Canadian Human Rights Tribunal   Tribunal canadien des droits de la personne

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MINISTER OF PERSONNEL FOR THE

GOVERNMENT OF THE NORTHWEST TERRITORIES,

AS EMPLOYER

Respondent

RULING ON APPLICATION FOR LEAVE UNDER SECTION 7

Ruling No. 10

2001/08/27

PANEL: Paul Groarke, Chairperson

Athanasios Hadjis, Member

Jacinthe Théberge, Member

[1] The Respondent has applied to the Tribunal for leave to call more than five expert witnesses under section 7 of the Canada Evidence Act, R.S.C. 1985, c. C-5. A copy of a letter from counsel for the Respondent, dated June 29, 2001, has been entered as Exhibit R-129 in support of the application. It sets out the witnesses which the Respondent intends to call, the purposes for which they are being called, and the issues on which they will testify.

[2] The Respondent has also referred us to two authorities: R. v. Mohan [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9 and R. v. Morin [1991] O.J. No. 2528 (Ont. Gen. Div.). These are criminal cases. The Morin decision merely holds that there must be a reasonable basis for calling expert witnesses. The Mohan case deals with the factors to be applied in deciding whether expert evidence is admissible. These factors include the relevance of the evidence and whether the trier of fact needs to hear the evidence in order to determine the facts of the case.

[3] Alan Mewett and Peter Sankoff have written that the general role of expert witnesses "differs from that of the ordinary lay witness in that the former gives testimony in order to assist the fact finder in coming to a conclusion from the facts before him or her, whereas the latter testifies as to those very facts." (1) Mewett and Sankoff advise that the use of expert witnesses "is as old as the trial process itself." (2) They suggest that there have beeen two concerns, historically, with respect to the use of such testimony. One is that it complicates the trial process, by introducing "redundant and superfluous" evidence. The other is that the weight of expert testimony is easily overstated and may undermine the role of the trier of fact. Although the courts have wavered on the issue, they "have generally attempted to restrict the use of expert evidence to instances where it is truly required." (3)

[4] The judgment in Mohan sets out some of the general principles in the area. The purpose of expert evidence is to assist an adjudicative body in deciding the facts of the case. It does so by providing the trier of facts with knowledge and "ready-made" inferences which stand outside the scope of their experience. It follows that experts have a special role in litigation which relies on statistical and scientific evidence. The issue in each instance is whether the evidence is "necessary" to decide the issues in the case. The standard of necessity is relatively relaxed, however, and should not be overstated. Mr. Justice Sopinka also remarks, at paragraph 24, that a trial should not become "a contest of experts with the trier of fact acting as referee in deciding which experts to accept."

[5] It is important to distinguish between the issues which arise on an application for leave to call witnesses and the issues which arise with respect to the admissibility of their

testimony. Although it is inevitable that there will be some blurring of the line between the two areas, issues with respect to the relevance and admissibility of an expert's testimony are more properly decided when the witness is called. The inquiry at the present stage of the proceeding is merely whether the party applying for leave has reasonable grounds for calling the witnesses. In deciding such an issue, a Tribunal must bear in mind that a party is entitled to provide a complete answer to the case against it.

[6] Counsel for the Respondent appeared to take the position that the relevant question is whether the proposed evidence would have a significant bearing on a distinct issue in the case. We agree with this view of the matter. A Tribunal is not in a position to assess the reliability of proposed witnesses at this stage of the proceeding and can merely determine whether their testimony would logically contribute to the defence. It is accordingly sufficient if it can be reasonably said that the expert's testimony is needed to determine one of the factual issues in the case. This excludes testimony which undermines the fairness or expeditiousness of the process.

[7] The letter entered by the Respondent refers to ten expert witnesses. The first expert mentioned in the letter is Dr. David Bellhouse, who will give evidence on sampling. The efficacy of the sample used in the Joint Equal Pay Study has become a major issue in the hearing and all of the parties agree that his evidence will be of assistance. We can safely say that the Respondent "needs" this evidence.

[8] The next expert witness, who is not identified by name, is a statistical expert. This witness is expected to testify on the "causative factors" which may explain any differences in earnings between male and female employees in the public service sector. Dr. Craig Riddell, the third expert, will testify to much the same effect on the characteristics of the labour market in the North. The evidence of these two witnesses is intended to assist the Respondent, in explaining any wage gap between different groups of employees.

[9] Although counsel for the Complainant questioned the need for these witnesses, her objections went more to the factual basis of their evidence. We are willing to recognize her concerns and accept, as a general principle, that expert opinions require some proof of the facts on which they are premised. In our view, however, it is premature to raise objections on the basis of such a principle. The only question at this stage is whether the Respondent needs the testimony of these experts to answer the complaint.

[10] We are satisfied that it does. We realize that there may be a difference of opinion on the state of the law relating to the cause of any gap in wages between male and female dominated groups. This is not the place to settle such an issue, however, which should be dealt with at a later time. At this point, we are only dealing with the appropriateness of the witness lists.

[11] The next four expert witnesses are uncontroversial. Robert Bass will testify as to the value of the benefits enjoyed by the members of the Northwest Territories public service. This testimony is expected to counter the evidence of Dr. Lee, who is being called by the Commission on the same issue. The Respondent is also calling Philip Wallace, an expert in job evaluation and Paul McGone, an expert in "the various methodologies used in equal pay cases". Dr. Mark Killingsworth, a statistical expert from Rutgers University, will respond to the evidence of Mr. Sunter, who has been called by the Complainant. All of the counsel before us agreed that these three witnesses would speak to important issues in the hearing.

[12] We are satisfied that the Respondent can reasonably claim that it needs the evidence of the previous witnesses. We do not believe that their testimony goes beyond the limits of what is required to present a full and complete case. There may still be issues with respect to the qualification of these experts, the ultimate relevance of their evidence, or its admissibility. Those issues should be dealt with, however, as they arise in the course of the hearing. We accordingly grant leave to call all seven witnesses.

[13] This leaves three other expert witnesses. The first two witnesses are Nicholas Underhill, Q.C., a Deputy Judge of the High Court of England and Wales, and Dr. Charles Shanor, former General Counsel at the American Federal Equal Employment Opportunities Commission. Mr. Underhill is expected to testify on the law of the European Community and the United Kingdom relating to equal pay for work of equal value. He is also expected to testify as to the jurisprudence under one of the International Labour Organization conventions. Dr. Shanor is expected to testify as to the American law on wage discrimination.

[14] These witnesses raise a different matter than the previous witnesses. We have not been advised, at this point in time, as to the international law or the state of the foreign jurisprudence in the area of wage discrimination. Ms. Noonan has nonetheless referred us to passages from the earlier transcript of these proceedings, in which the Respondent relied upon the international law. In volume 9 of the transcript, at page 1236, Mr. Brady referred to the Equal Remuneration Convention, which is known as International Labour Organization Convention No. 100. He also referred the Tribunal to two cases decided by the European Court of Justice under Article 119 of the Treaty of Rome, which apparently provides for equal pay for work of equal value. Ms. Noonan quotes from the same convention in volume 11, at page 1388 and 1398.

[15] There appears to be a dispute as to whether the Tribunal should be applying the international law or examining the jurisprudence of other jurisdictions, in interpreting our own Act. The decisions in other jurisdictions would, at the very least, seem to have some persuasive value. We are not in a position, however, to do anything more than recognize that these issues have been raised in the hearing and may be significant in deciding the substantive matters before us. Whatever the state of the foreign jurisprudence, we see no reason for expert evidence on the law and feel that legal issues should be raised in argument.

[16] The appearance of justice is important in our law and the Tribunal must be seen as the author of its own decisions. Under section 50(2) of the Canadian Human Rights Act, a Tribunal has the authority to decide "all questions of law or fact necessary" to determining the matter before it. That task has been assigned to the members of this Tribunal. We have an obligation to make up our own minds on legal issues and cannot delegate that responsibility to expert witnesses, however learned they may be. The courts have always expressed concern with expert evidence that crosses into issues more properly decided by the trier of the case.

[17] We do not want to prevent the parties from arguing all matters of law that are relevant to a determination of the case. There is nothing to stop the Respondent from submitting a written brief on the international law, if that law is properly before us. It may also retain experts, and perhaps the experts in question, for the purpose of briefing counsel. The law is the province of counsel and the Tribunal, however, and we are firmly

of the view that it should be raised in argument, rather than as expert or opinion evidence. We leave it to the Respondent to decide who will present these arguments before us.

[18] These remarks are subject to two reservations. One is that the Tribunal would like to be alerted to any authorities which deal with the application and interpretation of international conventions and foreign jurisprudence in the human rights process. The second reservation is that counsel for the Respondent has an obligation to provide the other parties with ample notice of the law on which it wishes to rely. Ms. Noonan has already suggested that the Respondent may provide a written brief to the other parties, outlining the state of the law. This would be sufficient to meet our concerns.

[19] This leaves one remaining witness, Paul Weiler, who is a former Chairperson of the British Columbia Labour Relations Board and a professor of law at Harvard University. We were advised that Mr. Weiler's evidence would relate to the joint liability of the management and union in collective bargaining, apparently on the question of sex discrimination. We were not directed to any outstanding factual issue between the parties on which his evidence would assist the Tribunal.

[20] We accept that Mr. Weiler testified as an expert witness in P.S.A.C. v. Canada Post. The Respondent did not explain, however, why it needed his evidence to answer the complaint before us. It will be apparent that we do not feel it would be appropriate to elicit his opinion of the law. In our view, the Respondent has accordingly failed to demonstrate that the evidence of Mr. Weiler would assist the Tribunal in deciding the facts of the case.

[21] The application for leave to call the last three expert witnesses is accordingly denied.

Paul Groarke, Chairperson

Athan D. Hadjis, Member

Jacinthe Théberge, Member

OTTAWA, Ontario
August 27, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

TIBUNAL FILE NO.: T470/1097
STYLE OF CAUSE: Public Service Alliance of Canada v. Minister of Personnel for the Government of the Northwest Territories, as Employer
PLACE OF HEARING: Ottawa, Ontario
August 7, 2001
DECISION OF THE TRIBUNAL DATED: August 27, 2001
APPEARANCES:
Judith Allen For the Public Service Alliance of Canada
Ian Fine For the Canadian Human Rights Commission

George Karayannides
Joy Noonan For the Government of the Northwest Territories

1. Alan W. Mewett and Peter J. Sankoff, Witnesses (Toronto: Carswell,;1991, 2001), p. 10-1
2. ibid., p. 10-2
3. ibid. p. 10-3