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05-11R

NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

**IN THE MATTER OF The Northwest Territories
Human Rights Act, R.S.N.W.T, 1988. as amended,**

BETWEEN:

ELIZABETH PORTMAN

Appellant

-and-

**GOVERNMENT OF THE NORTHWEST TERRITORIES and
SUN LIFE ASSURANCE COMPANY OF CANADA**

Respondents

Reasons for Decision

Ruling on preliminary applications

Before: Adrian Wright, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife NT (Mr Neilson by telephone)

Date of Hearing: 11 July, 2013

Elizabeth Portman, for herself

Trish Paradis, Counsel for the Respondent, Government of the Northwest Territories in both complaints

James Neilson, Q.C., Counsel for the Respondent Sun Life Assurance Company of Canada

[1] These are reasons arising from applications commenced by Sun Life Assurance Company of Canada ("Sun Life") and the Government of the Northwest Territories ("GNWT") before these complaints proceed to hearing.

Background

[2] Ms Portman commenced two complaints. The first (number 04 -11) alleges Sun Life and the GNWT discriminated against her on the basis of disability. GNWT did this by providing a disability insurance policy as a term of its employment of Ms Portman. This policy did not extend benefits to individuals suffering from disability when they started employment. Ms Portman says Sun Life discriminated by providing a policy which did not provide such benefits.

[3] The second complaint (number 05-11) alleges GNWT did not accommodate her so she could return to work either part-time or full-time. Sun Life is a not a party to complaint 05-11.

Can complaints number 04-11 and 05-11 be heard at the same time?

[4] The first application is Mr Portman's. She requests the two complaints be heard at the same time. She maintains issues in the two complaints are related. She says the existence of the Sun Life disability policy was a reason she was not accommodated within the workplace by the employer. Further, the employer expected her to apply for disability before the period provided in the policy. This refers to the policy which did not extend coverage either if

- She received treatment for her disability during the first thirteen weeks of employment (excepting periods of treatment lasting less than two days) or
- Her disability did not commence during the first twelve months of employment.

[5] Sun Life and GNWT both submit

- The issues in the two complaints are distinct
- Sun Life would be required to present evidence during the portion of the hearing relating to complaint 05-11. Sun Life is not a party to that complaint.

- There is a potential for confusion in receiving evidence on the failure by GNWT to accommodate Ms Portman. This evidence may not be relevant to the issues in complaint 04-11.

Both Sun Life and GNWT relied on *Lattey v. Canadian Pacific Railway* 2002 C.H.R.T. No. 7; 2002 CanLII 45928.

[6] For the purpose of this application I assume the allegations in both complaints are true. I apply the factors set out by the Canadian Human Rights Tribunal in *Lattey* at paragraph 13:

1. The public interest in avoiding a multiplicity of proceedings, including considerations of expense, delay, the convenience of the witnesses, reducing the need for the repetition of evidence, and the risk of inconsistent results;

[7] This tends to suggest the two complaints in this case be heard together. On the other hand, these risks can be reduced by the parties agreeing to admit in both the hearings the evidence that may be common to both complaints. The risk of inconsistent results can be reduced if the same adjudicator hears both complaints.

2. The potential prejudice to the respondents that could result from a single hearing, including the lengthening of the hearing for each respondent as issues unique to the other respondent are dealt with, and the potential for confusion that may result from the introduction of evidence that may not relate to the allegations specifically involving one respondent or the other; and

[8] I am most concerned with the potential for confusion amongst the parties and the adjudicator concerning which evidence may relate to which complaint. There may also be confusion about whether evidence not relevant to one complaint should be considered in relation to that complaint because it is admitted as a result of its relevance to the other complaint. I am less concerned about lengthening the hearing for Sun Life.

3. Whether there are common issues of fact or law.

[9] I see few if any common issues of fact or law between the two complaints. Ms Portman was employed by the GNWT and is an insured under the Sun Life policy. The issues on the Sun Life complaint are whether Ms Portman fell within the restriction described above; whether that restriction discriminates on the basis of disability; and if it did whether Sun Life and the GNWT had a bona fide reason to discriminate. The issues on the second complaint are the extent of the GNWT's duty to accommodate and whether that has been satisfied.

[10] For these reasons, I see no benefit to hearing the two complaints together. I do, as I have said, see the potential for confusion from admitting evidence on one complaint because it is relevant to the other.

[11] As a result, I decline to allow the two complaints be heard together.

Does the complainant as a member of the Union of the Northern Workers have the standing to challenge provisions of a disability insurance plan provided in the collective agreement between the UNW and GNWT?

[12] This application was commenced by GNWT.

[13] GNWT relies on articles 3 and 4 of the collective agreement between the UNW and GNWT. These indicate the UNW is the exclusive bargaining agent for the employees in the bargaining unit – which includes Ms Portman. The collective agreement states there shall be no discrimination on the basis of disability in the workplace. The agreement also says it applies to the UNW, the GNWT and the employees.

[14] GNWT contends Ms Portman should have UNW file a grievance rather than filing a complaint under the *Human Rights Act*. GNWT argues the subject-matter of Ms Portman's complaint falls within the collective agreement. As a result there cannot be a human rights complaint.

[15] GNWT relies on a series of cases including *Noel v. Societe d'energie de Baie James et al* [2001] 2 SCR. 207; *Oranchuk v. City of Saskatoon* 2001 SKCA 67; and *PSAC v. GNWT* 2007 NWTSC 20. These cases all support the proposition disputes arising from the collective agreement must be

brought by the union; an individual member has no standing independent of the collective agreement to pursue contentious issues under the collective agreement.

[16] None of these cases addresses whether human rights disputes occurring in a workplace with a collective agreement must be grieved; all these cases concern whether an employee wishing to appeal an arbitrator's decision regarding a grievance brought on his or her behalf may appeal or judicially review the decision.

[17] In *Amalgamated Transit Union, Local 583 v. Calgary (City)*, 2007 ABCA 121, Paperny J.A. for the Court held (paragraph 67) a human rights tribunal cannot be prevented from considering a complaint of discrimination where the issue has not been fully addressed in a labour arbitration. There must be a forum for an individual to raise allegations of discrimination. In addition, I must look at the legislation to decide whether it ousts my jurisdiction.

[18] Firstly, I must assume the *Human Rights Act* takes precedence over the *Public Service Act*. This is because of the importance of human rights issues. As a result, my jurisdiction to hear and decide disputes under the *Human Rights Act* will only be ousted by clear language saying so. The only provision addressing this issue is section 43. This gives the Director the power to defer consideration of a complaint. This will occur when the Director determines there is another proceeding capable of appropriately dealing with the substance of the complaint.

[19] In this case, there is no evidence UNW filed a grievance on Ms Portman's behalf. The period for filing a grievance under the collective agreement would have passed. As a result, if this complaint does not proceed, Ms Portman will not be able to pursue this issue. There is no other proceeding capable of dealing with the substance of her complaint.

[20] Furthermore, I know nothing about any request by the GNWT to have the Director exercise the authority under section 43. I assume I would have heard about this if it had occurred. In my mind, this too is a factor – if GNWT wanted this to be addressed under the collective agreement it could have requested the Director to defer under section 43.

[21] Finally, a complaint under the *Human Rights Act* is a serious matter. Clear language in the legislation would be needed to oust my ability to hear such complaints.

[22] For all these reasons, I dismiss GNWT's application. I find I have jurisdiction to decide both complaints.

Does an adjudicator under the Human Rights Act have the jurisdiction to rule on a disability insurance plan made mandatory for all GNWT employees by a federal statute?

[23] This application was also commenced by GNWT. This refers to the Sun Life disability insurance policy. This is provided as a benefit to employees of GNWT as a result of section 7.1 of the *Financial Administration Act*. This allows Treasury Board (Canada) to provide group insurance or other benefit programs to "persons or classes of persons" it designates to be members of those programs.

[24] If Ms Portman's succeeds in complaint 04-11, I will find the Sun Life plan discriminates against her. It is not clear to me what remedy might flow from that finding. As a result, it is premature to rule on this issue. I may decide the only realistic remedy is systemic; I may impose a remedy applying to Ms Portman only. It is unclear to me at this time whether any such remedy may or may not be enforceable. In my view, without hearing the evidence and hearing further argument on this issue I cannot decide whether I have jurisdiction to make the appropriate remedy or not.

[25] As a result, I defer consideration of this issue until the hearing.

[26] To conclude,

1. I dismiss Ms Portman's application to have the complaints 04-11 and 05-11 heard together.
2. I dismiss GNWT's application for an order I do not have jurisdiction to hear these complaints on the basis the issue in these complaints should have been the subject of a collective agreement grievance.

3. I defer GNWT's application for an order I do not have jurisdiction to hear these complaints because they are matters within federal jurisdiction.

DATED at Yellowknife NT this 2nd day of December 2013

A handwritten signature in black ink, appearing to be 'A. Wright', written in a cursive style.

Adrian Wright
Adjudicator
Human Rights Adjudication Panel