Human Rights Tribunal considering issues already litigated in other proceedings...and reaching different conclusions.

Posted by Erin Kuzz on Friday, October 22, 2010

Under the old *Human Rights Code*, a Respondent (typically an employer) could ask that the Tribunal not 'deal with' a complaint because it 'could be adequately dealt with in another forum.' Practically, this meant places like the Workplace Safety and Insurance Board or in labour arbitration (where arbitrators are not only entitled, but obligated to, interpret and apply legislation like the *Code*).

However, the 2008 amendments to the Code changed this provision. Now, the Tribunal will only dismiss an application where 'it is of the opinion that another proceeding has appropriately dealt with the substance of the application'.

Even during the consultation process before the legislation was passed this change garnered a great deal of debate. What did it mean to have a matter dealt with 'appropriately'? How was the 'substance of the application' to be defined?

We now have two cases that provide some insight, and the answers are not helpful to employers.

The first case was *Boyce v. TorontoCommunity Housing Corporation*. In that case an employee had suffered a work related injury. When the employer assigned him alternate work and he declined it on the basis that the travel requirements were inappropriate. The WSIB Claims Adjudicator found that the work offered was, indeed, suitable and discontinued his benefits.

The employee filed an application to the Tribunal, alleging that his employer had failed to accommodate him to the point of undue hardship. The Tribunal agreed.

The Tribunal looked at both pieces of legislation (the *Code* and *Workplace Safety and Insurance Act*) and concluded that both had jurisdiction over matters related to returning injured workers to the workplace; the *WSIA* because that was the entire purpose of the legislation, and the *Code* because any work related injury is considered a 'disability' under the *Code*.

However, the Tribunal concluded that the question under the *WSIA* is whether the employer had offered 'suitable modified work,' while the *Code* holds an employer to a higher standard: accommodating to the point of undue hardship. The Tribunal concluded that the employer hadn't adequately considered the employee's request to be moved to another location (and whether to do so would amount to undue hardship) and therefore the employer had acted in violation of the *Code*.

In another recent case, *Barker v. ServiceEmployees International Union*, the employee had been terminated after an absence due to medical reasons. The matter went first to arbitration, where the arbitrator ultimately concluded that the medical evidence provided by the employee did not show that she was likely to be able to return to work in the foreseeable future, with or without accommodation. The termination was upheld.

The employee also filed an application to the Tribunal. The Tribunal said it was required to 'scrutinize the human rights analysis of other decision makers' and concluded that the arbitrator had not adequately considered the sections of the *Code* that the Tribunal felt applied. The

Tribunal refused the employer's request to dismiss the human rights application and sent the matter on for a full hearing.

So employers need to be very aware that "*it's not over 'til it's over*." Just because an employer is successful in one forum doesn't mean that there is no possibility of a human rights application that considers a matter in a very different light and reaches the opposite conclusion.

The lesson: make sure you're aware of all pieces of legislation that may affect workplace decisions and your actions are in compliance with them all. It won't avoid two proceedings, but at least it will best position you to win both!

Erin Kuzz is a lawyer at Sherrard Kuzz LLP, a firm that does nothing but help employers in dealing with workplace issues. Erin is an avid golfer (note: avid, not good) and an equally avid football fan. Her world view: if you're not having fun, why bother?