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Alberta Human Rights Tribunal Distinguishes *Lockerbie* and Moves Away From Constrictive Definition of Employment

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Decision Considered:

Pelley and Albers v Northern Gateway Regional School Division, 2012 AHRC 2 (*Pelly and Albers*)

Once again the issue of who can be considered an employer under the *Alberta Human Rights Act*, RSA 2000 c A-25.5 ("AHRA") has arisen. In a previous blog, (see here), I discussed the potentially negative implications of the *Lockerbie & Hole Industrial Inc. v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3 decision ("*Lockerbie*").

Doreen Pelley and Marlene Albers each filed complaints with the Alberta Human Rights Commission (AHRC) alleging age discrimination under AHRA section 7 (1)(a) and (b) against both Northern Gateway Regional School Division ("School Division") and either First Student Canada or 1098754 Alberta Ltd. At issue was the School Division's policy that persons 65 years of age or older shall not be permitted to drive students.

As a preliminary matter, the School Division applied to have both complaints dismissed against it because it was not a proper party to the proceedings. This preliminary matter was dealt with at the same time for both complaints. The School Division argued that it was not an "employer" within the meaning of the *Alberta Human Rights Act*, RSA 2000 c A-25.5 (AHRA). It argued that the employer was an independent contractor which operated at arms' length from the School Division. The School Division argued that the facts in this case were analogous to those in *Lockerbie*. First Student Canada and the Director of the AHRC argued that the facts in this case were significantly different from those in *Lockerbie* and thus *Lockerbie* should be distinguished. In the end, the School Division was found to be an "employer" under the AHRA, and was not removed as a party.

In his analysis, Tribunal Chair William McFetridge noted that the Alberta Court of Appeal, in *Lockerbie*, recognized that provisions in human rights statutes must be given a wide interpretation to achieve their legislative goals. Indeed, the Court of Appeal also found (at para 15) that even though a relationship might not be called "employment" under common law, it will be given a wider meaning with respect to relationships involving the utilization of personal services.

The factors considered in finding employment (or not) as set down by the Alberta Court of Appeal in *Lockerbie* include (para 25):

- whether there is another more obvious employer involved;
- the source of the employee's remuneration, and where the financial burden falls;
- normal indicia of employment, such as employment agreements, collective

agreements, statutory payroll deductions, and T4 slips;
- who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline;
- who has the direct benefit of, or directly utilizes the employee's services;
- the extent to which the employee is a part of the employer's organization, or is a part of an independent organization providing services;
- the perceptions of the parties as to who was the employer;
- whether the arrangement has deliberately been structured to avoid statutory responsibilities.

Where it is alleged there is more than one co-employer, the following factors are also relevant:
- the nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer;
- the independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two;
- the nature of the arrangement between the primary employer and the co-employer,
- for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor;
- the extent to which the co-employer directs the performance of the work.

Other factors may be relevant in particular cases.

It is perhaps instructive to compare how the court/tribunal applied these factors in *Pelly and Albers* to how they were applied in the *Lockerbie* case:

Lockerbie:
- Luka was clearly an employee of Lockerbie & Hole
- Luka was a union employee dispatched to Lockerbie & Hole under a collective agreement, which required Lockerbie to source all electrical workers through the union; Luka was paid by Lockerbie & Hole
- Syncrude did not direct Luka's work
- Luka was not functionally a part of Syncrude's organization; relationship was too remote to justify a finding of employment
- Lockerbie & Hole has the burden of ensuring Luka's rights under AHRA are respected
- Luka had no direct contractual relationship with Syncrude
- Lockerbie & Hole was a sub-contractor of Marsulex, which was a sub-contractor of Kellogg, Brown and Root, which had a direct contractual relationship with Syncrude
- While Syncrude controlled its site, this factor alone does not indicate an employment relationship

Pelley and Albers:
- Pelley and Albers were employed by First Student and 1098754 Alberta Ltd. ("transportation companies") respectively
- School Division received funding for student transportation under Alberta Education grant; monies were paid to transportation companies under Transportation Agreements, and companies then remunerated drivers
- Pelley and Albers were not eligible to participate in School Division's disability insurance, health and pension plan. Attendance, payroll and benefit administration were handled by the transportation companies

- Pelley and Albers were removed from the approved drivers list by the School Division when they turned 65; this meant that they could no longer be employed because the School Division was the transportation companies' only customer;
- Bus drivers are hired by the transportation companies but must meet School Division requirements;
- School Division exercised significant control and direction over bus drivers' daily activities
- Pelly and Albers' work was functionally part of the School Division's organization; transportation of students to and from school is an integral part of the School Division function
- Transportation companies did not have the ability to resist mandatory retirement provisions as School Division was their only customer; if School Division was removed from proceedings, transportation companies would not be in a position to answer questions in a bona fide occupational requirement inquiry; if School Division removed, Tribunal could not order School Division to refrain from discrimination;
- to accept School Division's arguments would be to put it beyond the reach of the Act
- Pelley and Albers had no direct contractual relationship with the School Division
- Both transportation companies had a Transportation Service Agreement with the School Division to supply buses and drivers for specific bus routes; there was no extended chain of multiple employers
- Transportation companies had direct contractual relationship with the School Division
- School Division is the only customer and has the power to impose standard terms and conditions which the contractors must accept even where they find them objectionable

It is interesting to note that some of the factors relied upon in the *Pelley and Albers* case to find that there was an employment relationship are equally applicable in *Lockerbie.* If Lockerbie & Hole wanted Syncrude's business, they could not resist any of its discriminatory policies. If Syncrude were (and it was) removed from the proceedings, Lockerbie & Hole would have to answer the *bona fide* occupational requirement inquiries, the Tribunal could not order Syncrude to refrain from discrimination, and this would have the effect of putting Syncrude beyond the reach of the AHRA. The significant difference between the two cases was the length of the chain of contractors in the *Lockerbie* case, while the School Division was the sole customer of the transportation companies. Second, the School Division seemed to have more direct control over the work of the drivers; Syncrude did not direct Luka's work (although it did impose a mandatory drug testing policy).

While the Tribunal distinguished *Lockerbie* in this case, it followed *Lockerbie* in a recent decision with very similar facts: *Jurek v Rocky View School Division No. 41*, 2011 AHRC 6. Jurek complained to the AHRC that he was not allowed to bid on Southland's rural bus routes under Rocky View School Division No. 41 because of his age. The School Division had a policy that drivers had to be less than 66 years of age as of September 1 of each school year. Jurek's complaint against Southland was dismissed because Southland accommodated Jurek by assigning him to bus routes other than those in the Rocky View School Division (these others did not have an age restriction). He then complained against Rocky View School Division for age discrimination in employment. Tribunal Chair Shirley Heafy followed *Lockerbie*, holding that the School Division was not an employer.

The factors considered in this case include (para 15):

- Jurek was paid by Southland;
- Southland dictates a fuel economy policy to its drivers;
- Southland requires employees to complete a time sheet and operates a bi-weekly payroll;
- Remuneration is based on actual loaded and unloaded minutes;
- Southland determines the rate of pay drivers receive according to each contract it negotiates with the local school board;
- An extensive bus driver procedures policy was produced by Southland;
- Policies requiring communication between the driver and Rocky View School Division (e.g., about schedule changes due to inclement weather);
- The School Division utilized the services of Southland and Southland in turn utilized the services of Jurek; and
- When Jurek complained initially, he complained against Southland, whom he perceived was his employer.

One cannot really see any difference between *Jurek* and *Pelly and Albers*, except in the way that the factors were considered by each Tribunal. The only possible contextual difference is the relative proximity to a different School Division with a different policy on age. Presumably First Student operates in more than one school division in Alberta and thus the option to assign a driver to a different division would be available in *Pelley and Albers*.

In Alberta particularly (but likely in many jurisdictions) the issue of who is an employer for the purposes of human rights legislation needs to be settled; in light of the purpose of human rights legislation, the final settlement should err on the side of including parties as employers rather than eliminating them.