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Seasonal Workers and Discriminatory Benefits: The NWTCA Provides Some Clarity

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Case commented on: *NWT (WCB) v Mercer*, 2014 NWTCA 01 (Can LII)

This decision from the Northwest Territories Court of Appeal was passed on to me by an ABlawg reader in response to one of my recent posts on the ongoing uncertainty regarding the test for discrimination under human rights legislation. The decision is important in several ways. First, it finds that the standard of review for a decision on discrimination is reasonableness. Second, it affirms the application of the *prima facie* test for discrimination, most recently discussed by the Supreme Court of Canada in *Moore v British Columbia (Education)*, 2012 SCC 61 (CanLII), [2012] 3 SCR 360. Third, and relatedly, it indicates that the government's objectives for a particular statute should be considered at the justification stage of analysis rather than under the *prima facie* discrimination stage. Fourth, it finds that seasonal workers can be seen as a group protected by human rights legislation under the ground of social condition (which includes source of income). I will elaborate upon all of these findings in this comment.

Philip Mercer worked seasonally for about 6 months each year as a transport truck driver in the Northwest Territories. In the off season, he would return to his home in Newfoundland and either work there or collect employment insurance (EI) benefits. In February, 2001, Mercer broke his hip while on the job in the NWT, and applied for temporary disability benefits from the Workers Compensation Board (WCB). Under the *Workers' Compensation Act,* RSNWT 1988, c W-6, temporary disability benefits are tied to the worker's gross annual remuneration. The WCB had a written policy providing that for permanent workers, gross annual remuneration would be calculated based on their salary at the time of the accident; for seasonal workers, gross annual remuneration was estimated based on the worker's actual remuneration for 12 months before the accident. The practice of the WCB was to exclude EI benefits from the calculation of gross annual remuneration of seasonal workers. Had Mercer been a permanent worker, he would have received $265 more in benefits every 2 weeks than he was paid as a seasonal worker. Mercer's financial situation following his accident was dire; he had to mortgage the family home, cash in RRSPs, and take out loans to be able to pay his living expenses (paras 4, 10-14, 17).

Mercer brought a complaint of discrimination in the receipt of services customarily available to the public based on the ground of social condition under section 11 of the *Human Rights Act,* SNWT 2002, c 18. The *Human Rights Act* defines social condition in section 1(1) as follows:

> "social condition", in respect of an individual, means the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, **source of income**, illiteracy, level of education or any other similar circumstance (as cited at para 15, emphasis in original).

The adjudicator appointed under the *Human Rights Act* found that Mercer was a member of a group "composed of seasonal workers who live in areas of high unemployment; are required to work away from home, and often outside their home province; they earn less than the national and provincial average salaries; and they have lower education levels with fewer job opportunities." (Appeal Book, Vol 2, p 239, cited in 2014 NWTCA 1 at para 16). She held that the lower level of disability benefits received by seasonal workers as a result of EI payments being excluded from their gross annual income amounted to discrimination on the basis of social condition, and ordered that Mercer's workers' compensation benefits be adjusted accordingly. She did not award any additional damages to Mercer for pain and suffering and did not provide reasons for that decision (para 16).

The WCB appealed the finding of discrimination, and Mercer appealed the adjudicator's conclusion that he was not entitled to additional damages. The reviewing judge, Justice Smallwood of the NWT Supreme Court, upheld the finding of discrimination as reasonable, and allowed Mercer's appeal on damages, remitting the matter to the adjudicator. The WCB brought a further appeal to the NWT Court of Appeal (paras 18-21).

Writing for the NWT Court of Appeal, Justice Myra Bielby (Justices Virginia Schuler and Barbara Veldhuis concurring) determined that the reviewing judge had applied the appropriate standard of review, reasonableness, to the issues of discrimination and damages (at paras 24-25).

This aspect of the Court's decision provides an interesting contrast with the recent Alberta Court of Queen's Bench decision in *Bish v Elk Valley Coal Corporation*, 2013 ABQB 756. In that case, Justice Michalyshyn found that the question of whether a workplace policy was discriminatory was a question of law requiring a correctness standard of review. As I noted in my post on this case, Justice Michalyshyn seemed particularly persuaded by the Alberta Court of Appeal's decision in *Lethbridge Regional Police Service v Lethbridge Police Assn*, 2013 ABCA 47 "that human rights issues may be decided by a number of tribunals and that where a number of tribunals have concurrent jurisdiction over an issue, consistency requires that review be conducted on a correctness standard" (*Bish* at para 20, citing *Lethbridge Police Assn* at para 28).

The WCB did not dispute a reasonableness standard of review in *Mercer*, but it is interesting that Mercer's challenge to his WCB benefits could have been brought under the *Workers' Compensation Act* as an alternative to the *Human Rights Act,* or under section 15 of the *Charter* for that matter. This multiplicity of possible forums did not dissuade the NWT Court of Appeal from affirming reasonableness as the appropriate standard of review.

The Court of Appeal went on to find that the reviewing judge had correctly concluded that the adjudicator's finding of discrimination was reasonable. The Court of Appeal articulated the test for discrimination as follows:

> [28] A claimant who alleges discrimination in the provision of a service customarily available to the public must prove that he or she has a characteristic protected from discrimination under the *HRA*; that he or she experienced an adverse impact with respect

> to the service; and that the protected characteristic was a factor in the adverse impact: *Moore v British Columbia (Education),* 2012 SCC 61 (CanLII), 2012 SCC 61 at para 33, [2012] 2 SCR 360 [*Moore*]. If the claimant proves these elements, *prima facie* discrimination is established. The onus then shifts to the respondent to establish that it has a *bona fide* and reasonable justification.

This is a nice, clear statement of the test for discrimination that can once again be contrasted with the *Bish* decision. In *Bish*, Justice Michalyshyn held that the third stage of the test for *prima facie* discrimination "includes some consideration of whether that adverse treatment was based on stereotypical or arbitrary assumptions" (*Bish* at paras 36, 38, relying on *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee),* 2012 ABCA 267, leave to appeal dismissed, 2013 CanLII 15573 (SCC)).

The WCB made a similar argument in *Mercer*, that "not all distinctions which create a disadvantage are discriminatory" (at para 31, citing *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 (CanLII) at para 93). It also relied on *Withler v Canada (Attorney General),* 2011 SCC 12 (CanLII), [2011] 1 SCR 396, where the Supreme Court found that the purpose of benefit schemes should be considered at the discrimination stage. According to the Supreme Court in *Withler*,

> Where, as here, the impugned distinction is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people, the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries. (*Withler* at para 3, cited in *Mercer* at para 33).

The WCB's argument was that the adjudicator should have considered the broader legislative scheme, specifically the fact that "workers' compensation premiums are not subtracted from EI benefits, [so] EI benefits do not contribute to funding the scheme" (at para 34). If she had done so, the WCB argued, this would have precluded a finding of discrimination.

The NWT Court of Appeal agreed with the reviewing judge that the adjudicator's failure to consider the object of the *Workers' Compensation Act* was reasonable. The Court noted that the exclusion of EI benefits for seasonal workers was a matter of practice rather than a legislative exemption with an obvious purpose. Even if the objective of the legislation had been considered, the inclusion of EI benefits may have been seen as consistent with that objective – i.e. replacement of employment related earnings (at para 38). Furthermore, consideration of the entire scheme would have made it apparent that permanent workers were entitled to have EI benefits counted as part of their gross annual income, which "starkly illustrates the discriminatory impact of the WCB policy" for seasonal workers (at para 39). The Court also noted that *Withler* could be distinguished, as it was a case decided under section 15 of the *Charter* rather than human rights legislation and it involved a claim of age-based discrimination that was apparent on the face of the legislation, making the legislative intent clear.

The NWTCA's approach is especially compelling in this paragraph:

> [42] [A] claimant seeking to establish *prima facie* discrimination in the provision of services need not establish the purpose behind the allegedly discriminatory conduct. In this case, *prima facie* discrimination is established if the WCB policy had an adverse

> impact on Mercer and his social condition was a factor in that adverse impact, never mind the purpose for it: *Moore* at para 33. The purpose of the WCB's policy, or of the wider legislative scheme under which it was adopted, may be relevant to whether the WCB has a justification for a policy that is otherwise discriminatory but, as noted above, justification was not argued in this case.

This is exactly how claims for discrimination should be analyzed, if one takes *Moore* seriously (and ignores a few offhand references in *Moore* to "arbitrary" discrimination – see here). The *prima facie* discrimination stage is not the appropriate locus for considering the objectives of the government or other respondents, and this was well recognized until the test for discrimination under human rights legislation became muddled by importing aspects of the test for discrimination under the *Charter* (see e.g. *Peel Law Association v. Pieters*, 2013 ONCA 396 (CanLII) at paras 67-74).

The final noteworthy aspect of the *Mercer* decision is the finding that seasonal workers can be considered a group protected from discrimination on the ground of social condition. This finding was not subject to challenge on appeal, but it is important nevertheless. There have been a number of discrimination claims rejected under section 15 of the *Charter* on the basis that "occupational status" or status as a particular kind of worker does not qualify as an analogous ground under section 15 (see e.g. *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 (per Bastarache J for the majority); *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 (per Rothstein J for the majority); *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3 (per Charron and Rothstein JJ, concurring); but see *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 at para 166 (per L'Heureux Dube, J, finding that occupational status as an agricultural worker should be protected as an analogous ground). *Mercer* does not deal with the issue of analogous grounds, since human rights legislation protects only those grounds that are explicitly set out in the legislation. Still, its finding that seasonal workers are protected by the ground of social condition provides hope that workers in similar scenarios may be able to mount human rights claims where they are discriminated against based on their source of income (and note that in Alberta, "source of income" is a protected ground under the *Alberta Human Rights Act*, RSA 2000, c A-25.5).

In turn, perhaps social condition will eventually be accepted by the courts as an analogous ground under section 15 of the *Charter*, allowing discrimination claims to be brought by particular groups of workers identifiable by their source of income. The issue of whether homelessness – another element of social condition – may qualify as an analogous ground under section 15 of the *Charter* will soon be considered by the Ontario Court of Appeal in the case of *Tanudjaja v Canada (Attorney General)* (for a post by Joshua Sealy-Harrington on an earlier decision in that case see here).

Overall, the *Mercer* decision is a welcome example of clarity on the test for discrimination under human rights legislation. It is to be hoped that the Alberta Court of Appeal – whose members largely make up the NWT Court of Appeal – will adopt this approach in *Bish* when the appeal of that case is decided.

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