
AVOIDING THE RE-LITIGATION OF HUMAN RIGHTS ISSUES IN WORKERS' COMPENSATION

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A recent Supreme Court of Canada case involving the Workers' Compensation Board of British Columbia (the "Board") and the British Columbia Human Rights Tribunal (the "Tribunal") illustrates how concurrent jurisdiction over human rights issues can lead to prolonged and expensive re-litigation of human rights issues.

In *British Columbia (Workers' Compensation Board) Figliola*, 2011 SCC 52, a group of workers attempted to re-litigate a human rights issue (*i.e.* the Board's Chronic Pain Policy that provided fixed compensation for all such claims, regardless of the severity of an individual worker's claim) that they had already raised in their workers' compensation claims. They did so by filing a complaint with the Tribunal after the Board had already considered the human rights issue and determined that there had been no breach of the British Columbia *Human Rights Code*.

The Board attempted to stop the complaint from proceeding by bringing a preliminary motion at the Tribunal, arguing that the Tribunal ought to exercise its discretion not to deal with the complaint on the basis that the issue being raised had already been appropriately dealt with by the Board.

The Tribunal denied the motion. The Board then sought judicial review of the Tribunal's decision at the British Columbia Supreme Court, which set aside the decision of the Tribunal. The Tribunal then appealed the judicial review decision to the British Columbia Court of Appeal, which reinstated the Tribunal's decision.

The case was then appealed to the Supreme Court of Canada. It overturned the Court of Appeal's decision and held that the human rights issues could not be re-litigated. In its decision, the court clearly emphasized the need for finality and avoidance of unnecessary litigation in dealing with such cases. However, the court did leave room for the exercise of discretion, and held that in some cases, such issues may be re-litigated.

Indeed, the Human Rights Tribunal of Ontario has issued several recent decisions wherein it has allowed human rights complaints to proceed even though a determination of the human rights issues had already been made by the Ontario **Workplace Safety and Insurance Board**. Upon a review of these decisions it appears that if the Human Rights Tribunal of Ontario finds that the Workplace Safety and Insurance Board did not fully consider the human rights issue, it will allow a complaint to proceed and it will determine whether or not an employer has breached the *Human Rights Code*, separate and apart from any determination by the Workplace Safety and Insurance Board on the same issue.

Implications for Employers

There are several practical implications for employers arising out of these cases, as follows:

- Employers must recognize that whenever they are dealing with a human rights issue, such as the duty to accommodate within a workers' compensation claim, there is always the possibility that the human rights issue may be raised and potentially re-litigated before the applicable human rights tribunal.
- Employers need to ensure that, if a human rights issue is raised as part of a workers' compensation claim or any other claim, the human rights issue is thoroughly dealt with as part of the overall claim. Any resolution or determination of the human rights issue should include some written confirmation that: (i) a fair and proper procedure was followed, and (ii) a thorough consideration of the substantive issues and applicable human rights law was undertaken.
- Even if a human rights issue is settled, employers need to ensure that any release that is entered into by the employee meets three criteria: (i) it includes a specific reference to the applicable human rights legislation, (ii) it is worded in a manner that the applicable human rights tribunal would consider valid, and (iii) it confirms that it was entered into voluntarily and after careful consideration by the employee after being provided an opportunity to seek legal advice.

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