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ABCA Agrees that Long Term Disability Plan was *Bona Fide*

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Case Commented On: *International Brotherhood of Electrical Workers, Local No. 1007 v Epcor Utilities Inc.*, 2017 ABCA 314 (CanLII)

In two earlier rather complex decisions (*Epcor Utilities Inc. v International Brotherhood of Electrical Workers Local No. 1007 (McGowan Grievance)* (2015), 22 CCPB (2d) 57, 2015 CanLII 62763 (AB GAA), application for judicial review dismissed; *International Brotherhood of Electrical Workers Local 1007 v Epcor Utilities Inc.*, 2016 ABQB 574 (CanLII)), Epcor Utilities Inc.'s long term disability plan was held at first glance to discriminate based on age, but was defended because it was a legitimate and genuine (*bona fide*) pension plan. In an earlier post, I described the lower court's focus on statutory interpretation of subsection 7(2) of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (AHRA).

After an appeal by the International Brotherhood of Electrical Workers, Local 1007 (IBEW), the ABCA (per Justices Ronald Berger, Frans Slatter and Jo'Anne Strekaf) upheld the ABQB's ruling.

A key issue was the interpretation of subsection 7(2) of the AHRA, which reads:

> 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.

The ABCA stated that each human rights case must be decided on its unique facts, but then spent quite a bit of time comparing and contrasting similar provisions that were in issue in both *Zurich Insurance Co. v Ontario (Human Rights Commission)*, [1992] 2 SCR 321, 1992 CanLII 67 (SCC) (*Zurich Insurance*) and *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 (CanLII) (*Potash*).

The legislation from New Brunswick that applied in *Potash* was worded very similarly to Alberta's legislation. On the other hand, the Ontario legislation, which applied in *Zurich Insurance* was different.

According to the ABCA, *Zurich Insurance* involved discrimination in automobile insurance premiums based on the age, sex and marital status of the driver (at para 10). The ABCA stated (at para 10) that:

> The applicable Ontario statute provided in s. 21 that a protected right:

> . . . is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and bona fide grounds because of age, sex, marital status, family status or handicap.

The ABCA also noted that: "It was conceded that the insurance premiums in question were bona fide, in that they were developed for legitimate economic and business reasons. The issue came down to whether they were 'reasonable'" (at para 10). In *Zurich Insurance*, the Supreme Court of Canada (SCC) interpreted the requirement of reasonableness in the Ontario legislation as (at 341):

> . . . The exemption therefore permits the employer to apply practices and work rules that may affect some employees in a discriminatory fashion provided they are reasonable. This requirement of reasonableness has two aspects. First, any discriminatory practice or rule must have a substantial connection to the operation of the employer's business and second, it must not discriminate more than is necessary. The second aspect of the requirement is addressed by considering whether there is an alternative to the impugned practice which would be less discriminatory while still achieving the sought after business-related objective. . . .

The ABCA pointed out that the insurance premiums in *Zurich Insurance* were calculated based on actuarial evidence, and the SCC had held that the reliance on actuarial evidence satisfied the first part of the reasonableness test, because the discriminatory rates had a "substantial connection" to the operation of the business (para 11). The SCC had also noted that while statistical evidence could not override human rights, Zurich Insurance had established that it was not practical to use any alternative basis for setting insurance rates. Hence, the rates were both reasonable and *bona fide* (at para 12).

On the other hand, the SCC in *Potash* addressed a pension plan that required mandatory retirement at age 65. The exceptions in the New Brunswick legislation were summarized by the ABCA at para 14:

> (5) Notwithstanding subsections (1), (2), (3) and (4), a limitation, specification or preference . . . shall be permitted if such limitation, specification or preference is based upon a bona fide occupational qualification as determined by the Commission.
>
> (6) The provisions of subsections (1), (2), (3) and (4) as to age do not apply to
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> (a) the termination of employment or a refusal to employ because of the terms or conditions of any bona fide retirement or pension plan;
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> (b) the operation of the terms or conditions of any bona fide retirement or pension plan that have the effect of a minimum service requirement; or
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> (c) the operation of terms or conditions of any bona fide group or employee insurance plan. (emphasis added)

Thus, the statutory exemptions in *Zurich Insurance* were different from those in *Potash*, in that the former required a "reasonable and bona fide" plan, whereas the latter only required a "bona fide plan". Because the New Brunswick legislation lacked the "reasonableness" requirement, the necessary requirement was that the pension plan be *bona fide* or "adopted in good faith and not for the purpose of defeating protected rights" (*Potash* at paras 30, 35, 42). The requirement for the plan to be *bona fide*, had a subjective requirement related to motives and intentions and an objective requirement related to whether it was legitimate and genuine, which requires an examination of the whole plan, but not any individual provision (at paras 14, 15).

The ABCA then set out a list of ways that the plan in the case at bar was similar or dissimilar from *Zurich Insurance* or *Potash*:

> The appellant and the respondent disagree on whether this case is governed by *Zurich Insurance* or *Potash Corporation*. The circumstances underlying this appeal are both similar and dissimilar from both of those prior decisions:
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> - this appeal involves an insurance plan (i.e., disability insurance), making it similar to *Zurich Insurance* (automobile insurance), but it is also related to pensions and retirements like *Potash Corporation*;
> - this appeal, like *Potash Corporation*, arises in the employment context;
> - at issue in *Zurich Insurance* were the premiums charged, which were based on age and gender; at issue in *Potash Corporation* (as in this appeal) were the benefits available under the plan, not the premiums;
> - there was no attempt in this appeal, as in *Zurich Insurance*, to justify the plan based on actuarial or statistical evidence;
> - the Alberta statute has separate exemptions for insurance plans and "bona fide occupational requirements", like the statute involved in *Potash Corporation*;
> - the Alberta statute does not have a requirement for "reasonableness" with respect to insurance plans, making it similar to *Potash Corporation*;
> - the Alberta wording ("<u>does not affect</u> . . . the terms or conditions" of a bona fide insurance plan) is arguably not quite as strong as the wording in *Potash Corporation* ("<u>do not apply to</u> . . . the terms or conditions" of a bona fide pension plan), and arguably roughly equivalent to the wording in *Zurich Insurance* ("<u>is not infringed</u> [by] a distinction . . . on reasonable and bona fide grounds");
> - there is no evidence that the Sun Life insurance plan is "registered" under any applicable legislation. It is, however, a product of the collective bargaining process. (at para 17)

The ABCA concluded that the outcomes in both cases could be helpful in this instance (at para 17). However, the ABCA went on to hold that the wording of the AHRA more closely resembles that in *Potash*:

> Because of the absence of a "reasonableness" requirement in the *Alberta Human Rights Act*, and based on the ruling in *Potash Corporation*, in Alberta there is no separate requirement for "reasonableness" in the analysis of the Sun Life policy. Under s. 7(2), if

> the Sun Life policy is a "bona fide group or employee insurance plan", then its "terms and conditions" are not "affected" by the prohibitions in the *Act*. The insurance policy must be bona fide, meaning that it was a legitimate and genuine plan, "adopted honestly, . . . not for the purpose of defeating the rights protected under the *Act*". Objectively, the insurance policy as a whole must be legitimate and genuine. (at para 23)

The ABCA held that the judicial review judge was correct in determining that there was nothing incorrect or unreasonable about the Arbitration Board's decision that the Sun Life policy complied with the AHRA and then dismissed the appeal (at para 31).

What is the significance of this line of cases for disability plans? While the human rights decisions in Alberta are not binding on other jurisdictions, they may inform the court (and companies) as to the possible interpretation that will be made of similar provisions in human rights laws in other jurisdictions. It seems that the precise wording of the provisions in a particular province's human rights legislation will dictate whether or not any actuarial evidence is required to demonstrate a plan is "reasonable" or whether the legislation merely requires that the policy as a whole is legitimate and genuine.

Thus, my conclusion in my previous post stands. 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*, 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 (s 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 usually require proof that it is reasonable and justifiable, in view of the outcome in these decisions, it should consider amending s 7(2) to add "reasonableness" in order to reflect that intention.

This post may be cited as: Linda McKay-Panos "ABCA Agrees that Long Term Disability Plan was *Bona Fide*" (14 November, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/11/Blog_LMP_Long_Term_Disability.pdf