Labour arbitrators share concurrent jurisdiction with Human Rights Tribunal: Ontario court

Case confirms unionized employees can take human rights complaints to tribunal

By Cameron Miller

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In Weilgosh v. London District Catholic School Board, 2024 CanLII 20606, the Ontario Superior Court of Justice (Divisional Court) confirmed that labour arbitrators share concurrent jurisdiction with the Human Rights Tribunal of Ontario over human rights disputes that arise under a collective agreement.

The decision is significant because, in 2021, a similar issue was addressed under The Labour Relations Act of Manitoba and in that case - Northern Health Authority v. Horrocks, 2021 SCC 42 - the Supreme Court of Canada ruled a labour arbitrator appointed under the Manitoba act had exclusive jurisdiction over a human rights claim arising under a collective agreement.

The Weilgosh decision confirms that, in Ontario, the grievance procedure is not the only avenue available for a unionized employee to bring a complaint of an alleged violation of the Ontario Human Rights Code (Ontario code).

Karen Weilgosh, a teacher and member of a bargaining unit, claimed her employer discriminated against her on the basis of disability. Weilgosh's union filed a grievance and Weilgosh also filed her own application with the tribunal under the Ontario code in which she alleged discrimination and failure to accommodate.

After Weilgosh filed her application with the tribunal, but before a decision was reached, the Supreme Court of Canada released its decision in Horrocks. As a result, Weilgosh's employer raised a preliminary challenge in which it argued Weilgosh's allegations fell within the exclusive jurisdiction of a labour arbitration and the tribunal lacked jurisdiction to hear her application.

Two-step test for jurisdiction

In the Horrocks decision, the Supreme Court set out a two-step test to resolve this type of jurisdictional issue. Step one - does legislation grant exclusive jurisdiction to a labour arbitrator and, if so, over which matters? Step two - if legislation does grant an arbitrator exclusive jurisdiction, does the dispute at issue fall within the scope of that jurisdiction?

Under step one, the Supreme Court noted that s. 78(1) of The Labour Relations Act of Manitoba granted a labour arbitrator exclusive jurisdiction to decide "all differences" concerning the meaning, application, or alleged violation of a collective agreement:

"Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties thereto, or

persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation."

By contrast, while The Human Rights Code of Manitoba "vest[ed] broad jurisdiction in the Commission over Code violations [...] absent express displacement of the exclusive jurisdiction of a labour arbitrator" the language of The Human Rights Code was insufficient to find the commission holds concurrent jurisdiction.

Under step two, the dispute in Horrocks concerned an alleged violation of a collective agreement – namely, how Horrocks' employer addressed her attendance at work while under the influence of alcohol. Thus, in Horrocks, the dispute fell within the scope of a labour arbitrator's exclusive jurisdiction.

The Human Rights Tribunal decision

Applying the two-step test, the tribunal - in Weilgosh v. London District Catholic School Board, 2022 HRTO 1194 - concluded it shared concurrent jurisdiction with labour arbitrators. First, similar to Horrocks, the tribunal held an arbitrator appointed under Ontario's Labour Relations Act has exclusive jurisdiction to hear claims of discrimination and harassment within the scope of a collective agreement, subject to a clear legislative intent to displace this jurisdiction.

However, in this case, the tribunal held the Ontario Code had demonstrated a clear legislative intent to displace the labour arbitrator's exclusive jurisdiction, and thus the tribunal had concurrent jurisdiction:

Under the Ontario code, the tribunal has express discretion to dismiss an application if it "is of the opinion that another proceeding has appropriately dealt with the substance of the application."

Under the Ontario code the tribunal has express discretion to defer an application, in accordance with tribunal rules.

Amendments to the Ontario code in 2008 permitted a person to apply directly to the tribunal if they believed their rights under the Ontario code had been infringed.

The legislature made no attempt to "narrow" the deferral or dismissal powers of the tribunal, which signaled "a positive expression [...] to maintain concurrent jurisdiction, thereby displacing labour arbitration as the sole forum for disputes arising from a collective agreement."

The Ontario code expressly removes the jurisdiction of the tribunal when a person has brought a civil proceeding arising out of a violation of a right protected by the code; whereas, no such express language existed with respect to a grievance under a collective agreement.

The Divisional Court weighs in

Weilgosh's employer sought judicial review of the tribunal's decision but was unsuccessful. Upholding the tribunal's decision, the Divisional Court stated as follows:

“In considering the broad language used in the Ontario code, its statutory scheme and the broader legal context of the legislative and jurisprudential history of the Ontario code, the HRTO correctly applied Horrocks to find concurrent jurisdiction. In the words of Horrocks, in these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.

The practical impact of this decision is that, in Ontario, a unionized employee may elect whether to pursue a human rights claim as an individual applicant at the tribunal or before a labour arbitrator through a grievance under a collective agreement.

If an employee elects to pursue both a grievance and an application, the tribunal has broad power to either defer the application in accordance with the tribunal rules, or dismiss the application if another proceeding, such as a labour arbitration, has appropriately dealt with the substance of the application. What is considered “appropriate” is another ball of wax, best left for another article.

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