November 1, 2016

Age Discrimination in Long Term Disability Plans: Reasonableness Not Required in Alberta

By: Linda McKay-Panos

Case Commented On: *International Brotherhood of Electrical Workers, Local 1007 v Epcor Utilities Inc*, 2016 ABQB 574 (CanLII) (*IBEW* ABQB)

This case demonstrates grievance arbitration panels' shared jurisdiction with the Alberta Human Rights Commission on human rights issues. It also shows one of the fairly rare circumstances when individuals (or their employers) can effectively contract out of human rights protection. The International Brotherhood of Electrical Workers (IBEW) Local 1007 represented Darrell McGowan in a grievance wherein he asserted that he was forced to resign and access his pension instead of being able to access his long term disability (LTD) benefits. The LTD Policy negotiated between McGowan's employer (Epcor) and its third party benefits provider (Sun Life) expressly excluded access to LTD benefits for people "who retire or those who are eligible to retire with a full pension" (*Re Epcor Utilities Inc. and IBEW, Local 1007 (McGowan)*, 2015 CarswellAlta 1657 (*IBEW* Arbitration) at 2).

McGowan had worked for Epcor for 36 years and had been receiving LTD payments for about a year when his payments ceased as he reached pensionable age. McGowan's Union argued that the provision in the LTD Policy constituted discrimination against McGowan on the basis of age and/or disability. The Union reasoned that the policy was discriminatory because those who are disabled and thus eligible for LTD benefits, but who intend to and are potentially able to return to work, or who may recover from a disability and be accommodated by the employer, are not eligible to receive LTD benefits (*IBEW* Arbitration at 2).

While the majority of the Arbitration Panel did not find that there was disability discrimination, it did find that there was age discrimination, as McGowan's LTD benefits were terminated because of his age and years of service (*IBEW* ABQB at para 3).

Epcor argued that it was exempt from a finding of discrimination under the provisions of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*) by virtue of subsection 7(2), which states:

> Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

In order to determine whether the employer's plan was saved from a finding of age discrimination, the Arbitration Panel referred to two Supreme Court of Canada decisions: *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 (CanLII), [2008] 2 SCR 604 (*Potash*); and *Zurich Insurance Co v Ontario (Human Rights*

Commission), [1992] 2 SCR 321 (CanLII), 9 OR (3d) 224 (*Zurich*) (*IBEW* Arbitration at 13). Both decisions dealt with the interpretation of a "defence" section similar to that in subsection 7(2).

The Union argued that the inclusion of the word "or" in subsection 7(2) supports the idea that retirement/pension plans should be treated differently from insurance plans, and thus the focus should be on the "terms and conditions" of the insurance plans (*IBEW* Arbitration at 13). The Union also argued that a consideration of the two cases (*Potash* and *Zurich*) highlights the distinction in treatment. *Potash* dealt with pension plans but not insurance plans. In *Potash* (at para 133), the Supreme Court emphasizes that the whole plan needs to be looked at in determining its *bona fides* (good faith) and not a particular section. By way of contrast, when referring to insurance plans, the legislation refers to the operation of the "terms and conditions" of insurance plans, thus implying the need for a more specific analysis of each term rather than the plan as a whole (*IBEW* Arbitration at 13).

The Union argued that the governing authority with respect to subsection 7(2) should be *Zurich*, as that case dealt specifically with insurance plans based on age and sex (citing *Zurich* at para 22). *Zurich* stated that an actuarial basis must exist for differentiation in employee insurance plans based on age and sex. The Union argued that there was no such evidence presented in this case (*IBEW* Arbitration at 13).

However, the provision discussed in *Zurich* included the word "reasonable" and Alberta's equivalent does not. The Union argued that the absence of the word "reasonable" in *AHRA* subsection 7(2) should not alter the conclusion that the *bona fides* of the plan depends on the insurer having a legitimate business reason to differentiate in employee insurance plans on the basis of age and sex (*IBEW* Arbitration at 13). Further, the employer should have to provide satisfactory evidence of the sound business reasons for differentiation. *Zurich* provides that in order to establish *bona fides*, the employer must show that the practice was adopted honestly, in the interests of sound business practice "and not for the purpose of defeating the rights protected under the [human rights] Code" (at para 24).

Epcor argued that there was no need to rely on *Zurich*; *Potash* resolves the issue in this case (*IBEW* Arbitration at 14). *Zurich* should be distinguished because of the differences in statutory provisions (i.e., the absence of the word "reasonable" in *AHRA* subsection 7(2)). The essence of Epcor's argument was that there is no need to provide evidence of the plan's consistency with sound business practices, including actuarial evidence. Furthermore, *Potash* actually dealt with terms and conditions of both pension plans and insurance plans, and the Supreme Court concluded in *Potash* that a piecemeal analysis of terms and conditions should be avoided in favour of examining the whole plan (*IBEW* Arbitration at 15).

Epcor also asserted that the LTD provision really amounts to a coordination of benefits between LTD and pension benefits in order to protect income. It is a legitimate plan and not a "sham to deprive employees of their rights" (*IBEW* Arbitration at 15).

The majority of the Arbitration Panel concluded that *AHRA* subsection 7(2) saved the plan from any age discrimination. The majority noted that while *Zurich* imposes a burden that was beyond what Epcor met in this case, *Potash* was decided after *Zurich*. It was based on very similar legislation to that in Alberta, and requires that when legislation states that a plan must be "*bona fide*", the employer is required to establish the *bona fides* of the overall plan and not each of its component parts. Because the majority of the Arbitration Panel was satisfied that the overall plan

was *bona fide*, any term and condition that may otherwise be viewed as discriminatory on the basis of age, was saved by subsection 7(2) (*IBEW* Arbitration at 19).

While the majority of the Arbitration Panel held that subsection 7(2) saved any age discrimination, the Dissenting Panel member disagreed. The Dissenting Member held that Epcor's policy was discriminatory on the basis of both physical disability and age. He relied on recent jurisprudence (e.g., *Moore v British Columbia (Education)*, 2012 SCC 61 (CanLII), [2012] 3 SCR 360 (at para 33)) to conclude that the policy had an adverse effect on McGowan on the basis of his disability. He noted that the majority had concluded there was age discrimination and he agreed that there was. He held that the age discrimination was not saved by subsection 7(2). (Note that disability discrimination can not be saved by subsection 7(2).) The Dissenting Member distinguished *Potash* as a case being primarily concerned with pension plans. The case did not address exemptions to age discrimination in the context of group insurance plans. Thus, some evidence should have to be provided to support the rationale for containing a discriminatory provision in a LTD policy and to explain why it is necessary (*IBEW* Arbitration, dissent at 10). Thus, he concluded, based on the test in *Zurich*, the requirement to demonstrate *bona fides* under subsection 7(2) was not met and the discriminatory policy was not saved by that subsection.

On appeal to the Court of Queen's Bench, the parties agreed that the standard of review was correctness because the appeal involved the interpretation of the term "*bona fide*" in subsection 7(2) (*IBEW* ABQB at para 5).

Justice JS Little held that the applicable test is to be based on the wording of the provision (subsection 7(2)), and not whether the instrument being examined is a pension plan or an insurance policy (*IBEW* ABQB at para 13). The applicable case was *Potash*, and based on that case, the relevant consideration was the *bona fides* of the plan. The test provided in *Potash* (at para 41) was to show that it is a legitimate plan, "adopted in good faith, and not for the purpose of defeating protected rights." It was not necessary to require proof that the plan was reasonable (*IBEW* ABQB at para 16). Thus, the Union's appeal was dismissed.

Commentary

It is noteworthy that when determining whether there was discrimination, the Dissenting Panel member focused on the *effect* of the impugned policy on the employee, and not on its purpose. Yet, the test developed in *Zurich* and adopted in *Potash* for interpreting the defence focuses on the *purpose* of the plan at issue. Traditionally, human rights law is considered remedial and educational. For that reason, the intention of the person alleged to have discriminated is not normally relevant; the impact of their behaviour is what is relevant. However, it appears that when considering the defence under subsection 7(2), intention has been allocated a very important position and effect has been thrown out the window, as it focuses on the *bona fide* purpose of the plan.

Interestingly, the incorporation of a requirement of "reasonableness" as occurred in the statute interpreted in *Zurich*, could actually go a long way in addressing the effect of a plan (or some of its terms and conditions). The reasonableness requirement anticipates that evidence will be required to explain why a term that is discriminatory (in effect) is necessary. This is more in keeping with the general defence in the legislation (section 11), which allows respondents a

defence if they can demonstrate the discrimination is "reasonable and justifiable in the circumstances." If the Alberta Legislature intends that any defence to discrimination should require proof that the discrimination is reasonable and justifiable, in view of the outcome in this decision, it should consider amending subsection 7(2) to add "reasonableness" in order to reflect that intention.

This post may be cited as: Linda McKay-Panos "Age Discrimination in Long Term Disability Plans: Reasonableness Not Required in Alberta" (1 November, 2016), on-line: ABlawg, http://ablawg.ca/wp-content/uploads/2016/11/Blog_LMP_IBEW_Nov2016.pdf