Court of Queen's Bench of Alberta

Citation: University of Lethbridge v University of Lethbridge Faculty Association, 2017 ABQB 556

Date:
Docket: 1706 00387
Registry: Lethbridge

Between:

The Governors of the University of Lethbridge

Applicant

- and -

University of Lethbridge Faculty Association, Donald Mitchell; Director of the Labour Mediation Services of Alberta, Anthony James Hall; Minister of Justice and Solicitor General for Alberta and Lyle Kanee

Respondents

Reasons for Decision
of the
Honourable Mr. Justice G.H. Poelman

I. Introduction

[1] In October 2016, the President of the University of Lethbridge suspended Professor Anthony Hall, a member of the academic staff of the Faculty of Arts and Sciences. The President relied on the University's concerns about contraventions of human rights laws by alleged anti-Semitic comments made in various circumstances by Professor Hall.

[2] The suspension was based on a statutory provision giving the President a discretionary power to suspend academic staff. The University of Lethbridge Faculty Association took the position that the suspension was a disciplinary measure governed by *The University of*

Lethbridge Faculty Handbook (which I will refer to as the "Collective Agreement"), and subject to the arbitration provisions set out therein.

[3] The parties have been in procedural disputes in court and before other authorities since the suspension. The Faculty Association succeeded in obtaining the appointment of an arbitrator and the arbitration hearing is scheduled to begin in November 2017. The University has challenged the arbitrator's appointment in a court application scheduled to be heard in March 2018.

[4] In the meantime, the University seeks a court to stay of the arbitration until its court application can be heard; and the Faculty Association asks me to dismiss the court application, and allow the arbitration to proceed as scheduled.

II. Facts

[5] These applications arise out of the University's suspension of Professor Hall on October 4, 2016.

[6] The University expressed concerns that Professor Hall had contravened section 3 of the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, and grounded its suspension on section 22(3) of the *Post-Secondary Learning Act*, S.A. 2003, c.P-19.5. That provision provided, in part, as follows:

> Subject to any collective agreement, a president may, in the president's discretion, suspend from duty and privileges any member of the academic staff at the university and shall forthwith report the president's action and the reasons for it
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> a) to the board and
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> b) to the executive committee of the general faculty's counsel.

[7] The president's letter further stated that "the suspension is being implemented as a precautionary, not disciplinary, measure, and will remain in effect until the University has concluded its review of this matter."

[8] The Faculty Association filed grievances on behalf of Professor Hall and on grounds of policy. Following intervening communications between the parties, the Faculty Association gave notices of arbitration and proposed an arbitrator under the applicable provisions of the Collective Agreement. The University maintained its position that the Collective Agreement did not apply and did not accept appointment of the proposed arbitrator.

[9] Thus, at the very beginning of the dispute fundamental legal and procedural differences arose between the University and Faculty Association, unrelated to the merits of the University's concerns about Professor Hall's activities. In brief, the University took the position that the *Post-Secondary Learning Act* gave its president a discretionary authority of, in this case, suspension, outside the disciplinary provisions of the Collective Agreement. Accordingly, the University said, the suspension could not be subject to the grievance procedures under the Collective Agreement, but was impeachable only by judicial review of the president's discretion.

[10] On December 2, 2016, the Faculty Association filed an originating application seeking appointment of an arbitrator by the court, relying upon article 22.10 of the Collective Agreement which provides that the arbitrator is appointed by agreement or, failing agreement, by a justice of

the Court of Queen's Bench of Alberta. Because the court hearing was scheduled for August 8, 2017, the Faculty Association sought an earlier appointment of an arbitrator by application to the Minister of Advanced Education based on regulations under the *Post-Secondary Learning Act*. The University opposed such an appointment on the grounds, among other things, that the Faculty Association had sought court appointment. The Minister responded to these positions by declining to intervene because "the matter of appointing an arbitrator is currently before the Alberta Court of Queen's Bench."

[11] Bill 7, "*An Act to Enhance Post-Secondary Academic Bargaining,* " received royal assent and thus came into effect on May 4, 2017. As a result, for the first time the collective bargaining arrangements between the University and members of the Faculty Association were governed by the *Labour Relations Code*, R.S.A. 2000, c.L-1 (rather than the *Post-Secondary Learning Act*). One of the already-existing provisions of the *Code*, which now became applicable to the University, was section 137(1). It provides as follows:

> If the parties to a collective agreement that provides for the appointment of a single arbitrator are unable to agree on a person to act as a single arbitrator within 14 days after the notice requiring that the matter go to arbitration, or any longer period that the collective agreement may contain for the selection of a single arbitrator, either party may, in writing, request the Director to appoint a single arbitrator.

[12] Following the change in law, on May 5, 2017, the Faculty Association applied to the Director of Mediation Services for appointment of a single arbitrator under section 137 (on an Alberta Government form apparently designed for that purpose). The University opposed the appointment, taking the position that the dispute between the parties was not arbitrable as it did not arise from matters covered by the Collective Agreement, and that if there was to be an appointment of an arbitrator it should be made by the Court of Queen's Bench as provided in article 22 of the Collective Agreement.

[13] The Director, in the decision at issue on this application, stated that he had no authority to determine the issue of arbitrability, but an arbitrator would have that authority. In his words, "objections of that type in response to requests are not uncommon and do not affect whether I make an appointment."

[14] He further stated that he did not believe he had a discretion to defer the matter. Again, in his words, "my position is that the fact that I have received a request under section 137 places the matter in my jurisdiction," and he would therefore make an appointment. Ultimately, after brief further communications, he gave notice of the person whom he appointed.

[15] The University filed an application for judicial review of the Director's decision, which is now scheduled to be heard in March 2018. The arbitrator appointed by the Director has scheduled the arbitration for November 2 and 3, 2017.

[16] The University seeks a stay of the Director's appointment of an arbitrator pending the hearing of its judicial review application. The Faculty Association has cross-applied for summary judgment dismissing the judicial review application.

III. Test for Stay

[17] The University's stay application is made pursuant to rule 3.23(1) of the *Alberta Rules of Court* which states that "the Court may stay the operation of a decision or act sought to be set aside under an originating application for judicial review pending final determination of the originating application." Whether the stay should be granted is determined under the tripartite test established in *RJR-MacDonald Inc. v Canada (AG)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, paras 82-85; *Sobeys West Inc. v Alberta College of Pharmacists*, 2014 ABQB 333, para 17. That test requires an applicant to establish that:

a) There is a serious issue to be tried;

b) The applicant would suffer irreparable harm if the stay is not granted; and

c) The balance of convenience favours granting the stay.

[18] The Faculty Association takes the position that the first element of the test, where the court must look at the merits of the underlying action to some degree, should be elevated in this case to a "strong *prima facie* case." I conclude that the usual test of "serious issue to be tried" is the applicable standard here.

IV. Serious Issue to be Tried

A. Parties' Positions

[19] The University's position is that, to quote from its brief at paragraph 37:

> As a matter of statutory interpretation, suspensions issued pursuant to section 22(3) of the *PSLA* do not engage the Handbook [Collective Agreement] and, by extension, section 137 of the *Code*.

Again, from paragraph 42:

> In particular, the Director may appoint an arbitrator pursuant to section 137 only if the suspension engages the collective agreement. If the suspension does not engage the collective agreement, then section 137 is also not engaged and the Director cannot appoint an arbitrator.

[20] The Faculty Association argues that this question should be determined, at least initially, by a duly-appointed arbitrator. It is within an arbitral tribunal's jurisdiction to decide whether it has jurisdiction over the issues in dispute.

[21] The University responds, in effect, that if this is so then the arbitrator cannot be appointed by the Director under section 137. The Collective Agreement determines the method by which an arbitrator with jurisdiction can be appointed.

B. Findings

[22] The Faculty Association and the Director submit that section 137 is simple and straight forward. If the parties to the Collective Agreement providing for the appointment of a single arbitrator are unable to agree on one within the designated time, they may request the Director to make the appointment. They say that this jurisdiction is conferred regardless of what a collective agreement says, except for the time provided in the collective agreement for a consensual appointment.

[23] That is the plain meaning of the section. The University, however, argues that it should not be interpreted to override the Collective Agreement. If that were the legislature's intention, it would have said the appointment could be made notwithstanding another appointment mechanism (such as application to a court), as was done in section 142 (allowing an arbitrator to extend time for taking a step in a grievance or arbitration process "notwithstanding the terms of the collective agreement," in certain circumstances).

[24] Express words overriding the Collective Agreement would have made the meaning urged by the Faculty Association more clear. But the absence of those words is not decisive. Section 137 is expressly made subordinate to the time allowed for a consensual appointment in a collective agreement. In doing so, the plain language of the section indicates that other details of an appointment process in a collective agreement are not a constraint on the Director's jurisdiction.

[25] As submitted by the Faculty Association, for most purposes parties may not contract out of labour relations codes, because they represent public policy: *Ontario (Human Rights Commission) v Etobicoke (Borough)*, [1982] 1 S.C.R. 202, at 213-14. Of course, when the Collective Agreement was made, the parties were not subject to the *Code* and, in particular, section 137. However, the policy of the courts to give paramountcy to labour codes over private agreements supports my view that section 137 should not be interpreted as subject to a different agreement of the parties, except where expressly stated – as occurred with the timing exception.

[26] It cannot reasonably be disputed (and is not) that section 137's condition of there being a collective agreement that provides for the appointment of a single arbitrator was satisfied. Further, it is plain that the parties were unable to agree on an arbitrator: the Faculty Association proposed one; the University did not accede to the proposal, nor suggest another person. Thus, section 137 was engaged upon the Faculty Association's request that an arbitrator be appointed.

[27] There remains the issue of whether the Director's decision is reviewable, as incorrect or unreasonable. I conclude that his decision is correct, even though the standard is probably one of reasonableness.

[28] Section 137 does not contemplate a deliberative process, based on evidence and submissions, as is conferred on an arbitrator, arbitration board or other body under section 143 of the *Code*. In my view, the Director's function is purely administrative. Section 137 provides a mechanism to appoint an arbitrator when parties have been unable to do so by agreement. When the basic condition has been satisfied, the administrative function must be performed.

[29] The University argues that this cannot be so when the basic question is whether there should be an arbitrator at all. In my view, that is no reason not to apply section 137 on its plain terms or for the Director to decline to comply with a request that satisfies its terms.

[30] As the Director correctly pointed out, "I have no authority to determine issues of arbitrability. An arbitrator would have that authority." The *Code* expressly confers that jurisdiction, by empowering an arbitrator to "determine any preliminary or jurisdictional issue at the outset or, without prejudice to any such objection, at any stage of the proceedings": section 143(2)(h). Courts have repeatedly recognized that arbitrators may decide on their own jurisdiction: *Weber v Ontario Hydro*, [1995] 2 S.C.R. 929, para 67. Often it has been held that it is preferable and in accordance with labour relations policy for all matters to be ruled on by an

arbitrator in the first instance: *Weber*, paras 41 and 44; *Allen v Alberta*, [2003] 1 S.C.R. 128, paras 12-15; and *Serendipity Adventures Inc. v Winters*, 2016 ABQB 398, para 26.

[31] I find that the Director correctly concluded "that the fact that I have received a request under section 137 places the matter in my jurisdiction," and that he had no discretion to defer the matter. The University has not raised a serious issue to be tried on the judicial review application. Rather, in my view, its application for judicial review is bound to fail.

[32] As it has not satisfied the first element of the test for a stay, it is unnecessary for me to consider whether it has established irreparable harm and where the balance of convenience lies.

V. Summary Judgment

[33] The Faculty Association's application for summary judgment dismissing the University's application for judicial review is based on rules 7.2 and 7.3 of the *Alberta Rules of Court*. I note that an affidavit of the nature usually required under rule 7.3 has not been tendered, although the University has not rested its arguments on that ground. In any event, all of the evidence that would be available on a judicial review application, primarily the record but also additional material which the University would seek leave to adduce by affidavit, is before me.

[34] The University opposes summary judgment because of what it characterizes as "numerous unresolved and complex issues raised in this case by all parties." The main issues it identifies are those I have already addressed, namely the argument that a jurisdictional dispute should not be determined by arbitration and that section 137 should not apply for that reason and because the Collective Agreement sets out a different appointment mechanism.

[35] The modern approach to summary judgment applications was described in *Hryniak v Mauldin*, 2014 SCC 7, 366 D.L.R. (4th) 641. It was recently summarized in *Condominium Corporation No. 0321365 v Cuthbert*, 2016 ABCA 46, as follows:

> When deciding a summary judgment application, there are two considerations. With respect to the process, the court must ask, "whether examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties". With respect to the substantive issues, the court must ask "whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defense is so compelling that the likelihood it will succeed is very high such that it should be determined summarily". An issue of merit is established when the respondent's (non-moving party) case discloses a "genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the 'fair and just [summary] process'".
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> ...
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> Complex legal questions may be sufficient to deny summary judgment. A full trial is required when the summary record cannot be used to decide legal issues that are unsettled, complex or intertwined with facts. A trial is also required when an applications judge is not satisfied she can fairly resolve the dispute on the record before her. [Paras 27 and 29, citations omitted.]

[36] I am satisfied that on the record before me I can make a decision that is fair and just for both parties, and that there is no issue of merit that genuinely requires a trial. This is not a case "when the summary record cannot be used to decide legal issues that are unsettled, complex or intertwined with facts." In my view, the justice on a judicial review application (with one day instead of a half day to hear argument) would be in no better position, and the parties would have no further advantage, than in the hearing before me.

[37] I find that there is no merit to the position put forward by the University in its judicial review application, and therefore grant summary judgment in favor of the Faculty Association dismissing its action.

VI. Conclusion

[38] For the reasons given, I dismiss the University's application for a stay of the Director's appointment of an arbitrator, and grant the Faculty Association's application for summary judgment dismissing the University's judicial review application.

[39] The parties have leave to speak to costs, if they cannot agree.

Heard on the 8th day of August, 2017.
Dated at the City of Calgary, Alberta this 15th day of September, 2017.

G.H. Poelman
J.C.Q.B.A.

Appearances:

Robert W. Thompson, Q.C. and Dextin Zucchi
for the Applicant

Roderick Wiltshire
for the Respondents Donald Mitchell, Director of the Labour Mediation Services of Alberta

Leanne Chahley
for the Respondents University of Lethbridge Faculty Association, Anthony James Hall; Minister of Justice and Solicitor General for Alberta and Lyle Kanee