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Once Again, ABCA deals with Jurisdictional Issue of Labour Arbitration Board vs. Human Rights Commission

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Cases Considered:

Calgary (City) v Alberta (Human Rights and Citizenship Commission), 2011 ABCA 65

Previously, the Alberta Court of Appeal dealt with the issue of what would occur if both the Human Rights Commission and another administrative body (such as a labour arbitration board) might have jurisdiction over an issue. In two decisions released one right after the other, *Calgary Health Region v Alberta Human Rights and Citizenship Commission and Diana Hurkens-Reurink*, 2007 ABCA 120 and *Amalgamated Transit Union, Local 583 v City of Calgary and Labour Arbitration Board*, 2007 ABCA 121, the ABCA held that where two tribunals were available, the employee or his/her union could pursue either avenue for a remedy. However, the Court also made it clear that the first tribunal's decision might be binding on the second tribunal. Consequently, if the labour arbitrator found that there was no discrimination in the case, that ruling would probably be binding on the Commission (if that process occurred later).

The current case deals with a similar issue. Gregory McDougall and Mark Scobie (the Complainants) were firefighters and members of the International Association of Fire Fighters, Local 255, which had a series of collective agreements with the City of Calgary. The Local and the City agreed to create a Supplementary Pension Plan (SPP), which was intended to bridge benefits for members between the ages of 55 and 65 (normal retirement age).

Both Complainants became permanently disabled. They were entitled to apply for long term disability payments or worker's compensation benefits, which usually anticipate a return to work. In addition, they may have been entitled to either ordinary pension benefits or a disability pension under the SPP (if they became "totally and permanently disabled"). Both Complainants elected to apply for a disability pension under the SPP.

While both Complainants started to receive benefits, a dispute arose (between the Trustees of the SPP and the City) as to whether they had to resign their employment in order to be eligible to receive a pension under the SPP. While the City and the Trustees of the SPP were attempting to resolve the dispute, McDougall filed a complaint with the Commission on January 23, 2003, alleging that he was discriminated against in the area of employment on the ground of mental disability, because his employment status was terminated unnecessarily by the City.

Effective February 7, 2003, the City terminated both Complainants' employment so that they could (in the opinion of the City) continue to receive disability pension payments. On March 17, 2003, both Complainants filed a second supplemental complaint with the Commission, adding an allegation that their employment had been terminated in a discriminatory manner. The complaint

included a support letter from the Local, indicating that the Local disagreed with the City's interpretation of the SPP and objected to the termination of the two Complainants.

Eventually the dispute over the interpretation of the SPP was ordered to be heard by an arbitrator under the collective agreements. While the arbitration was in process, McDougall was found to be eligible for workers' compensation benefits retroactive to the commencement of his disability. The City retroactively reinstated his employment, and he then received worker's compensation instead of the disability pension. His grievance therefore became moot.

In dealing with the grievance, the majority of the Board of Arbitration concluded that the City had wrongfully terminated the employment of the Complainants and directed that they be reinstated: *Calgary (City) v International Assn. of Firefighters, Local 255 (McDougall Grievance)*, [2005] AGAA No. 47 LAX/2005-412. The City was successful in its application for judicial review of the decision: the reviewing judge determined that under the SPP a continuing employee was not entitled to receive disability pension benefits and that the City was justified in terminating the Complainants: *Calgary (City) v International Assn. of Firefighters, (Local 255)*, 2006 ABQB 133, and this decision was upheld on appeal: *Calgary (City) v International Assn. of Firefighters, Local 255*, 2008 ABCA 77.

The grievance arbitration and the appeals did not directly engage the rights of the Complainants under the (then) *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-14. The principles of the Act, however, were relied upon in supporting the Local's interpretation of the SPP. In the case that is the subject of this post, the Alberta Court of Appeal (per Justices Clifton O'Brien, Frans Slatter and Gerard Hawko) noted that the Court of Queen's Bench and the Court of Appeal had implied in their comments in the arbitration matter that the requirement of the Complainants to resign their employment to be eligible to receive a disability pension was not inconsistent with human rights principles (*City of Calgary*, para. 12).

On March 12, 2007, after the Court of Queen's Bench had quashed the decision of the Board of Arbitration, but before the QB decision was upheld by the Court of Appeal, a Human Rights Officer released an Investigation Report on the second complaint filed by McDougall. The Officer rejected the argument that either the Board of Arbitration or the Alberta Labour Relations Board had exclusive jurisdiction over the dispute. In particular, the Officer concluded that the Commission continued to have jurisdiction over the human rights aspect of the complaint: the issue of accommodation during the SPP dispute. The Officer concluded that the Complainant had been discriminated against on the ground of disability. While McDougall was eventually re-employed by the City and had worker's compensation benefits reinstated, the Officer concluded that the City should not have terminated McDougall until there was finality in the legal dispute over the SPP, which would have been proper accommodation under the Act. The termination had exacerbated McDougall's mental disability. Further, the Officer concluded that the City had not accommodated the Complainant to the point of undue hardship (*City of Calgary*, para. 16).

Based on the recommendation of the Officer, the Chief Commissioner confirmed he would appoint a Human Rights Panel to hear McDougall's complaint. The City applied for judicial review, arguing, among other things that the Commission should be barred from proceeding further on the matter because it was *res judicata* (the matter had already been adjudged in a different forum). Although the Scobie matter was in abeyance, the City also sought an order prohibiting it from proceeding. The chambers judge granted the City's application for judicial review, holding that the issue of whether the City had a right to terminate the Complainants had

been dealt with in the arbitration proceedings. He also ordered that the continuation of the McDougall and Scobie human rights complaints be prohibited (*City of Calgary*, para. 18).

The matter was then appealed to the Alberta Court of Appeal. The Chief Commissioner argued that the chambers judge should not have decided the issues of *res judicata* (and other related issues) until the Human Rights Panel had had the opportunity to rule on them (*City of Calgary*, para. 22). The Court of Appeal held that because the issues in this case raised concerns about whether the tribunal had the ability to rule on the points in issue, and not directly on the merits of the complaint, the standard of review was correctness (*City of Calgary*, para. 26). Further, because the matter had been underway for several years, the chambers judge had discretion to make his own ruling rather than to send the matter back to the Human Rights Panel for its ruling (*City of Calgary*, para. 26).

The Alberta Court of Appeal next discussed the caselaw that indicates two different tribunals might have jurisdiction over the same dispute (citing, among others, the case noted above in paragraph one of this post). The Court opined that the mere fact that there were previous proceedings before the labour arbitrator and courts did not oust the jurisdiction of the Commission (*City of Calgary*, para. 28). The Court also made note of a 2009 amendment to the Act (see *Alberta Human Rights Act*, RSA 2000 c A-25.5, s. 22(1.1)), which effectively recognizes that both a grievance before an arbitration board and a complaint before the Commission can proceed, and it is often just a matter of timing as to which matter should proceed first and thus generate the most effective result. The risk of inconsistent results, or wasting resources, will be managed by the doctrines of *res judicata*, issue estoppel (which prevents the further litigation of an issue which a court or tribunal has already decided in a previous proceeding) and abuse of process (*City of Calgary*, para. 28).

The Alberta Court of Appeal also held that while the Commission has an independent mandate in the field of human rights under the Act, issues of economy, consistency, finality and integrity of the system of administration of justice justifies the binding of the Commission to issues previously decided by the courts (*City of Calgary*, para. 35). While the Chief Commissioner argued that there were outstanding human rights issues that were not fully adjudicated in the other proceedings, (e.g., twenty years of discrimination by the City), the Court of Appeal determined that the only issue that the Officer had suggested should be referred to the Human Rights Panel was the one of accommodation surrounding the SPP. The Court of Appeal also noted that the present proceeding did not engage the problem of 20 years of discrimination and that the order of prohibition issued by the chambers judge did not extend to that (*City of Calgary*, para. 37). The Court of Appeal also held that the human rights issue with respect to the way that the City had managed the uncertainty surrounding the interpretation of the SPP (i.e., whether this was sufficient accommodation under the Act), could not be detached from the other issues that had already been decided (*City of Calgary*, para. 39).

Thus, the Court of Appeal concluded that the core issues between the Complainants, the Local and the City had been decided and that it would amount to an abuse of process for a Human Rights Panel to reconsider them. Further, McDougall's complaint was largely moot and the complaint by Scobie was in abeyance. The Court of Appeal dismissed the appeal, noting: "Considerations of economy, consistency, finality and the integrity of the system of administration of Justice require that this long running dispute be brought to an end" (*City of Calgary*, para. 42).

While the decision of the Court of Appeal is quite strongly worded, it is not clear that the Commission would be prohibited from dealing with a fresh complaint from McDougall with respect to long standing discrimination by the City, as arguably this (or at least some aspects of it) is a separate issue. A fresh complaint might, of course, be barred by the one-year limitation period under the Act. The Court of Appeal found that there were no outstanding issues on the matter because there was lack of particulars in the Officer's report on the issue of long standing discrimination, and because Officer's report focused on accommodation during the SPP dispute.