionized as well, because understanding workplace dynamics is a fundamental part of resolving any workplace dispute. Yet workplace differences are currently being decided by a whole host of different bodies, from tribunals specialized in discrete areas of labour law to those which do not have any expertise in the workplace. The solution lies with a single tribunal, which can provide consistency, expertise and finality of outcome.

Models for such a tribunal exist in other jurisdictions. In New Brunswick, for example, the Labour and Employment Board, created in 1994 through the merger of a number of tribunals, adjudicates matters arising under six statutes: the *Industrial Relations Act*, which deals with union-related matters in the private sector, the *Public Service Labour Relations Act*, which deals with union-related matters in the public sector, the *Employment Standards Act*, the *Pension Benefits Act*, the *Human Rights Act*, and the *Fisheries Bargaining Act*, which deals with union-related matters in the fishing industry. In Britain, Employment Tribunals, independent judicial bodies consisting of a lawyer and employee and employer representatives, hear claims relating to a wide range of employment matters, including unfair dismissal, dismissal due to union involvement, compliance with employment standards and complaints of discrimination. And in Ireland, a Labour Court deals with cases involving breaches of a number of statutes, including the *Employment Equality, Pensions, National Minimum Wage, Protection of Employees and Industrial Relations Acts*.

In British Columbia, an expanded tribunal would deal with all workplace disputes, other than those covered by Workers' Compensation legislation, including those presently encompassed by the *Labour Relations Act*, Employment Standards legislation, and the *Human Rights Code*. In the union sector, arbitrators would continue to function as they do at present. S. 100 of the *Labour Relations Code* would be repealed, however, and appeals would go directly to the new tribunal, which would be subject to judicial review on the same basis as the Labour

Relations Board. Members of a collective bargaining unit who have human rights complaints in circumstances where their interests are opposed to those of the union, making the union more properly a respondent in the complaint, would have access to the new tribunal. In the non-union sector, all disputes would proceed directly to the tribunal. As a result, every workplace dispute would enjoy the kind of contextualized decision-making that such disputes require.

VI. Implication for the Existence of the Human Rights Tribunal

The question may then be whether there is any further need for the Tribunal. Elimination of the Human Rights Tribunal was one of the options considered by the *Human Rights Review*, issued as part of the more comprehensive *Administrative Justice Project*² initiated in 2001:

This model would eliminate the HRT and put the adjudication function in human rights legislation into the hands of the provincial court system, the supreme court system or a combination of the two.

For example, in a manner not entirely unlike the processes under the *Small Claims Act* and *Rules*, individuals would file human rights complaints directly with the Provincial Court with limited assistance from registry staff. The HRC would continue to exist but without its intake and screening functions. It would have the ability to file complaints of a systemic nature or participate in individual complaints and, once involved, to investigate complaints. Discovery (apart from the HRC's investigation functions in relation to the complaints it brings) and mandatory settlement conferences, would be overseen by court processes. Legal representation would be provided through a legal aid model operating through community clinics and lawyers in private practice.

Judges would be drawn from the existing Provincial Court or appointed as exclusive Human Rights Judges to a Human Rights Court. If judges were drawn from the existing Provincial Court, they would be legal generalists and the long-standing objective of using decision-makers with special expertise in human rights would be compromised. Because of the prominent criminal justice component of the Provincial Court, its "regular" judges might also tend to have a criminal law orientation that would be inappropriate to the adjudication of human rights matters. The traditional objective of using specialists to decide human rights complaints might be met by appointing exclusive Human Rights Judges. With such specialized appointments, other distinctions between using an administrative versus a court judicial system for first instance human rights decisions would then come to the fore.

Consideration might also be given to the bifurcation of direct access complaint adjudication streams into a small claims type of Provincial Court forum for individual complaints and a trial type of Supreme Court forum for systemic complaints. The Supreme Court is the principal venue of first instance for equality claims under the *Charter* and, although the tests are not the same, the jurisprudence in such cases is similar to human rights jurisprudence. Familiarity and expertise with *Charter*

² *Administrative Justice Project: Human Rights Review* by Deborah K. Lovett, Q.C. and Angela R. Westmacott (Victoria: Administrative Justice Project, Ministry of the Attorney General, 2001).

equality litigation would have value in the adjudication of both individual and systemic human rights complaints. However, most individual complaints would not require or benefit from the formality or expertise of a Supreme Court forum...

Yet a further, and more targeted, judicial forum variation might be to provide for a direct stream to the Supreme Court for stated cases on a point of law or, with leave of the court, for systemic cases. The objective would be to facilitate and expedite the movement into the senior court system of issues and cases that are destined to go there anyway (pp. 151-152).

In that case, it might also be time for the Legislature to reconstitute a Human Rights Commission to take on the proactive and educational role that should not animate a tribunal.

VII. Conclusion

To conclude, human rights issues in the workplace should not be subject to the added complication of adjudication before the Human Rights Tribunal. The Tribunal lacks expertise in and understanding of the labour relations and employment context, which is critical to so many human rights decisions. As a result, its decisions can have a significant impact on such matters as the interpretation of collective agreements, which go far beyond the immediate issues before it, and which the Tribunal is in no position to assess properly. Furthermore, its formalistic approach is inimical to the flexibility needed in dealing with such issues, and its involvement seriously hampers the need for the swift and final resolution of workplace disputes. As labour adjudicators have been given the legislative authority to deal with human rights concerns and have developed the expertise needed to do so, and, as their decisions are, in any event, subject to judicial review, the Tribunal's insertion into the process of resolving such disputes is, at best, unnecessary. This paper recommends the advancement of both human rights and labour and employment policy by the reconstitution of a human rights commission to handle public awareness and education and the creation of a workplace tribunal to deal with all matters arising in the workplace.