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End? of a "Twenty-two-Year Odyssey" for Delorie Walsh

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Case commented on:

Walsh v Mobil Oil Canada, 2013 ABCA 238.

While several blogs have been written on the *Walsh v Mobil Oil Canada* case (see here, here and here), I was hoping not to have to write yet another one, and I really hope that the matter has come to a final conclusion, but I almost hesitate to so state. As noted by the majority of the Alberta Court of Appeal (Justices Paperny and McDonald, with Justice O'Ferrall concurring in the result), Ms. Walsh could not have known that when she filed her discrimination complaint against her former employer in 1991, it would lead to the termination of her employment and to a "22-year odyssey" to seek a remedy for her situation. As noted by the Court, Walsh appeared before the Human Rights Tribunal four times, the Court of Queen's Bench twice, and this current case is Ms. Walsh's second time before the Alberta Court of Appeal.

Recently, Walsh appeared before the Tribunal in order to have damages assessed for Mobil's discriminatory and retaliatory conduct. The Tribunal assessed the damages for Ms. Walsh's complaints and on September 2, 2010, awarded her $656,920 in damages ($10,000 in general damages for the first complaint (discrimination); $472,766 for loss of income between the date of termination and December 31, 2000; $139,154 for loss of pension benefits; and $10,000 for future treatment and counseling) (*Walsh* CA, 2013 at para 11). The Tribunal also awarded general damages of $25,000 for the second complaint, in part guided by the Court of Queen's Bench's conclusion that the retaliatory action of Mobil's employees was "insensitive" and "cruel" (*Walsh* CA, 2013 at para 16). A subsequent decision on costs and interest was rendered on February 8, 2011 (*Walsh* CA, 2013 at para 11). Ms. Walsh appealed both the remedy and cost decisions to the Court of Queen's Bench and Mobil cross-appealed. The judge upheld the Tribunal's remedy entirely, and upheld the costs decision, except to remit the question of Walsh's entitlement to personal expenses back to the Tribunal. The appeal and cross-appeal were dismissed. Both parties then appealed the judge's decision to the Court of Appeal. The focus of the current appeal is on the remedy.

The first issue was the assessment of damages. The Court of Appeal determined that the standard of review was reasonableness (*Walsh* CA, 2013 at para 27). Ms. Walsh challenged: (i) the finding that her lost income could be attributed to Mobil's discriminatory conduct to the end of 2000 but not beyond, and (ii) the tribunal's use of Mobil's compensation and progression policies in the calculation of the amount of lost wages (*Walsh* CA, 2013 at para 29).

The Court of Appeal reviewed the case law on the calculation of damages in human rights employment cases and concluded that the Tribunal's determination that Ms. Walsh's depression

and physical problems after 2000 stemmed from other causes was sustainable (*Walsh* CA, 2013 at para 52). Second, the Court of Appeal found that the Tribunal's placement of Walsh on the salary grid (not on the highest paid male employee) was reasonable (*Walsh* CA, 2013 at para 58).

Both parties appealed the two awards for general damages (for loss of dignity and mental distress). While noting that general damages awards have been low, the Alberta Court of Appeal found that the Tribunal's award was reasonable in view of the egregious conduct of the respondent; noting also that both awards are on the low end of what they consider appropriate in the circumstances (*Walsh* CA, 2013 at para 64).

There were other minor damages issues and the Court of Appeal agreed that the Tribunal and Court's decisions were reasonable (*Walsh* CA, 2013 at para 67).

The second issue was the breach of the duty of fairness and the reasonable apprehension of bias. With regard to both sub-issues, the Court of Appeal held that they should have been raised before the Tribunal and not at the Court of Appeal; to allow the issue of bias to be raised for the first time on appeal would work an injustice to all (*Walsh* CA, 2013 at para 75).

The third issue was the application of the doctrine of election and abuse of process. Both of these concerns were in relation to a work-related motor vehicle accident. Mobil argued that Walsh could not pursue both a claim for loss of income against the other driver in the motor vehicle accident, and a claim for income loss arising from the human rights claim. The Court of Appeal held that the Tribunal was reasonable in its approach and that the reviewing court was reasonable in concluding that the doctrine of election did not apply to the case (*Walsh* CA, 2013 at para 92). Further, the co-existence of two separate cases in these circumstances is not an abuse of process (*Walsh* CA, 2013 at para 94).

The fourth and final issue was whether there should be an award of costs on the basis of solicitor client (meant to indemnify the complainant for her costs; usually higher than party and party costs). The Court of Appeal found that the decision of the Tribunal to award party and party costs was erroneous, as it did not consider costs in the specific context of the litigation on remedies. Parties were invited to make written submissions as to costs. (*Walsh* CA, 2013 at para 101; no decision has yet been rendered on this issue).

Further, there was no error with respect to the Tribunal's order on disbursements and personal expenses (*Walsh* CA, 2013 at para 103).

Justice O'Ferrall concurred with the result and endorsed the reasoning of the Court of Queen's Bench judge and would dismiss both appeals, subject only to having the costs issues resolved (*Walsh* CA, 2013 at para 124).

As I have stated before, this case is an extreme example of some of the criticisms of Alberta's human rights system. However, for reasons previously noted, it should not be used to argue for the complete disbandment of Alberta's human rights system. Once the costs issues are resolved, surely all parties involved must be more than ready to put this case behind them.