

TD 16/ 89

Decision rendered on November 27, 1989

HUMAN RIGHTS TRIBUNAL CONCERNING A COMPLAINT FILED BY PHILIP W. S. JAMES AGAINST AIR CANADA ON THE GROUNDS OF AGE IN TERMS OF EMPLOYMENT IN CONTRAVENTION OF SECTIONS 7 AND 10 OF THE CANADIAN HUMAN RIGHTS ACT

BETWEEN:

PHILIP W. S. JAMES Complainant

- and

CANADIAN HUMAN RIGHTS COMMISSION The Commission

- and

AIR CANADA Respondent

TRANSLATION

ORDER

At the beginning of the hearing on August 3, 1989, the respondent raised three preliminary objections to the jurisdiction of the Tribunal appointed Pursuant to exhibit T- 1 of the present case.

The first is a motion challenging the sole member of this Tribunal. The second raises the invalidity and inoperativeness of various provisions of the Canadian Human Rights Act. The third is based on the concept of pendency, since an action initiated by the complainant is now pending in the Superior Court of Quebec.

The challenge of the Tribunal is based on a reasonable apprehension of bias and non-independence.

According to the respondent, the reasonable apprehension of bias stems from the fact that the member of this Tribunal is a lawyer in private practice in Montreal.

Still according to the respondent, the non- independence of the Tribunal is the result of the Tribunal appointment process described in sections 48.1 and 48.2 of the Canadian Human Rights Act. These sections deal with the appointment of the Human Rights Tribunal Panel and its President. The appointment of the Tribunals themselves is provided for in section 49, specifically

in subsections (1) and (1.1). This does not however affect the substance of the respondent's arguments. The respondent argues that the power of the President of the Human Rights Tribunal Panel to choose one of the Panel members to form a Tribunal, the ability of the Commission to issue guidelines binding on Tribunals pursuant to section 27, subsections (2) and (3) of the Act, and the Commission's power to determine the remuneration of Tribunal members under its By-law No 4 result in the dependence of the Tribunal, and consequently disqualify it as such.

The second objection of the respondent raises the inoperativeness and invalidity of the above-mentioned process for appointing the Human Rights Tribunal, a process that, according to the respondent, does not guarantee the basic principle of independence of tribunals.

In support of this objection, the respondent recapitulates the arguments developed with regard to its challenge of the Tribunal for lack of independence, while also specifying the sections of the Canadian Human Rights Act that are particularly relevant.

According to the respondent, sections 27(2), 27(3) and 49(1) of the Canadian Human Rights Act prevent the Human Rights Tribunal from being an independent tribunal, since they give the Human Rights Commission the power to issue guidelines, binding on the Human Rights Tribunals, that set out the extent to which and the manner in which any provision of this Act applies.

The respondent, citing the principles established in the Valente case regarding the independence of tribunals, further maintains that recent changes in the process of appointing the judges of the Human Rights Tribunal are in reality only cosmetic. Consequently, the decision of the Federal Court of Appeal in the MacBain case, declaring former sections 39(1) and 39(5) of the Canadian Human Rights Act inoperative because they violated the right to a fair hearing guaranteed by the Canadian Bill of Rights, must be analogy apply to the present case.

The respondent therefore asked the Tribunal to declare inoperative and invalid the provisions of the Canadian Human Rights Act relating to its establishment and the appointment of its members.

For his part, counsel for the Canadian Human Rights Commission maintains that similar questions relating to the appointment of Tribunals pursuant to the Act are currently pending in Federal Court and that there would be a risk of contradictory rulings on this fundamental issue if the questions raised were not referred to the Federal Court in accordance with the referral procedure provided for in section 28(4) of the Federal Court Act. He also stresses that the referral procedure would ensure faster handling of the complaint. Hearing delays are an important consideration in this case (mandatory retirement of a pilot).

It is the Tribunal's opinion that the first two arguments of counsel for the respondent must indeed be referred to the Federal Court. The objections raised with regard to apprehension of bias stemming from the profession of the Chairman of this Tribunal and the appointment process provided for in sections 48.1 and 48.2 of the Canadian Human Rights Act are in fact based on well-established principles of natural justice; this makes a referral necessary in the interest of

justice and that of the parties themselves, in accordance with the procedure provided for in section 28(4) of the Federal Court Act.

The Tribunal takes note of the commitment made in the course of the hearing by the solicitors for the respondent and the Commission with regard to the preparation of a statement of facts so that the matter can be brought before the Federal Court.

As for the third preliminary argument raised by the respondent, namely the question of pendency, the Tribunal believes that it would be premature to make a decision on this matter until its jurisdiction has been established.

Consequently, the Tribunal rules that the following questions of law and jurisdiction be referred to the Federal Court in accordance with section 28(4) of the Federal Court Act.

1. Does the fact that a member of the Human Rights Tribunal appointed pursuant to the said Act is a practising lawyer give rise to a reasonable apprehension of bias, preventing the Tribunal from disposing of the complaint brought before it and justifying a challenge of the Tribunal?

2. Do the appointment of the Tribunal by the President of the Human Rights Tribunal Panel pursuant to sections 48.1, 48.2, 49(1), (1.1) and (5) of the Canadian Human Rights Act, the procedure for remuneration of the Human Rights Tribunal provided for in section 49(4), and the powers of the Commission described in sections 49(1), 27(2) and 27(3) affect the administrative independence of the tribunal and do they prevent it from forming an independent and fair Tribunal?

Montreal, October 31, 1989 (signed) Nicole Duval Hesler, Tribunal

REFERENCES

- (1) Valente v The Queen (1985) 2 SCR 673
- (2) MacBain v Lederman (1985) 1 PC 856

TRANSLATION

FROM FRENCH FEDERAL COURT OF APPEAL CONCERNING A COMPLAINT FILED BY PHILIP W. S. JAMES AGAINST AIR CANADA ON THE GROUNDS OF AGE IN TERMS OF EMPLOYMENT IN CONTRAVENTION OF SECTIONS 7 AND 10 OF THE CANADIAN HUMAN RIGHTS ACT.

REFERENCE (Section 28(4) of the Federal Court Act)

On February 17, 1988, the complainant Philip W. S. James filed a complaint alleging that the respondent Air Canada had engaged in a discriminatory practice. The complainant alleges that he was retired because of his age in contravention of sections 7 and 10 of the Canadian Human Rights Act.

The complaint was to be heard on August 3, 1989. At the beginning of the hearing, counsel for the respondent raised three preliminary objections to the jurisdiction of the Tribunal.

On October 31, 1989, the Human Rights Tribunal decided to refer the following two questions raised by the preliminary objections of the respondent to the Federal Court of Appeal for hearing and determination in accordance with section 28(4) of the Federal Court Act.

1. Does the fact that a member of the Human Rights Tribunal appointed pursuant to the said Act is a practising lawyer give rise to a reasonable apprehension of bias, preventing the Tribunal from disposing of the complaint brought before it and justifying a challenge of the Tribunal?
2. Do the appointment of the Tribunal by the President of the Human Rights Tribunal Panel pursuant to sections 48.1, 48.2, 49(1), (1.1) and (5) of the Canadian Human Rights Act, the procedure for remuneration of the Human Rights Tribunal provided for in section 49(4), and the powers of the Commission described in sections 49(i), 27(2) and 27(3) affect the administrative independence of the Tribunal and do they prevent it from forming an independent and fair Tribunal?

Montreal, October 31, 1989

(signed) Nicole Duval Hesler, Tribunal