Forum shopping a growing problem

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Forum shopping by disabled employees has become an increasing problem for employers. Employees unhappy with decisions of labour arbitrators or workers' compensation boards often threaten or bring human rights applications. Multiplicity of proceedings raises the spectre of inconsistent findings and is wasteful of employer and scarce public resources.

Perhaps more troubling is that employers who comply with the directions and findings of other statutory decision makers may face liability for doing so in other forums.

In the past, human rights tribunals have taken jurisdiction over complaints that were already subject to adjudication in other forums, often considering and critiquing the content of decisions by other administrative bodies and evaluating their procedures.

In a recent decision, *British Columbia (Workers' Compensation Board) v. Figliola* [2011] S.C.J. No. 52, the Supreme Court of Canada provided clear guidance as to when human rights tribunals should decline jurisdiction.

Guiseppe Figliola had alleged that the B.C. Workers' Compensation Board chronic pain policy was discriminatory. A board review officer ruled against him. Instead of appealing that decision, Figliola commenced a human rights application. The board brought a motion to dismiss the complaint.

B.C.'s Human Rights Code provides that applications may be dismissed where the substance of the complaint has been "appropriately dealt with" in another proceeding. The Supreme Court held the complaint had been "appropriately dealt with" by the review officer and should have been dismissed. It outlined the following factors to consider:

- whether there was concurrent jurisdiction to decide human rights issues;
- whether the previously decided legal issues were essentially the same as what is being complained of to the human rights tribunal; and
- whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it.

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The Supreme Court held that another process need not be a "procedural mimic." Justice Rosalie Abella summed up that, "[a]t the end of the day, it's really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute."

Arguably, the ratio in *Figliola* would be applicable wherever adjudicators share overlapping jurisdiction. Nearly all common law jurisdictions in Canada provide in their respective human rights legislation that complaints may be dismissed where another proceeding has "appropriately dealt with" the substance. Several jurisdictions permit complaints to be dismissed where another proceeding "could" or "should" be more appropriate.

In *Canada (Human Rights Commission) v. Canadian Transportation Agency*, [2011] F.C.J. No. 1685, a disabled Air Canada employee complained to the Canadian Transportation Agency that the airline's attendant policy was an undue obstacle to his mobility. The agency found against him. Rather than appeal that decision, the employee commenced a human rights complaint. The Canadian Human Rights Tribunal assumed jurisdiction. Ultimately, the Federal Court of Appeal set aside the tribunal's decision and ruled, following *Figliola*, that by permitting the complaint to proceed "the Tribunal was 'complicit' in an attempt to collaterally appeal the merits of the Agency's decision and decision-making process."

In *Gomez v. Sobeys Milton Retail Support Centre*, [2011] O.H.R.T.D. No. 2276 and *Paterno v. Salvation Army*, [2011] O.H.R.T.D. No. 2277, the applicants brought human rights complaints after unsuccessful labour arbitrations. The Human Rights Tribunal of Ontario dismissed both applications, applying *Figliola*. In *Paterno*, the tribunal emphasized that it should not, "[e]valuate whether the arbitration process was the same as the process this Tribunal would have applied, whether the respondent was subject to the same kind of disclosure as would have been required in this Tribunal, whether the respondent withheld evidence in that process, or whether the arbitrator acted correctly in conducting the proceedings under s. 50 of the Labour Relations Act."

In *Whitwell v. U.S. Steel Canada*, [2012] O.H.R.T.D. No. 143, the employer allegedly terminated the applicant's employment after finding it had no suitable work that met the employee's restrictions. The case manager at Ontario's Workplace Safety and Insurance Board (WSIB) granted the employee certain benefits based on the strength of the employer's evidence that it did not have suitable work. The employee did not appeal the case manager's decision but instead filed a human rights application. The employer now seeks dismissal of that application, relying on *Figliola*.

Whitwell is the first case since *Figliola* in which the Ontario Human Rights Tribunal will reconsider its own line of jurisprudence. That line holds that decisions of front line WSIB decision makers, such as case managers, were not made in the course of "proceedings" and therefore cannot have appropriately dealt with the relevant human rights issues (see e.g. *Galves v. Balzac's Coffee Roastery*, [2010] O.H.R.T.D. No. 1530). The decision may resonate wherever employees are unhappy with operations level workers' compensation decisions. ■

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