Noteworthy Decision Summary

Decision: WCAT-2011-00160 **Panel**: Warren Hoole **Decision Date:** January 19, 2011

Board jurisdiction – Federal employees – Discriminatory actions – Occupational health and safety – WCAT jurisdiction – Constitutional issues -- Section 151, Part 3 of the Workers Compensation Act – Section 8 of the Constitutional Questions Act – Section 44 of the Administrative Tribunals Act

The employee was employed by a federal government department. Her employment was terminated. She sought to bring a discriminatory action complaint against her employer pursuant to section 151 of the *Workers Compensation Act* (Act). The Workers' Compensation Board, operating as WorkSafeBC (Board), concluded that it lacked jurisdiction over discriminatory action complaints by federal employees against federal employers. The employee appealed the Board's decision to WCAT.

Section 151 is found in Part 3 of the Act. Part 3 deals with occupational health and safety. As a matter of constitutional law, Part 3 is generally not applicable to federal workplaces. In particular, the discriminatory action provisions of Part 3 do not extend to federal workplaces. The federal government has core authority over labour relations and occupational health and safety, in relation to federal government employees. Provincial legislatures lack the constitutional competence to intrude into this core authority.

The discriminatory action provisions in Part 3 were therefore not available to the appellant, who was a federal employee, working for the federal government. The *Canada Labour Code,* rather than Part 3 of the Act, provided the proper venue for the federal employee's complaints of discriminatory action against her employer and union.

Notice of constitutional challenge under section 8 of the *Constitutional Questions Act* was not required. Such notice was only required where a law is held to be inapplicable or invalid. In the current appeal, the panel was merely determining whether WCAT had the necessary threshold jurisdiction to address the federal employee's discriminatory action complaints.

Pursuant to section 44 of the *Administrative Tribunals Act* (ATA), WCAT does not have jurisdiction over constitutional questions. The *ATA* defines a "constitutional question" as any matter requiring notice under the *Constitutional Questions Act*. Therefore, even if such notice was required in these circumstances, the panel would lose jurisdiction to address the employee's appeal pursuant to section 44 of the ATA.

The panel concluded that, in either case, it was unable to hear the merits of the discriminatory action claim, brought by a federal employee against a federal employer. It confirmed the Board's decision of a lack of jurisdiction to address the merits of the discriminatory action complaint.

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Panel: Warren Hoole, Vice Chair

Introduction

[1] This appeal involves a discriminatory action complaint by an employee of a federal government department. In a decision letter dated September 8, 2010, the Workers' Compensation Board, operating as WorkSafeBC (Board), concluded that it lacked the jurisdiction to hear discriminatory action complaints by federal employees against federal employers.

[2] The employee now appeals the Board's September 8, 2010 decision to the Workers' Compensation Appeal Tribunal (WCAT). The employee requested that her appeal proceed by way of an oral hearing because the employer's credibility was said to be in dispute and the employee wished to prove her innocence.

[3] I have considered the WCAT's *Manual of Rules of Practice and Procedure* (MRPP) and I have reviewed the issues, evidence and submissions in this appeal. Although the employee calls the employer's credibility into question, I consider that the appeal turns on a legal question of jurisdiction. This issue may be fully canvassed by way of written submissions and I therefore do not consider an oral hearing necessary.

Issue(s)

[4] Did the employer's termination of the employee engage the discriminatory action provisions of the *Workers Compensation Act* (Act)?

Jurisdiction

[5] Subsection 240(1) of the Act provides a right of appeal to the WCAT from a decision of the Board regarding a complaint of unlawful discrimination.

Background and Evidence

[6] I need set out only a brief background to the employee's claim of discriminatory action.

[7] The employer assigned the employee to statistics gathering duties at a secondary school in May 2009. The employee complained to her employer of harassment and intimidation by the school. For its part, the school appears to have complained to the employer about the employee's conduct.

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[8] Following an investigation into the school's complaints, the employer terminated the employee's employment on August 31, 2009. The employee says that her employer failed to note her occupational health and safety concerns and fired her on the basis of false allegations and hearsay.

[9] The employee advised her federal union of her concerns; however, her federal union refused to assist her. The employee therefore filed a complaint of discriminatory action under the Act against both her federal employer and her federal union.

[10] The Board denied the employee's complaint of discriminatory action on the grounds that the Act, as provincial legislation, was constitutionally incapable of interfering with health and safety matters at federal workplaces. Rather, the Board found that the *Canada Labour Code* is the exclusive legislative authority and consequently the Board lacked the jurisdiction to hear the employee's complaint of discriminatory action.

Submissions

[11] I directed the WCAT Registry to advise the employee that I had identified a preliminary issue relating to the WCAT's jurisdiction over discriminatory action complaints at federal workplaces.

[12] The employee responded in a letter dated December 20, 2010. The employee queried why a constitutional issue had been raised and stated that the WCAT had jurisdiction over fit people who work for more than one year. The employee also queried why notice under the *Constitutional Questions Act* had not been provided. Finally, the employee indicated that she had not had enough time to retain counsel. The remainder of the employee's submissions turned on the merits of her appeal.

Reasons and Findings

[13] The employee's appeal cannot succeed. The provincial Board and the WCAT take their authority from the Act. Part 3 of the Act provides that employers cannot retaliate against a worker for exercising certain rights in relation to occupational health and safety matters.

[14] However, as a matter of constitutional law, Part 3 of the Act, which deals with occupational health and safety, is generally not applicable to federal workplaces. In particular, I consider that the discriminatory action provisions of Part 3 of the Act do not extend to federal workplaces.

[15] The Supreme Court of Canada addressed this issue in *Alltrans Express Ltd. v. British Columbia (Workers'/Workmen's Compensation Board)*, [1988] 1 S.C.R. 897. It will suffice for the purposes of this appeal to set out the head note to that decision:

> Appellant operates a trucking service that is exclusively interprovincial and international. It is a federal undertaking under ss. 91(29) and 92(10)a. of the *Constitution Act, 1867*. After an inspection at one of its depots in British Columbia, an officer of the Workers' Compensation Board of that province found that appellant failed to comply with ss. 4.04 (safety committees in the workplace) and 14.08 (use of protective footwear) of the *Industrial Health and Safety Regulations*. In the officer's report, the appellant was ordered to ensure that all workers in this work establishment who were required to enter the vehicle repair section were wearing adequate footwear and to establish and maintain a safety committee. The *Regulations* were promulgated by the Board under the *Workers Compensation Act*, and the officer's report was made in accordance with the *Act* and the *Regulations* adopted pursuant to it.… The following constitutional question is raised by this appeal: is the *Workers Compensation Act*, in so far as it purports to empower the Workers' Compensation Board of British Columbia to regulate safety conditions at a federal undertaking, *ultra vires* the Legislative Assembly of British Columbia, or inapplicable or inoperative in respect of such undertaking?
>
> Held: The appeal should be allowed. The *Workers Compensation Act*, in so far as it empowers the Workers' Compensation Board of British Columbia to regulate safety conditions, is inapplicable in respect of a federal undertaking.
>
> It is impossible to distinguish the legislative and regulatory provisions impugned in this case from those of the Quebec Act respecting occupational health and safety which are discussed in *Bell Canada* and in *Canadian National*. Therefore, for the reasons given in *Bell Canada*, the provisions of the Workers Compensation Act relating to the prevention of worker accidents, including s. 73, cannot constitutionally apply to a federal undertaking. These provisions necessarily relate to the working conditions, labour relations and the management of the undertakings which are subject to the *Act*….

[16] I note that more recent guidance from the Supreme Court of Canada, particularly in *Canadian Western Bank v. Alberta*, 2007 SCC 22, has adapted the constitutional analysis somewhat; however, as I understand the law, provincial legislatures still lack the constitutional competence to intrude into the federal government's core authority over labour relations and occupational health and safety in relation to its own employees.

[17] I am aware that in *Jim Pattison Enterprises v. British Columbia (Workers' Compensation Board)*, 2009 BCSC 88, the Court found aspects of the provincial occupational health and safety scheme applied to fishers, an area of regulation that had previously been

considered as falling under the federal government's exclusive constitutional authority relating to navigation and shipping. I do not consider that this case assists the employee because it dealt with provincial workers operating in an activity that fell in part under both the federal and provincial legislative powers, whereas the current appeal relates to a federal employee represented by a federal union working for the federal government in the core context of a labour relations dispute.

[18] I therefore conclude that the discriminatory action provisions set out in the Act are not available to the federal employee in this appeal. Instead of Part 3 of the Act, federal employees must look to the *Canada Labour Code* for protection against discriminatory action and that is the proper venue for the employee's complaints in this regard against her employer and union.

[19] For her part, the employee has raised several arguments. First, she queries why a constitutional issue was raised in the first place. The answer to this question is simply that where, as here, there is an obvious question about the WCAT's jurisdiction to hear the merits of the employee's discriminatory action complaint, the tribunal must first resolve its jurisdiction before proceeding to address the merits of an appeal.

[20] Second, the employee submits that notice should have been filed in accordance with section 8 of the *Constitutional Questions Act*. I am unable to agree. Notice is only required under this statute where a law is held to be inapplicable or invalid. In the current appeal I am merely dealing with whether or not the WCAT has the necessary threshold jurisdiction to address a federal employee's complaints of discriminatory action against an employer.

[21] Even if I am wrong and notice were required pursuant to the *Constitutional Questions Act*, it would necessarily follow that I would lose jurisdiction over the employee's appeal because of section 44 of the *Administrative Tribunals Act*, which applies to the WCAT by virtue of section 245.1 of the Act and which provides:

> **44** (1) The tribunal does not have jurisdiction over constitutional questions.
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

[22] Section 1 of the *Administrative Tribunals Act* goes on to define a "constitutional question" as any matter requiring notice under the *Constitutional Questions Act*. It is therefore apparent that, if notice were required under the latter statute, I would lose the necessary jurisdiction to address the employee's appeal in any event pursuant to section 44 of the former statute. If this were so, I would dismiss the employee's appeal under paragraphs 31(1)(a), (f), and (g) of the *Administrative Tribunals Act.* In either case, the result is the same – I am unable to hear the merits of this federal employee's claim of discriminatory action against her federal employer.

[23] The employee's third and final argument relates to her right to retain legal counsel. I agree that she is entitled to do so if she wishes; however, she does not indicate that she is in fact seeking counsel. Nor did the employee request an adjournment in order to permit her to seek counsel. It is not enough to merely complain that inadequate time was provided to permit the employee to retain counsel in the absence of attempts to retain counsel and in the absence of a request for an adjournment.

[24] In any event, the constitutional difficulties with the employee's appeal are plain and obvious and retaining counsel would not offer any practical advantage to the employee in this appeal. For all of these reasons I do not consider that the employee's argument on this point is of assistance to her.

[25] In summary, I agree with the Board's September 8, 2010 decision and I find that both it and I lack the necessary jurisdiction to address the merits of the federal employee's discriminatory action complaint against her federal employer.

[26] As a result, I must deny the employee's appeal.

Conclusion

[27] I confirm the Board's September 8, 2010 decision. I find that the Board was without the necessary jurisdiction to decide whether or not the federal employer engaged in discriminatory action against the federal employee contrary to section 151 of the Act.

[28] No expenses were requested and none are apparent. Consequently, I make no order for the reimbursement of expenses.

Warren Hoole
Vice Chair

WH/gl