BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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"Fire Me Once, Shame on You – Fire Me Twice…!!"
Arbitrator Finds Post-Discharge Termination is not Void *Ab Initio*

In a recent decision, Arbitrator Frumkin held that an employer could terminate an employee who had already been discharged.

The Grievor, a letter carrier, had been terminated for abusive conduct to a customer. At the disciplinary meeting, after being told that he was discharged and handed the discharge letter, the grievor assaulted his supervisor. In a subsequent letter a few days later, the employer advised the grievor, in essence, that in the event he were to be re-instated as a result of arbitration of the first discharge, he was fired for a second time. He later plead guilty to a criminal assault charge.

The initial discharge was successfully grieved. In December 2011, the arbitrator overturned the discharge, substituting a three month suspension and an order for reinstatement.

In response to the award ordering reinstatement, the employer confirmed by letter that the grievor would not be reinstated, given that he had been again terminated eighteen months earlier.

Counsel for the Union argued that it was not open to the employer to discharge the grievor a second time when they did, as he had already been discharged and was therefore no longer employed by the employer at the time of the second discharge. The Union argued that because the conduct occurred after the grievor had been discharged, he was beyond the reach of the employer's disciplinary authority.

The Union relied on decisions where arbitrators had held that a union official could not be discharged when conducting union-related activities during a leave of absence from their employer or after they had been terminated by their employer. The Union also argued that the employer could only rely on

post-discharge conduct in the context of the initial discharge to request that the arbitrator not reinstate the grievor.

The arbitrator rejected this analogy given that the grievor was not a union official, and the misconduct did not take place during union-related activity. The arbitrator concluded that "where there is no union dimension attaching to the misconduct, the employee, or discharged employee, may be subject to discharge for post-discharge misconduct, where circumstances warrant."

The arbitrator also noted that the grievor was a *de facto* employee at the time of the second discharge, given that he had been retroactively reinstated by the first award.

The arbitrator stated that there were two ways which an employer could have relied upon the assault. While it could not have relied on the conduct to support the first discharge per se, it was open for the employer to rely upon it with respect to whether or not the arbitrator should exercise his discretion to reduce the penalty on the first matter. In this case, the employer chose not to do this, and the arbitrator concluded that there was nothing in the case law or the collective agreement which precluded the employer from treating the grievor's post-discharge misconduct separately from the misconduct it had relied upon for the purposes of the initial discharge. Rather, all that was required was that the employer advise the employee, in accordance with the collective agreement, of its intention to discharge the employee in the event that the grievance against the initial discharge decision succeeded.

The arbitrator therefore held that a second discharge was possible where post-discharge misconduct occurred.

This is an important decision for employers where a post-termination event occurs, or where evidence of misconduct comes to the attention of the employer post-termination. An employer has an option of relying upon it going to remedy in respect of the termination, or as an independent ground warranting discipline, including termination for the event itself in the event that the initial termination is not upheld at arbitration.

Supreme Court of Canada Ruling Prohibits Forum Shopping

The Supreme Court of Canada has clarified the test for determining whether a matter has been "appropriately dealt with" in another proceeding: the Court has confirmed that human rights tribunals cannot review human rights decisions of other administrative decision makers.

In *British Columbia (Workers' Compensation Board) v. Figliola*, three injured employees had received compensation payments in accordance with the British Columbia Workers' Compensation Board's Chronic Pain Policy. On appeal to the Review Division, the employees argued that the policy, which provided for a fixed award for chronic pain, was unreasonable, unconstitutional, and discriminatory contrary to British Columbia's *Human Rights Code*.

The relevant legislation was amended, and removed the Board's ability to apply the *Code*. As such, the Workers' Compensation Appeals Tribunal no longer had the jurisdiction to hear an appeal of the Review Officer's decision. Rather than seeking to judicially review the Review Officer's decision, the employees filed complaints with the Human Rights Tribunal, raising the same issues.

The Board brought a motion to dismiss the human rights complaints, and argued that the Human Rights Tribunal had no jurisdiction. The case ultimately made its way to the Supreme Court of Canada, where the Court had to determine whether the Human Rights Tribunal had the jurisdiction to re-hear a complaint that had already been dealt with by another tribunal of competent jurisdiction.

The Supreme Court's decision focused on subsection 27(1)(f) of the *Code*, which provides that all or part of a complaint can be dismissed without a hearing where the substance of the complaint has been "appropriately dealt with" in another proceeding.

The Court set out the following test for the application of subsection 27(1)(f):

1. is there concurrent jurisdiction to decide human rights issues;
2. is the previously decided legal issue essentially the same as what is being complained of to the Tribunal; and
3. have the complainants had the opportunity to know the case to be met and the opportunity to meet it, regardless of how similar the process was to the one the Tribunal uses?

The Court further clarified that the legislation does not grant the Human Rights Tribunal the power to judicially review another tribunal's decision; rather, there is to be "territorial respect" between adjudicative bodies, such that they treat each other's decisions as final. Had the employees wanted to judicially review the Board's decision, that option was available to them through the courts.

In this case, the Court found that the Tribunal and the Board both had concurrent jurisdiction over the subject matter and, as such, the complaints constituted a duplication of the Board's proceedings. The Board had already decided the issues, and the complainants were found to have fully participated in the proceedings. Thus, the Tribunal's decision to proceed with the complaints was found to be patently unreasonable. On that basis, the Court set aside the Tribunal's decision and dismissed the complaints.

The Court's decision reiterates the importance of finality, and provides a clear statement that the type of "forum shopping" that occurred in this case is inappropriate. Although this decision is based on British Columbia's *Human Rights Code*, very similar language appears in Ontario's *Human Rights Code*. Accordingly, this decision provides helpful commentary on proper interpretation of human rights legislation in Ontario.

Further, although the particular facts in this case were limited to the interpretation of human rights legislation, this decision is likely to have far broader application, especially given the Court's thorough analysis of the principle that "collateral attacks" on final decisions are to be avoided. Thus, it is likely that this decision of the Supreme Court will be raised in the context of grievance arbitrations, occupational health and safety matters, and in many other forums where the issue of concurrent, or overlapping, jurisdiction arises.

Saskatchewan Court of Queen's Bench Says *Charter* Protects Right to Strike

A judge of the Saskatchewan Court of Queen's Bench has ruled that the right to strike is constitutionally protected by section 2(d) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of association.

Saskatchewan's *Public Service Essential Services Act* (*PSESA*) prohibits public sector workers that perform essential services from striking. The legislation also requires that, at least 90 days before the expiry of a collective agreement, the parties must negotiate an essential services agreement that determines which services are deemed essential, and which employees must remain on the job during a strike or lockout. Where the parties cannot agree, the employer determines which employees are to be designated essential.

The *PSESA* allows unions to appeal to the Saskatchewan Labour Relations Board in respect of the number of employees designated by the employer as essential. However, the Board's abilities are limited, and the Board has no authority to review the reasonableness of an employer's designation of specific employees.

In *Saskatchewan v. Saskatchewan Federal of Labour*, the Union applied for a declaration that the *PSESA* was invalid and unconstitutional. Before the Court, the Union argued that the right to strike must be protected by section 2(d) of the *Charter*; otherwise, the right to bargain collectively, which was recognized by the Supreme Court of Canada in both the *B.C. Health Services* and *Fraser* decisions, would be meaningless. The Province responded by arguing that the Supreme Court has never explicitly recognized a constitutional right to strike, and that section 2(d) does not protect all aspects of activity related to collective bargaining.

The Court ultimately found that the right to strike is a constitutionally-protected freedom under section 2(d). The Court stated that the previously recognized right to collective bargaining can only operate effectively where there is a threat of economic sanction. Since the *PSESA* interferes with the right to engage in strike activities, it was found to be unconstitutional.

The Court explained that the *PSESA*'s interference with the right to strike was not justified under section 1 of the *Charter*, primarily because an overly restrictive approach to the "essential service" designation had been taken, and went further than was necessary in limiting the right to strike. Further, unlike other essential services legislation in Canada, the *PSESA* contains no dispute resolution processes.

The Court suspended the declaration of invalidity for 12 months, in order to allow the government to bring the legislation into compliance.

The Province has already filed a Notice of Appeal in this matter, requesting that the Court of Appeal overturn the decision of the Queen's Bench. Given that the decision in this case appears to contradict the Supreme Court's ruling in *Fraser* that the *Charter* does not protect particular models of collective bargaining, the stage has been set for an eventual pronouncement by the Supreme Court on this issue.

New Privacy Tort Does Not Impact Employer's Right to Employee Medical Information

In *Complex Services and OPSEU Local 278*, Arbitrator Surdykowski confirmed that, regardless of the existence of individual privacy rights, employers still have the right to request and even require that employees provided medical information in certain circumstances.

The employer in this case had become concerned about the grievor's mental health upon her return from a medical leave of absence. The employer accordingly referred the grievor to a doctor to have her functional abilities assessed.

However, the grievor refused to consent to the disclosure of her functional abilities, claiming that this medical information was confidential. As the employer was unable to discern the grievor's accommodation needs and fitness to attend at work without this information, the grievor was placed on a second medical leave, until such time as she could safety return to work.

Both the union and the employer filed grievances. The union alleged that the grievor had been discriminated against and harassed in the course of the accommodation process, while the employer alleged that the union and the grievor had failed to meet their obligations pursuant to the duty of accommodation by failing to provide the requisite medical information.

Arbitrator Surdykowski found that, although an employee's personal medical information is generally private and confidential, an employer is entitled to access that information for legitimate work purposes, including to confirm that an employee is able to safely return to work, to provide appropriate accommodation, or to otherwise comply with applicable legislation and/or collective agreement. While employees are entitled to refuse to provide their confidential medical information to their employer, they must then accept the consequences of that decision, which may include the employer's refusal to allow them to return to the workplace, the delay or disruption of the accommodation process, the denial of benefits, or even the loss of their employment.

The Arbitrator then went on to consider the impact of the Ontario Court of Appeal's decision in *Jones v. Tsige*, released January 18, 2012, in which the Court recognized the privacy rights of individuals with the creation of the new tort, "intrusion upon seclusion". Finding that the Court's decision did not limit employers' rights to access employee's medical information for the above-referenced purposes, he stated:

> "…it does not stand for the proposition that asking for or even demanding that an employee disclose medical information for a legitimate purpose constitutes an improper or actionable intrusion on the employee's right to privacy."

In the case before him, Arbitrator Surdykowski concluded that, as a result of the grievor's refusal to disclose her functional abilities, insufficient medical information was available to allow the employer to accommodate the employee safely in the workplace. He further found that, in so refusing, the grievor had failed to fulfil her obligations under the accommodation process. Accordingly, the union's grievance was dismissed, and the employer's grievance was allowed.

Complex Services is significant, in that it is the first arbitration award to consider the impact of the Court of Appeal's recognition of the tort of intrusion upon seclusion. While it remains to be seen whether Arbitrator Surdykowski's decision will be applied by other decision-makers, in our view, his interpretation of the impact of the new privacy tort on employers' rights and obligations in respect of employee medical information is a reasonable one.