

When Tribunals Collide: Collective Bargaining Rights and Human Rights Complaints

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Is a provincial human rights commission entitled to investigate complaints which are parallel to, or overlap with, grievances that have previously been resolved through the labour arbitration process? The Alberta Court of Appeal has recently ruled on this issue and concluded such proceedings are an abuse of process.

The case involved two permanently disabled firefighters, M. and S., who had been employed by the City of Calgary. Both alleged they had a mental disability, Post-Traumatic Stress Disorder, and both were members of the firefighters' union, Local 255, which had a series of collective agreements with the City. Depending on the degree of disability, the firefighters were eligible for long-term disability payments or workers' compensation; ordinary pension benefits; or disability pension payments under a "Supplementary Pension Plan" (SPP), available for those who were "totally and permanently disabled." M. and S. elected to receive disability pensions under the SPP, but a disagreement arose as to whether they had to resign their employment to receive these benefits. The City's position was that, to remain compliant with income tax rules and based on a proper interpretation of the SPP, such benefits could not be paid to those who were still employees.

While this issue was being negotiated between the union and the City, M. filed a complaint with the Human Rights Commission under the provincial *Human Rights, Citizenship and Multiculturalism Act*, alleging that the City had discriminated against him based on his mental disability. He claimed his employment had "been terminated unnecessarily," and he had had "the crap pounded out of [him] at previous appointments" to address his benefits entitlements. S. filed a similar complaint. The City had terminated the complainants' employment so that they could continue to receive disability pension payments. The letters of termination specifically stated that "this decision is made solely to enable you to have access to benefits afforded you under the Firefighters [SPP]."

In the meantime, the dispute over the proper interpretation of the SPP was submitted to arbitration under the collective agreement (this did not directly engage the discrimination complaints). The initial ruling was that the City wrongfully terminated the complainants, and they were ordered reinstated. The City applied for judicial review of the arbitrator's decision, and both the court hearing the application, and the Court of Appeal on appeal, ruled that a continuing employee was not entitled to receive disability pension benefits and that the City was justified in terminating the complainants' employment. [See *Calgary (City) v. International Assn. of Fire Fighters, Local* 255, 2008 ABCA 77, 86 Alta. L.R. (4th) 24]. In coming to its decision, the appellate court noted that it was not discriminatory to require a disabled firefighter to resign or be terminated from employment in order to receive a disability pension, since an injured employee had options short of permanent disability status under the SPP, and these options provided him or her with continued employment status.

While the collective bargaining matter was wending its way up the judicial food chain, an officer of the Commission concluded that the Commissioner continued to retain jurisdiction over the human rights aspect of M's complaint, and that the City had failed to accommodate the employee by terminating him before finality was reached on the legal dispute. She recommended the matter proceed to a panel of inquiry. The City applied for judicial review of the officer's decision. The court below ruled that the City's right to terminate the complainants had been determined in earlier proceedings; accordingly, the issue was res judicata or, alternatively, it would be an abuse of process to allow a human rights panel to re-examine the issues.

The Alberta Court of Appeal dismissed the Commission's appeal of that ruling. Previous proceedings before a labour arbitrator and the courts did not necessarily oust the jurisdiction of the Commission: because of this recognized concurrent jurisdiction, the issue was more properly analyzed under the doctrines of issue estoppel and res judicata, and not as a jurisdictional claim. This required an examination of whether the same question had been decided in the earlier proceedings; whether the earlier judicial decision was final; and whether the parties (or their privies) were the same in both proceedings. Here, arguably, the parties were not the same as the Commissioner was not involved in the labour arbitration proceedings.

Even where the preconditions for issue estoppel and res judicata were not met, the related concept of abuse of process could still be engaged. While there was "no definitive test for finding an abuse of process in this context," "binding the Commission to issues previously decided by the courts [was] justified by issues of economy, consistency, finality and the integrity of the system of administration of justice." Looking closely at what was alleged in M's complaint, the court found he wanted two things: his SPP benefits, and the continuation of his employment. The City correctly concluded it could not provide both, but the officer's ruling assumed it somehow could, and therefore could "accommodate" these inconsistent demands. The decision assumed the City should have "accommodated" the employee's incorrect interpretation

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(2010). A copy is available online at http://tinyurl.com/4omg5ch.
3. [1972] 2 All E.R. 353 (C.A.); *aff'd on other grounds*, [1973] 2 All E.R. 1169 (H.L.).
4. *Id.* at 376. (Quoted with approval in *R v. Campbell and Shirose* [1999] 1 S.C.R. 565, at para. 50).
5. For example, those called to the Bar in Alberta swear the following oath: "That I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors according to the law. That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta." The oath in Ontario is: "I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. I shall protect and defend the rights and interests of such persons as may employ me. I shall conduct all cases faithfully and to the best of my ability. I shall neglect no one's interest and shall faithfully serve and diligently represent the best interests of my client. I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon frivolous pretences. I shall not pervert the law to favour or prejudice any one, but in all things I shall conduct myself honestly and with integrity and civility. I shall seek to ensure access to justice and access to legal services. I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession. All this I do swear or affirm to observe and perform to the best of my knowledge and ability." There is an optional oath of allegiance to the Sovereign. Law Society of Upper Canada, By-Law 4, Sections 22, 23(1) and 24 (optional), respectively.
6. Melissa Dunne, *In-house counsel must act as the company moral compass*, In-house Counsel (Spring 2009) at 6.
7. Andrew C. Varga, On Being Human 138 (Paulist Press 1978). ML

Federal

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WL 285683 (N.D. Fla. Jan. 31, 2011), was filed minutes after the President signed the bill into law, and included, as parties, 26 States' Attorney Generals or Governors.

Judge Vinson agreed that a person's private decision not to buy health insurance was economic "inactivity," and the reach of the Commerce Clause was limited to individuals and entities engaged in "activity." In every Supreme Court case decided thus far, he said, "Congress was not seeking to regulate under its commerce power something that could even arguably be said to be 'passive inactivity,'" and it was a "radical departure" to accept that it could. Further, because the Necessary and Proper Clause could not be utilized to "pass laws for the accomplishment of objects" that were not within Congress' enumerated powers, the individual mandate could not be otherwise authorized by an assertion of power under that clause. Severability "ultimately turn[ed] on the nature of the statute at issue," and, while a severability clause was included in an earlier version of the Act, it had not been carried forward. The court concluded that "the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently. I must conclude that the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit."

On February 03, Virginia's Attorney General announced that he would seek an expedited review of the health care ruling by the U.S. Supreme Court, bypassing the Circuit Court of Appeals; the U.S. Department of Justice has likewise announced its intention to appeal Judge Vinson's decision to the Eleventh Circuit Court of Appeals. ML

Supreme Court

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addicts, outer space, and the Due Process Clause have in common. He began with an outright rejection of any federal constitutional right to informational privacy. Pointing out that the employees' brief did not once identify the portion of the Constitution that gave rise to such right, he added that this approach "was refreshingly honest. One who asks us to invent a constitutional right out of whole cloth should spare himself and us the pretense of tying it to some words of the Constitution." In any event, the Due Process Clause, the likely choice, was inapposite as it protected those fundamental rights and liberties which were "deeply rooted in this Nation's history and tradition." The employees, he said, did not even attempt to argue that the claim at issue passed that test, "perhaps recognizing the farcical nature of a contention that a right deeply rooted in our history and tradition bars the Government from ensuring that the Hubble Telescope is not used by recovering drug addicts." ML

Inside Canada

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of the SPP and pay the benefits until the dispute was decided. Because it was previously decided that the City could not do both things, "it would be an abuse of process to revisit that issue, and it [was] equally an abuse of process to attack that substantive conclusion by challenging the process used to decide it.... it offend[ed] the integrity of the administration of justice to attempt to litigate the process by which a decision was made, after the decision itself ha[d] been fully litigated." It was time for

"this long running dispute [to] be brought to an end." The ruling is *Calgary (City) v. Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65 (Alta. C.A., Feb. 24, 2011). M

Cases

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Apart from McEnroe's "bare speculation, the record [was] devoid of any evidence of discriminatory intent." *McEnroe v. Microsoft Corp.*, No. CV-09-5053-LRS, 2010 WL 4806864 (E.D. Wash. Nov. 18, 2010).

Search and Seizure

Traffic Stop, Search and Detention

Kesner Liberal, an African-American, was the designated driver for two friends. Officer Estrada, believing that Liberal was operating a car with illegally tinted windows, turned on his lights, but not his siren. Liberal was not sure whether he was being asked to pull over, but made a right turn at the next light, and immediately made another left into an unlit parking lot, parked his car and turned off his headlights. Liberal asked why he had been pulled over; Estrada ordered everyone out of the car, accused Liberal of trying to flee, and called for assistance. Six officers arrived. They grabbed Liberal, pushed him against the car and handcuffed him (he remained handcuffed for about 30 minutes). They asked Liberal if they could search the car, and he said yes. Officers searched the car thoroughly. Estrada continued to yell at Liberal about attempting to flee. One officer turned on the audio-recorder and read Liberal his rights. Officers also administered a sobriety test and determined Liberal was not intoxicated. Liberal and his passengers were allowed to leave. Liberal was never charged. He testified that the car's front and passenger-side windows were not tinted and were rolled down at the time of the incident.

Liberal sued, alleging violations of his Fourth Amendment and due process rights. The district court denied the officers qualified immunity for the traffic stop because, construing the facts in the plaintiff's favor, there was neither probable cause for the stop nor a reasonable suspicion of illegal activity. Estrada's determination that the car windows were tinted did not qualify as a "reasonable mistake." The officers appealed the denial of summary judgment on qualified immunity grounds.

The U.S. Court of Appeals for the Ninth Circuit affirmed the denial of qualified immunity for the officers. Estrada violated Liberal's clearly established constitutional right to be free from unreasonable seizures by initiating the traffic stop without a reasonable suspicion that Liberal was engaged in illegal activity. An officer's mistake of fact would not render a stop illegal, if the objective facts known to the officer gave rise to a reasonable suspicion of criminal activity. Here, however, while Estrada's determination that the windows were illegally tinted was a mistake of fact, it was not a reasonable mistake. Estrada would not have been able to see the car windows at all, as Liberal testified that these were rolled down. There was no reasonable basis for the stop because Liberal had violated no traffic laws, and "did not engage in headlong flight upon seeing Officer Estrada. Thus, even if Officer Estrada reasonably suspected that Plaintiff was avoiding him, such noncooperation, without more, does not support a suspicion that Plaintiff was engaged in criminal activity."

Because the traffic stop was unjustified, the ensuing frisk, search of the car, and 45-minute detention of the occupants were also unlawful. Excessive force was used against Liberal after he had complied with Estrada's requests: Liberal did not pose an immediate threat to anyone, and the background search revealed nothing that would have provided a reason to use force. The search of the car was also unconstitutional as Liberal had been coerced into providing his consent: he was already in custody, seven officers were present and had control of the vehicle, and an incomplete Miranda warning had been given. *Liberal v. Estrada*, 632 F.3d 1064 (9th Cir. 2011). M

CORRECTION

In the last issue, the photo caption on page 31 neglected to mention John "Kelly" Addy. Our sincere apologies.

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