Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

SALVATORE MILAZZO

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AUTOCAR CONNAISSEUR INC.

Respondent

RULING ON JURISDICTION

Ruling No. 1

2002/11/12

PANEL: Anne Mactavish, Chairperson

[1] This case involves a complaint brought by Salvator Milazzo against his former employer, Autocar Connaisseur Incorporé. Mr. Milazzo alleges that Autocar failed to accommodate his perceived disability, (dependence on drugs), and terminated his employment, all in contravention of Section 7 of the *Canadian Human Rights Act*.

[2] Mr. Milazzo further alleges that Autocar's drug testing policy is discriminatory, and violates Section 10 of the *Act*.

I. THE ISSUE

[3] Without admitting that the policy applies in this case, Autocar alleges that the publication of a drug testing policy by the Canadian Human Rights Commission[(1)] brings into question the institutional independence of the Canadian Human Rights Tribunal, and makes it impossible for the respondent to get a fair hearing before the Tribunal. Autocar further submits that the wording of the press release issued by the Commission when this case was referred to the Tribunal for hearing prejudges that case before the Tribunal. Finally, Autocar seeks to have these proceedings adjourned until such time as the Supreme Court of Canada renders its judgment in *Bell Canada v. CTEA et al.* ("*Bell Canada*").[(2)]

II. THE HISTORY OF THE *BELL CANADA* CASE

[4] In order to put the respondent's motion into context, it is necessary to understand the history of the *Bell Canada* case. *Bell Canada* involves a challenge to the jurisdiction of the Canadian Human Rights Tribunal, based upon the claim that the Tribunal does not have the requisite degree of institutional independence and impartiality because of deficiencies in the statutory scheme governing the Tribunal. In a November, 2000 decision of the Trial Division of the Federal Court[(3)], Madam Justice Tremblay-Lamer

found that the Canadian Human Rights Tribunal was not an institutionally independent and impartial body because the Canadian Human Rights Commission has the power to issue guidelines binding upon that Tribunal.[(4)] Tremblay-Lamer J. also concluded that the independence of the Canadian Human Rights Tribunal was compromised by the provision in the statute that requires that members of the Tribunal have the Chairperson's approval in order to be able to complete cases after the expiry of their appointments.[(5)] As a consequence, Tremblay-Lamer J. ordered that there be no further proceedings in the *Bell Canada* matter until such time as the problems that she identified with the statutory regime were corrected.

[5] Madam Justice Tremblay-Lamer's decision in *Bell Canada* was overturned by the Federal Court of Appeal, which concluded that the Canadian Human Rights Tribunal possessed a sufficient degree of institutional independence.[(6)] Leave to Appeal to the Supreme Court of Canada has been granted,[(7)] although the appeal has not yet been heard.

III. AUTOCAR'S SUBMISSIONS

[6] Autocar points to the uncertainty regarding the question of the Tribunal's institutional independence and impartiality arising out of the pending appeal in *Bell Canada*, and submits that the Tribunal should suspend these proceedings until such time as the matter is finally resolved by the Supreme Court of Canada. As long as this uncertainty exists, Autocar says, it cannot be assured that it will receive a fair hearing before the Tribunal.

[7] Insofar as the Commission's drug testing policy is concerned, Autocar says that the policy prohibits pre-employment and random drug tests. As a consequence of what it says is the binding nature of this policy, Autocar submits that it is now impossible for an employer to be able to justify testing its employees for drug use before the Tribunal. While an employer could try to do so, Autocar says, the binding effect of the Commission's drug testing policy creates not just a reasonable apprehension of bias, but actual institutional partiality on the part of the Tribunal.

[8] According to Autocar, the decision of the Federal Court of Appeal in the *Bell Canada* matter is distinguishable from the present situation. The Federal Court of Appeal based its conclusion that Guidelines published under Section 27 of the *Canadian Human Rights Act* did not compromise the institutional independence of the Tribunal on the 1998 amendments to Section 27(2). These amendments allow the Commission to promulgate Guidelines dealing with classes of cases, but no longer permit the Commission to create Guidelines dealing with specific cases. In contrast, in this case, Autocar says, the adoption of the Commission's drug testing policy will affect not just a category of cases, but this case in particular - precisely what would have concerned the Federal Court of Appeal.

[9] Autocar also points out that the drug testing policy was adopted by the Commission after this complaint was filed with the Commission. The Commission has therefore eliminated, after the fact, any form of justification that Autocar may have had for performing random drug tests. This situation clearly creates the appearance of partiality, according to Autocar.

[10] Insofar as the Commission's press release is concerned, Autocar contends that the wording of the release(8) demonstrates that the Commission has prejudged the matter before it has been dealt with by the Tribunal.

[11] Autocar says that the Tribunal is effectively being asked to sit "on appeal" of a decision of the Commission, simply to validate that decision. While this is not what Parliament intended, Autocar says, it is the practical result of what it says is the binding nature of the Commission's drug testing policy and the Commission's prejudgment of the case.

[12] Finally, Autocar submits that the effect of the Supreme Court of Canada having granted leave to appeal in the *Bell Canada* case is to raise the Sword of Damocles over the decision of the Federal Court of Appeal, creating great uncertainty. The granting of leave to appeal by the Supreme Court attests to the importance that the issue of the Tribunal's institutional independence has for the public. Forcing it to submit to a hearing before a Tribunal lacking in institutional independence and impartiality would create irreparable harm, Autocar says. The balance of convenience favours suspending the hearing until the Supreme Court of Canada renders its decision in *Bell Canada* or until such time as the statute is amended to correct what Autocar says are the deficiencies affecting the impartiality of the Tribunal.

IV. THE COMMISSION'S SUBMISSIONS

[13] The Commission submits that its drug testing policy is not a "Guideline" within the meaning of Section 27 of the *Canadian Human Rights Act*. Subsection 27(2) of the *Canadian Human Rights Act* provides that the Commission may, by order, issue guidelines setting out how the Act applies in a class of cases. Subsection 27(4) stipulates that each guideline issued under subsection (2) shall be published in the Canada Gazette. According to the Commission, its drug testing policy is not a "Guideline" within the meaning of Section 27 of the *Act* as it was not adopted by order and has not been published in the Canada Gazette. As a result, in contrast to the Equal Wages Guidelines that were in issue in the *Bell Canada* case, the Commission's drug testing policy is not binding on members of the Tribunal.

[14] In the event that the Tribunal were to conclude that the Commission's drug testing policy is a "Guideline" within the meaning of the *Act*, the Commission says that the policy applies to all federally-regulated employers, and relates to a class of cases, and not just Mr. Milazzo's complaint. In *Bell Canada*, the Federal Court of Appeal concluded that

guidelines governing a class of cases did not interfere with the independence and impartiality of the Tribunal.

[15] The Commission states that in order to justify the suspension of the Tribunal proceedings on the basis that the publication of the Commission's drug testing policy creates a reasonable apprehension of institutional partiality on the part of the Tribunal, or impinges on the Tribunal's independence, Autocar should have to satisfy the tripartite test set out in *RJR - Macdonald Inc. v. Canada (A.-G.)*[(9)] In the Commission's submission, Autocar has not done so, and the case should therefore proceed.

[16] Insofar as the Commission's press release is concerned, the Commission contends that Autocar has not indicated how the press release prejudges Mr. Milazzo's complaint before the Tribunal. According to the Commission, the press release merely recites the allegations contained in Mr. Milazzo's complaint, and draws no conclusions as to the merits of the complaint. In any event, the Commission says, a Commission press release has no binding effect on Tribunal members.

[17] Mr. Milazzo has not made any submissions with respect to Autocar's motion.

V. ANALYSIS

A. The Effect of the Promulgation of the Canadian Human Rights Commission's Policy on Alcohol and Drug Testing.

[18] As was noted by Evans J. in *Canada (Attorney General) v. Public Service Alliance of Canada*[(10)], in enacting subsection 27(2) of the *Canadian Human Rights Act*, Parliament has conferred on the Canadian Human Rights Commission, an independent administrative agency, the power to make subordinate legislation on substantive matters.

[19] A review of Guidelines enacted by the Commission confirms their status as either statutory orders, regulations, or statutory instruments.[(11)] In the case of the Commission's drug testing policy, the policy itself states that:

The object of this policy is to set out the Commission's interpretation of the human rights limits on drug- and alcohol-testing programs, as well as provide practical guidance on compliance with the *Canadian Human Rights Act*.... The Commission will apply its policies in the enforcement and interpretation of the *Act*.

This policy is not a substitute for legal advice and any employer considering a drug- and alcohol-testing policy should seek legal guidance on the issue.

The policy further recites that:

This policy has been approved by the Commission and came into effect on June 11, 2002.

[20] There is nothing before me to suggest that the Commission's drug testing policy is a "Guideline" within the meaning of Section 27 of the *Canadian Human Rights Act*. There is no evidence indicating that the policy was made "by order" of the Commission or that it was ever published in the Canada Gazette. Further, there is nothing before me that would indicate that the Commission's drug testing policy was ever subjected to the scrutiny that Guidelines must undergo in accordance with the *Statutory Instruments Act*. (12)

[21] Finally, there is nothing before me that would suggest that the policy was intended to be binding on the Canadian Human Rights Tribunal. It appears to be nothing more than a statement of the Commission's opinion on the issue of drug and alcohol testing, an opinion that the Canadian Human Rights Tribunal may agree with or not, as it sees fit.

[22] The *Bell Canada* case involves consideration of the effect that the binding nature of the Equal Wages Guidelines has for the institutional independence and impartiality of the Tribunal. In contrast, in this case I have concluded that the Commission's drug testing policy is not a "Guideline" within the meaning of Section 27 of the *Canadian Human Rights Act*, and is thus not binding on the Tribunal. As a consequence, I am of the view that the issues raised by the *Bell Canada* case have no application to this case.

[23] In the event that I am mistaken in my conclusion that the Commission's drug testing policy is not a "Guideline" within the meaning of the *Act*, based upon the plain reading of the policy itself I am satisfied that the policy relates to a class of cases, and not just Mr. Milazzo's complaint. In *Bell Canada*, the Federal Court of Appeal concluded that guidelines governing a class of cases did not interfere with the independence and impartiality of the Tribunal.

B. The Effect of the Publication of the Commission's Press Release

[24] Insofar as the publication of the Commission's press release is concerned, I do not accept Autocar's submission that the wording of the release demonstrates that the Commission has prejudged the matter before it has been dealt with by the Tribunal. The release is framed in a manner that makes it clear that what is being stated are Mr. Milazzo's allegations. The only point at which the release does not make it clear that what is being stated is simply an allegation is the assertion that "The employer apparently refused to take measures to accommodate the complainant and instead terminated his employment." Even then, this assertion is qualified somewhat by the use of the word "apparently".

[25] As a result, I am not persuaded that the Canadian Human Rights Commission has prejudged this matter. Even if that were the case, the fact is that the Canadian Human Rights Tribunal does not sit on appeal of the decisions of the Canadian Human Rights Commission. Hearings before the Canadian Human Rights Tribunal consist of the *de novo* consideration of individual complaints. The Commission's view of the merits of Mr. Milazzo's complaint carries no more and no less weight with the Tribunal than does the view of any of the other parties to the proceeding. The task of the Tribunal is to decide

the case, based upon the evidence presented to the Tribunal. Anything that the Commission may have said in a press release at the time that this case was referred to the Tribunal for hearing is simply irrelevant to that task.

C. Should This Case be Put in Abeyance, Pending the Decision of the Supreme Court of Canada in *Bell Canada*?

[26] The final matter to be addressed is Autocar's submission that this proceeding should be suspended until such time as the Supreme Court of Canada renders its judgment in *Bell Canada*. Autocar argues that forcing it to submit to a hearing before a Tribunal lacking in institutional independence and impartiality would create irreparable harm. Autocar further submits that the balance of convenience favours suspending the hearing until the Supreme Court of Canada renders its decision in *Bell Canada* or until such time as the statute is amended to correct what Autocar says are the deficiencies in the legislation.

[27] There is no doubt that the fact that the Supreme Court of Canada has granted leave to Bell Canada to appeal the decision of the Federal Court of Appeal creates a climate of uncertainty for the Canadian Human Rights Tribunal as an institution. As long as the *Bell Canada* case is before the Court, there remains the possibility that the Supreme Court of Canada may conclude that the current statutory scheme does not provide the Tribunal with a sufficient degree of institutional independence. Depending on the findings of the Supreme Court of Canada, the decision in *Bell Canada* may have implications for cases other than equal pay cases before the Canadian Human Rights Tribunal.

[28] The question, then, is whether this climate of uncertainty means that this case should not proceed until such time as the issue of the Canadian Human Rights Tribunal's institutional independence and impartiality is determined for once and for all.

[29] Both parties have approached this issue on the basis of the tripartite *RJR - Macdonald* test. In my view, the fact that the Supreme Court of Canada has granted leave to appeal to *Bell Canada* in relation to the issue of the institutional independence and impartiality of the Canadian Human Rights Tribunal clearly satisfies the "serious issue" component of the *RJR - Macdonald* test.

[30] However, I am not persuaded that Autocar has established that it would suffer irreparable harm if it were forced to proceed with this hearing before the Supreme Court of Canada's decision in *Bell Canada* is rendered. Harm is irreparable if it can not be cured or quantified in monetary terms.[(13)]

[31] As was noted by the Federal Court of Appeal in *Nature Co. v. Sci-Tech Educational* [(14)], proof of irreparable harm must be clear and not speculative. At this juncture, we do not know if the Supreme Court of Canada will uphold the decision of the Federal Court of Appeal in *Bell Canada* or will overturn it. If the Federal Court of Appeal decision is overturned, we do not know what the Court's reasons will be for doing so, nor do we know what, if any, implications the decision may have for cases such as this one where

there are no Guidelines in issue. In my view, the evidence before me does not meet the standard of 'clear and not speculative'. As a consequence, I am not satisfied that the respondent has met the burden on it of establishing that it would suffer irreparable harm if the hearing were to proceed.

[32] Similarly, Autocar has not met the burden on it of establishing that the balance of convenience favours suspending the hearing. In this regard, Autocar asserts that the balance of convenience cannot favour a situation that could violate the constitutional rights of a party.

[33] It seems to me that this is an argument that goes more to the question of irreparable harm than balance of convenience. If it turns out that the Supreme Court of Canada's decision in *Bell Canada* has implications for cases such as this one, Autocar will have its remedies in the Federal Court with respect to any decision that the Tribunal may ultimately render. While Autocar will inevitably incur costs if the Tribunal were to proceed, the courts have clearly established that the incurring of unnecessary costs does not constitute irreparable harm.(15)

[34] In assessing the balance of convenience, I must take into account the public interest in having complaints of discrimination dealt with expeditiously.(16) In all of the circumstances, I find that the balance of convenience favours proceeding with the hearing.

VI. ORDER

[35] For these reasons the respondent's motion is dismissed.

"Original signed by"

Anne L. Mactavish

OTTAWA, Ontario

November 12, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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RULING OF THE TRIBUNAL DATED: November 12, 2002

APPEARANCES:

Salvatore Milazzo On his own behalf

Patrick O'Rourke and Céline Harrington For the Canadian Human Rights Commission

Philippe-André Tessier and Louise Baillargeon For Autocar Connaisseur Inc.

1. [1] The "Canadian Human Rights Commission Policy on Alcohol and Drug Testing". Online: CHRC Homepage <http://www.chrc-ccdp.ca/Legis&Poli/DrgTPol_PolSLDrg/DrgPol_PolDrg2.asp?l=e>.

2. [2] [2001] S.C.C.A. No. 406

3. [3] [2001] 2 F.C. 392

4. [4] See sub-sections 27 (2) and (3) of the *Canadian Human Rights Act*.

5. [5] Section 48.2 (2) of the *Canadian Human Rights Act*.

6. [6] [2001] 3 F.C. 481 (C.A.)

7. [7] Supra., footnote 2.

8. [8] The Commission's press release states:

"Salvator Milazo (sic) of Montreal alleges that his former employer, Autocar Connaisseur Incorporé, discriminated against him on the ground of his disability. Mr. Milazo claims

that, along with the other bus drivers employed with the company in question, he underwent a mandatory drug test. He also alleges that, when his results showed signs of marijuana, he was suspended for two days. After the suspension, Mr. Salvator (sic) says he met with a director and offered to follow a rehabilitation program in order to overcome his addiction and to take a subsequent drug test. The employer apparently refused to take measures to accommodate the complainant and instead terminated his employment."

9. [9] [1994] 1 S.C.R. 312

10. [10] [2000] 1 F.C. 146 (T.D.), at para. 139.

11. [11] See the Equal Wages Guidelines, 1986, SOR/86-1082, the Immigration Guidelines, SI/80-125 and the Age Guidelines, SI/78-165.

12. [12] R.S.C., 1985, c. S-22. See also the Tribunal's ruling in *Canadian Telephones Employees Association et al. v. Bell Canada,* (April 26, 1999, C.H.R.T.), for a discussion of this process.

13. [13] *Northwest Territories v. Public Service Alliance of Canada*, [2001] F.C.J. No. 19, at para. 16.

14. [14] (1992), 41 C.P.R. (3d) 359 at 367

15. [15] *Northwest Territories*, supra., at para. 19.

16. [16] *Bell Canada v. Communications, Energy and Paperworkers Union of Canada et al.*, [1997] F.C.J. No. 207 (T.D.)