

Human Rights Update in Alberta

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HUMAN RIGHTS UPDATE IN ALBERTA¹

Introduction

This paper discusses some recent human rights developments in Alberta, related to the area of human rights and employment. Alberta Court of Appeal, arbitration, and Alberta Human Rights Tribunal decisions will be canvassed.

1. Alberta Court of Appeal Decisions

a) Breach of *Human Rights Act* Does Not Obligate Parties to Submit Grievance to Arbitration

In *AUPE v Alberta*², the Alberta Court of Appeal considered whether a grievance adjudication arising from an alleged breach of Alberta's *Human Rights Act*³ required resolution by an adjudicator who was entirely independent of the employer. The collective agreement provided for the resolution of certain disputes before a 'Designated Officer' who was an employee of the Government of Alberta. Section 135 of the *Labour Relations Code*⁴ requires that all collective agreements contain a method for settling disputes arising from the interpretation of a collective agreement. It does not specifically require that the resolution means be through arbitration nor does it specifically require adjudication by an independent third party.

Previous Alberta case law had upheld the use of a Designated Officer under section 135 in relation to disputes that did not involve the breach of a statutorily protected right. The issue in *AUPE* was whether there is an exception to the general rule in Alberta that it is permissible for parties to deny access to the arbitration process as long as another dispute resolution mechanism is made available.

The dispute in *AUPE* stemmed from the discharge of Jamie Graham's employment with the Alberta Department of Employment, Immigration and Industry. Graham, who had been employed in a temporary position as part of a co-operative education program, suffered from cerebral palsy and

¹ This paper is based on a paper presented by Joyce Mitchell, partner, McLennan Ross LLP and Alison Adam, Associate, McLennan Ross LLP for CACE in 2014. Allison Rudzitis, student-at-law, in the Edmonton office of McLennan Ross LLP updated this CACE paper.

² 2013 ABCA 212 ("*AUPE*").

³ RSA 2000 c A-25.5 ("*Act*").

⁴ RSA 2000 c L-1 ("*Code*").

required the use of a wheelchair and voice recognition software. Graham's employment was brought to an end on the basis of his inability to perform the duties and requirements of the position.⁵

AUPE grieved the discharge. The collective agreement provided that a grievance concerning the dismissal of a "wage employee" (such as Graham) was to be determined by a "Designated Officer". The dispute was referred to a Designated Officer who dismissed the discharge.

AUPE took the position that despite the collective agreement provision, the dispute should have proceeded to arbitration because the discharge occurred in circumstances allegedly breaching a statute. The parties put the jurisdictional issue before Arbitrator Wallace, who concluded he did not have jurisdiction to hear the grievance. AUPE unsuccessfully sought judicial review of that decision. The decision of the reviewing judge was the subject of the appeal before the Alberta Court of Appeal.

The Court of Appeal first considered whether section 135 of the *Code* requires that differences arising from an alleged breach of a statutory right to be free from discrimination in employment be submitted to arbitration. The Court of Appeal noted that section 135 requires only that every collective agreement contain a method for the settlement of disputes. AUPE argued that Arbitrator Wallace's interpretation of section 135 of the *Code* offends both the *Act* and the *Charter*. The Court noted that section 2(d) of the *Charter* guarantees a meaningful process, it does not guarantee the contents of any resulting collective agreement. Further, there is nothing specific in either the *Charter* or the *Act* that compels adjudication through arbitration or by an independent decision maker. The Court of Appeal concluded that there is nothing in section 135 of the *Code* that required Graham's dispute to have been submitted to arbitration, rather than to a Designated Officer.

Second, the Court of Appeal considered whether *Parry Sound (District) Social Services Administration Board v O.P.S.E.U., Local 324*⁶ requires dispute resolution arising from a discharge (for reasons allegedly in contravention of a statute) be achieved only through arbitration. The Court of Appeal concluded that *Parry Sound* did not determine that all disputes had to be referred to arbitration noting that *Parry Sound* did not address this issue given that the ruling was specific to Ontario where labour relations legislation, (unlike Alberta) establishes arbitration as the only permitted dispute resolution mechanism for any dispute arising in the context of a collective agreement. AUPE argued that the purpose of *Parry Sound* was to include full human rights protection in the operation of a collective agreement, including independent adjudication of discrimination

⁵ AUPE at para 10.

⁶ 2003 SCC 42; 2003 2 SCR 157 ("*Parry Sound*"). In *Parry Sound*, a grievor whose probationary employment was terminated as a result of her pregnancy was found to be entitled to have her claim heard by an arbitrator despite a contrary provision in the collective bargaining agreement.