

LABOUR ARBITRATORS MAY NOT HAVE FINAL SAY WHEN IT COMES TO HUMAN RIGHTS

Megan Barker v. S. E.I. U., Local 1, CanLII 2010 HRTO 1921

In a recent interim decision, the Human Rights Tribunal refused to dismiss an application alleging discrimination in employment on the basis of disability even though the Applicant's dispute with her employer had already been addressed in a labour arbitration.

The Applicant was employed as a receptionist by the S.E.I.U. She was represented by the United Steelworkers and her employment was governed by the terms of a collective agreement. After several months of sick leave, she was dismissed because she failed to participate in an independent medical examination requested by her employer.

The Steelworkers grieved the Applicant's termination and the dispute proceeded to arbitration. In a preliminary award, Arbitrator Surdykowski found that the substance of the dispute was whether the employer's actions, including its decision to discharge the Applicant, violated the Ontario *Human Rights Code*. He emphasized in his award that "[the] *Code* complaint is properly made, and having been made in this forum cannot be made elsewhere."

Ultimately, Arbitrator Surdykowski dismissed the grievance because he found that it was unlikely that the Applicant could have been able to return to work in the foreseeable future. Following established case law, he held that an employer is not required to hold a disabled employee's job where the employee will not be fit for work in the foreseeable future, with or without accommodation.

Arbitrator Surdykowski was critical of the Applicant's failure to furnish sufficient medical documentation, respond to the employer's requests for information and establish a clear return-to-work timeframe.

The Steelworkers did not judicially review Arbitrator Surdykowski's decision. The Applicant did not file a duty of fair representation complaint against her union under the Labour Relations Act. Instead, she filed a human rights application against her employer.

The employer sought early dismissal of the Tribunal application under section 45.1 of the *Code* on the basis that the Arbitrator Surdykowski had already appropriately dealt with the substance of the application. Section 45.1 of the *Code* provides as follows:

The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application. [emphasis added]

In its interim decision, the Tribunal held that dismissing an application under section 45.1 of the *Code* is an “extraordinary exercise” and that because quasi-constitutional rights are at stake, applications should only be dismissed where it is “manifestly clear” that human rights issues have been “fully and properly addressed.”

The Tribunal held that while it “does not exercise review power over the decisions of others, from a practical standpoint, it is necessary at times to scrutinize the human rights analysis of other decision makers. The purpose is to determine whether the kind of analysis contemplated by the *Code*, and central to the Tribunal’s expertise, has been undertaken where a Code issue has been raised.”

In its scrutiny of Arbitrator Surdykowski’s decision, the Tribunal found that the arbitrator focussed too much on whether the employer had just cause to terminate the Applicant and did not address human rights issues such as whether the employer could accommodate the Applicant’s absence up to the point of undue hardship or whether her dismissal was discriminatory. In addition, it was also not apparent if Arbitrator Surdykowski considered whether “requiring the applicant to return to work or to furnish additional medical documentation was non discriminatory”. The Tribunal also found that Arbitrator Surdykowski failed to consider whether the employer had discriminatorily obstructed the Applicant’s application for LTD benefits.

The Tribunal did not find it significant that the Applicant had failed to file a duty of fair representation complaint against the Steelworkers, reasoning that any such complaint was unrelated to the relevant issue of whether the arbitration hearing had appropriately dealt with the substance of the human rights application. Finally, the Tribunal was sympathetic to the Applicant’s arguments regarding access to justice, noting that in a labour relations setting, a worker’s individual rights are balanced against other individual and collective interests.

October 4, 2010