QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2014 SKQB 27**

Date: **2014 01 24**
Docket: QBG 2385/2013
Judicial Centre: Regina

BETWEEN:

SASKATCHEWAN UNION OF NURSES
AND GREGORY W. PITTMAN

APPLICANTS

- and -

INVESTIGATION COMMITTEE OF THE
SASKATCHEWAN REGISTERED NURSES
ASSOCIATION

RESPONDENT

Counsel:

Ronni A. Nordal — for the applicants
Roger J. F. Lepage — for the respondent

DECISION ON APPLICATION FOR JUDICIAL REVIEW — McMURTRY J.
January 24, 2014

---

[1] Gregory Pittman is a registered nurse. On May 20, 2010, he was terminated by his employer for alleged sexual abuse/sexual harassment of co-workers. At the same time, the employer made a complaint of misconduct to the Saskatchewan Registered Nurses Association ("SRNA"), under *The Registered Nurses Act, 1988,* S.S. 1988-89, c. R-12.2 (the "*Act*"), with respect to the same acts of sexual assault/sexual harassment.

[2] The applicants submit that the disciplinary proceedings under the *Act* should be stayed until the conclusion of the grievance proceedings. A stay was denied by the SRNA Discipline Committee seized with hearing the complaint. The applicants seek judicial review of that decision.

BACKGROUND

[3] Following Mr. Pittman's dismissal on May 20, 2010, the Saskatchewan Union of Nurses ("SUN") filed a grievance on Mr. Pittman's behalf alleging wrongful termination of his employment. The grievance proceeded through the grievance procedure set out in the Collective Agreement between SUN and the Saskatchewan Association of Health Organizations. An Arbitration Board has been chosen by the parties and has commenced hearing evidence. It is due to reconvene at the end of this month. The Arbitration Board is obliged under the terms of the Collective Agreement to render a decision as soon as possible thereafter.

[4] On March 21, 2011, an Investigation Committee of the SRNA, struck in accordance with the terms of the *Act,* charged Mr. Pittman with professional misconduct. On May 30-31, 2011, a Discipline Committee appointed pursuant to the *Act* held a hearing on the charge of professional misconduct. The Discipline Committee rendered a decision, but that decision was successfully appealed to this Court. The court ordered a new hearing before a differently constituted Discipline Committee.

[5] The new Discipline Committee began its hearing on October 1, 2013. On that date, SUN applied to the committee to intervene in the disciplinary proceedings for the

purpose of requesting, jointly with Mr. Pittman, that the proceedings be stayed, or held in abeyance, until the Arbitration Board has rendered its decision. In a decision rendered November 7, 2013, the Discipline Committee declined to give SUN standing before it and denied Mr. Pittman's application for a stay. SUN and Mr. Pittman seek judicial review of the Discipline Committee decision.

ARGUMENT

[6] SUN and Mr. Pittman argue that it is an abuse of process, or a potential abuse of process, for both the Discipline Committee and the Arbitration Board to hear and adjudicate on the same evidence. The applicants assert that the Arbitration Board is in a better position to adjudicate on the allegations against Mr. Pittman because it involves work place issues as opposed to nursing practice issues. Accordingly, they argue that the Discipline Committee should await the Arbitration Board decision and follow the Arbitration Board's findings of fact. For reasons that follow, I find the Discipline Committee made the correct decision to proceed notwithstanding the grievance proceedings before the Arbitration Board.

Standard of Review

[7] SUN takes the position that the Discipline Committee was required to correctly decide the question of its right to intervene and the question of the stay. The SRNA Investigation Committee argues that both questions are matters of discretion within the jurisdiction of the Discipline Committee and their decision may only be overturned if unreasonable.

[8] In my view, it is not helpful to these parties to consider the issue of the appropriate standard of review at much length. The Discipline Committee denied SUN's standing, but heard and fully considered SUN's arguments. Consequently, as SUN does not request intervenor status beyond this application, the issue is moot. I agree with SUN that it is in a different position than Mr. Pittman before the Discipline Committee, as it is a party to the grievance procedure and Mr. Pittman is not. This gives SUN a different perspective from which to argue the effect of the discipline process on the grievance procedure. That being said, SUN was permitted by the Discipline Committee to fully participated before it. Consequently, it is not necessary to reconsider the question of standing.

[9] Nor do I think it is helpful to consider whether the standard of review applicable to the Discipline Committee decision to refuse a stay of its proceedings is reasonableness or correctness. I am of the view the committee made the correct decision.

Discipline Committee Decision on a Stay

[10] Both Mr. Pittman and SUN argue that the discipline proceedings against Mr. Pittman should be "held in abeyance" pending the outcome of the grievance arbitration procedure. The Discipline Committee decided that there was no legal requirement for one entity to "stand down in favour of the other" (Decision of Discipline Committee, November 7, 2013, para. 61) In so finding, the Discipline Committee relied on a decision of the Ontario Divisional Court in *Howe v. Institute of Chartered Accountants of Ontario*, (1994) 121 D.L.R. (4th) 149, 21 O.R. (3d) 315.

[11] In *Howe,* the applicant sought a stay of disciplinary proceedings before the Institute until civil suits against him and his employer were resolved. The court held, in a decision that was fully upheld by the Ontario Court of Appeal, that it would be inconsistent with the public interest in disciplinary proceedings to permit civil actions to block their process. The reasons of the court are found in the following passages at pps. 155-156:

> Although the decision of the Discipline Committee on the charges against the applicant would no doubt be granted some deference in the civil actions, and might be of considerable persuasive value in those actions, it would not be binding in the civil actions, because the plaintiffs in the civil actions will not have been parties to the disciplinary proceedings. Issue estoppel only arises where the parties in the subsequent proceedings, or their privies, were parties or privies to the earlier proceedings: see 16 Hals., 4th ed., reissue, para. 977. The plaintiffs in the civil actions would not be prevented from attacking a decision of the Discipline Committee exonerating the applicant, nor would the applicant be prevented from challenging in the civil actions an adverse decision by the Discipline Committee.
>
> The public has an interest in the prompt and just exercise by the ICAO of the disciplinary powers conferred upon it by statute. Mr. Binnie aptly referred in this connection to the following passage from the judgment of the Supreme Court of Canada delivered by Sopinka and Cory JJ., in *RJR-MacDonald Inc. v. Canada (Attorney-General)* (1994), 111 D.L.R. (4th) 385 at p. 409, 54 C.P.R. (3d) 114, [1994] 1 S.C.R. 311:
>
> > In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> To permit the disciplinary hearings in the case at bar to be blocked indefinitely by the existence of civil actions which may not be prosecuted

expeditiously and which may ultimately be settled, would be quite inconsistent, in my opinion, with a recognition of the public interest in the disciplinary proceedings.

It was common ground in this court that the vice-chair applied the correct principle in deciding to grant the stay requested by the applicant. He said the following:

> Both counsel referred to the principles of law which should govern my decision which are set out at page 27 of the *Brindle* case.
>
> > "It has been common ground before us that the decision is not to be judged by reference to the *Wednesbury* principle of irrationality but by whether or not it is productive of a real risk of prejudice or injustice.
>
> Thus in *R. v. Panel* on Takeovers and Mergers Ex-Parte Fayed (1992) BCC 524, Neill L.J. said at p. 531:
>
> > "It is clear that the Court has power to intervene to prevent injustice where the continuation of one set of proceedings may prejudice the fairness of the trial of other proceedings. The existence of this power has been recognized in a number of cases including *Jefferson Ltd. v. Bhetcha* (1979) 1 WR 898, *R. v. British Broadcasting Corporation* Ex-Parte Lavelle (1983) 1 CR 99; and more recently in the unreported decision in *R. v. Solicitors Disciplinary Tribunal* Ex-Parte Gallagher (30th September 1991). But it is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice."
>
> Applying the test to the facts of this case, I cannot conclude as Mr. Knight sets out in his Affidavit, that this is one of the exceptional cases where there is a real risk of prejudice which far outweighs the public interest. There will be inconvenience to KPMG as there is to any member or member's firm when a member is charged under the rules of professional conduct of the Institute of Chartered Accountants of Ontario. The facts may be more conveniently packaged for the plaintiffs in other actions than they might normally be prior to discovery, but I do not think this amounts to substantial prejudice or injustice.

[12] In *Miller v. Saskatchewan Psychiatric Nurses' Association*, (1992) 103 Sask. R. 61, [1992] S.J. No. 294 (QL) (Sask. Q.B.), McLellan J. came to a similar conclusion. Mr. Miller was appealing a decision of the Saskatchewan Psychiatric Nurses' Association ("SPNA"), that found against him on the question of whether Miller had sexually assaulted the complainant. An earlier grievance arbitration decision had determined that

there was insufficient evidence of a sexual assault. Miller argued on the appeal that the doctrines of abuse of process, issue estoppel and *res judicata* barred the SPNA from adjudicating on the same question.

[13] McLellan J. did not agree. He noted first that the parties before each tribunal were different. More significantly, I suggest, he found that each tribunal served a different purpose. The Arbitration Board was created by contract between the parties and adjudicated on the issue of whether Miller's conduct justified his dismissal. The disciplinary tribunal was established to fulfill the statutory obligation of the SPNA to pursue complaints of professional misconduct. McLellan J. found that "given the different nature of the proceedings and the different parties involved, the principles of *res judicata*, issue estoppel and abuse of process are not applicable". (*Miller, supra*, at para. 61)

[14] SUN and Mr. Pittman argue that *Howe* and *Miller* are no longer good law following the Supreme Court of Canada decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. In that decision, the Workers' Compensation Board claimed that the Human Rights Commission should not hear Figliola's complaint that the Board's chronic pain policy was contrary to the B.C. *Human Rights Code*, R.S.B.C. 1996, c. 210. The Board asserted that it had already dealt with the complaint. Abella J., writing for the majority, agreed holding that it was patently unreasonable for the Human Rights Commission to allow Figliola to relitigate the same complaint.

[15] I agree with the Discipline Committee that *Figliola* does not apply in these circumstances and that *Howe* and *Miller* are still good law. In *Figliola*, Abella J. noted a concern that the same issue not be relitigated by a different adjudicator in a different form by a party seeking a different result. (para. 1) Both tribunals in *Figliola*, the Workers' Compensation Board and the Human Rights Commission, had concurrent jurisdiction to hear a complaint that the Board violated the B.C. *Human Rights Code*. This is not uncommon. Abella J. noted that "multiple tribunals frequently exercise concurrent jurisdiction over the same issues". (para. 26) However, the tribunals in issue here, an arbitration board and a disciplinary committee, are not exercising concurrent jurisdiction. As held by McLellan J. in *Miller*, the tribunals fulfill different functions.

[16] In *Figliola*, Abella J. re-stated a number of legal doctrines and principles that apply to tribunals with concurrent jurisdiction:

> [34] ...
>
> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative

decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto City*), at paras. 37 and 51).

[17] Here, as held by the Discipline Committee, the Arbitration Board and the Discipline Committee will be deciding different legal issues. These issues have a common factual foundation. However, it is premature to suggest that either tribunal will relitigate "issues that have been previously decided in an appropriate forum". (see *Figliola, supra*, at para.34), Given the distinction in the mandates of each tribunal, it is unlikely the concerns addressed by Abella J. will arise. Moreover, the Discipline Committee is statutorily mandated to inquire into complaints of professional misconduct. It is inconsistent with that responsibility to delay its proceedings indefinitely because of the possibility it may make a legal error down the road.

[18] The Discipline Committee correctly decided to deny the application for a stay of its proceedings. The application is dismissed with taxable costs to the respondent, payable by the Union only.

J. E. McMURTRY