July 27, 2013

Arbitration, Disability and Human Rights Cases

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Case commented on:
AUPE v Alberta, 2013 ABCA 212.

This case involves the fairly technical issue of whether, in Alberta, a grievance involving a human rights issue should be resolved by an adjudicator who is entirely independent of the employer, who is a party. In this case, the collective agreement provided for the complaint to be resolved before a Designated Officer who was an employee of one of the parties, although not subject to the collective agreement. The *Labour Relations Code*, RSA 2000, c L-1 (*Labour Code*), section 135, provides that every collective agreement must include a dispute resolution mechanism, but does not contain any direct statement requiring that the arbitration mechanism must operate in circumstances absent a reasonable apprehension of bias (as is the case in some other provinces). There had been some prior cases involving section 135, but none of these involved a potential breach of both the collective agreement and the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*).

The Alberta Union of Public Employees (AUPE) and the Alberta Government (the Employer) were parties to a collective agreement. AUPE grieved the termination of Jamie Graham under the collective agreement on the grounds that the dismissal violated the *AHRA* as it involved discrimination on the basis of physical disability. Because Graham was employed in a temporary position as a student as part of a cooperative education program, the grievance was heard by a Designated Officer and did not proceed to arbitration (at para 5). The Designated Officer was an employee of the Alberta Government, but if the matter had proceeded to arbitration, it would have been heard by an independent three-person arbitration board consisting of one person selected by AUPE, one by the Employer and the third selected by mutual agreement of the other two parties. Alternatively, it would have been heard by a single arbitrator, chosen by agreement (at para 6).

AUPE argued that because the termination occurred in circumstances where the *AHRA* was allegedly breached, the matter should have proceeded to arbitration. An Arbitrator selected by agreement determined that Graham had no right to arbitration for his grievance. On judicial review of that decision, AUPE was unsuccessful. This decision is the subject of the current appeal (at para 7).

At issue was whether the decision in *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, compels a different interpretation of *Labour Code* section 135 where the dispute arises in the context of an *AHRA* complaint.

Mr. Graham suffers from cerebral palsy and requires the use of a wheelchair and voice recognition software. He was a Management student at the University of Lethbridge, involved in a co-operative education program and was employed by for the Alberta Department of Employment, Immigration and Industry from May to December 2008. He was required to join AUPE as a condition of his employment. On July 8, 2008, he was notified by the Employer that his employment would be terminated on July 22, 2008, because of his "inability to perform the duties and requirements of [the] position" (at para 10). Graham initially grieved his termination through AUPE to a Designated Officer under the collective agreement and the complaint was dismissed (October 20, 2008). There was no application for judicial review of that decision. However, in January 2009, AUPE decided to advance the grievance to arbitration, alleging that Graham's dismissal was the result of discrimination on the basis of disability and the Employer's failure to reasonably accommodate Mr. Graham (at para 12).

The Arbitrator concluded that he did not have jurisdiction to hear the grievance. He also determined that *Parry Sound* did not require that grievances based on an alleged violation of human rights legislation be resolved by arbitration (at para 28). He determined that *Labour Code* section 135 permitted parties to contract for different forms of dispute resolution other than by arbitration (here it was the Designated Officer) and that Graham did not have the right to have his dispute resolved otherwise (at para 28).

The standard of review of the Arbitrator's decision applied by the judicial review court was reasonableness (see para 29) and the Court of Appeal (per Justices Bielby, Côté, and Conrad), agreed that this was the correct standard of review.

The Court of Appeal examined *Parry Sound,* and determined that its three essential findings did not address the issue of whether adjudication of disputes under a collective agreement that also consisted of an alleged violation of human rights legislation must be conducted by someone other than an employee of one of the parties. While the Supreme Court of Canada had stated that the substantive rights and obligations found in human rights statutes are implicit in every collective agreement and form a floor beneath which the parties cannot contract, it did not speak about procedures; it did not say that arbitration is the only means for settling a discrimination-based dispute (see *AUPE* at para 52).

AUPE argued that the decision of the (first) Arbitrator was wrong because he supported his decision on *Parry Sound* and section 135 of *the Labour Code* with the argument that Mr. Graham could have launched an application for judicial review of that decision or could have made a complaint directly to the Alberta Human Rights Commission. However, these alternatives, argued AUPE, do not adequately address the risks created by the inherent bias of the Designated Officer (at para 61). While the Court of Appeal agreed that there may have been some apprehension of bias and that the reasons of the Designated Officer did not address the discrimination issue directly, these issues would have been addressed in an application for judicial review (at para 63). Further, AUPE could have addressed the appearance of bias during the collective bargaining process, by asking for impartial dispute resolution for all employees during bargaining (at para 64).

This technical case does bring to mind the issue of when it may be more appropriate to address an employment issue at the Human Rights Commission, which does address discrimination on a daily basis, rather than using a different dispute resolution process (such as a collective agreement or other arbitration process). The Commission does have concurrent jurisdiction over human rights complaints in Alberta: *Amalgamated Transit Union, Local 583 v Calgary (City)*, 2007 ABCA 121. Thus, it is important for representatives to be aware of the various dispute resolution alternatives available in a human rights case.