

LEISUREWORLD REVISITED YET AGAIN

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I firmly believe that (1) arbitrators go to bed at night thinking that they did the right thing. During their waking hours, which presumably and hopefully coincide with hearing time, arbitrators, I also believe, (2) really want to get to the merits of a dispute.

In the February issue of the Labour Relations Section of the Ontario Bar Association newsletter, there appeared an article entitled "Leisureworld Revisited" wherein the authors suggest that in the post-Leisureworld world the bar is set fairly high preventing unions from litigating grievances that have been referred outside the time limits specified in the collective agreement.

In reply, I would suggest that the bar is not set quite as high as suggested in last month's article. In 1999, Ms. Elaine Newman authored a decision [see *Natrel (Ontario) Inc. and Teamsters, Local 647*, 83 L.A.C. (4th) 55] wherein she basically provides a road map for trade unions to get around the Leisureworld problem. Her decision was upheld on judicial review.

The relevant facts were that John Ramsberger, a maintenance mechanic in the Natrel plant at the Don Valley Parkway and Lawrence, filed a grievance over what he perceived to be an inequitable distribution of overtime. The grievance was referred one day late to arbitration by the local union. In fact,

historically the union and employer had a lackadaisical attitude toward filing grievances and referring them to arbitration. The parties had allowed late grievances and late referrals without objection from either side. These facts are not unique. Anyone who deals with unions and employers with a fairly good working relationship will find that there is a fair amount of give and take with respect to the time limits in the collective agreement. For one reason or another, Natrel decided to raise the timeliness issue of the late referral in Mr. Ramsberger's grievance.

Ms. Newman determined that the parties effectively amended the collective agreement by their conduct. She imposed an estoppel against the employer from raising the timeliness issue which saved the grievance. Ms. Newman did conclude that the union was now on notice that the rules of game had changed and that in the future it had better file its referrals to arbitration on time.

While the Divisional Court in Leisureworld held that the **Labour Relations Act** ("Act") was amended in 1995 to take out the ability of arbitrators to relieve against late referrals (see the difference between s.45(8.3) before the 1995 amendments and s.48(16) after), Ms. Newman points out that the parties were still free, by their conduct, to create an estoppel situation, which would preclude on party from relying on the strict wording of the collective agreement. One has to wonder whether the legislature really intended to preclude unions from filing referrals late. A quick look at the Hansard Reports from the time period of the amendments shows that there was no debate about that issue. Furthermore, I would imagine that if you called one of your local MPPs and asked whether in 1995 they intended to take

away that right from a union, you would be hard pressed to find an MPP that had addressed his or her mind to that issue. In any event, as Slammin' Sam Snead said , " You gotta dance with what you brung". Accordingly, we are left with an Act that does not allow arbitrators to relieve against a late referral, although I can't emphasize enough that I don't believe that that was ever the intention of the legislature.

As a result, union lawyers should not simply recommend that their clients withdraw a grievance referred outside the time limits in a collective agreement. A review of the history of how the employer and union have dealt with each other may provide a solution on how to keep the grievance alive.

To conclude, why should unions have some optimism about the Leisureworld problems? I refer you to points 1 and 2, in the first paragraph of this article.

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