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DECISION RENDERED ON JULY 28, 1980

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT AND
IN THE MATTER OF A COMPLAINT BY KENNETH ARNISON AGAINST
THE PACIFIC PILOTAGE AUTHORITY

Inquiry Tribunal: R.G. Herbert, Esq.
Representing the Parties:
Kenneth Arnison - A.E. Black, Esq.
Complainant Lorraine Shore

Pacific Pilotage Authority - W. O'Malley Forbes, Esq.
Respondent M.J. Bird, Esq.

Ministry of Transport - G.C. Carruthers, Esq.
Human Rights Commission - R.G. Jurianz, Esq.
The Tribunal sat on June 9 and 10, 1980 to hear evidence and
consider submissions.

Captain Arnison's Complaint is as to his removal from the
eligibility list maintained by The Authority from which to fill
vacancies which might occur in the staff of pilots employed by it,
to provide pilotage services in Area 1 (formerly Zone B) of the
region for which it is responsible to furnish such services.

The area includes what I will call the navigable portion of the
Fraser River and its environs.

Captain Arnison, born November 25, 1928, has held a Masters
Certificate since 1955 and passed the requisite examinations to
become an apprentice pilot in 1973 and was placed on an eligibility
list for employment as such. He maintained that eligibility,
rising to Number 1 on that list, until he attained his 50th
birthday on November 25, 1978.

Regulation 26 of the Authority provides:

"Where the Authority is of the opinion that an apprentice
pilot is required to meet the needs of its pilotage service,
it may appoint as an apprentice pilot a person whose name is
on the eligibility list referred to in Section 25 if he

(a) is not less than 23 and not more than 49 years of age and

(b) ..."

The Pacific Pilotage Authority is established as a body corporate

to provide pilotage service in the Pacific Coast region, pursuant
to Section 3 of The Pilotage Act, S.C. Chapter 52. Section 14 of
that Act provides that an Authority may with the approval of the
Governor in Council:

"... make regulations necessary for the attainment of its
objects ..."

including

"(f) prescribing the qualifications that a holder of any class of licence or any class of pilotage certificate shall meet including the degree of local knowledge, skill, experience, proficiency ... in addition to the minimum qualifications prescribed by the Governor in Council under Section 42; ..."

The subject of age is not mentioned in Section 14, but the General Pilotage Regulations stipulate:

"4(1) Every applicant for a licence shall be:

(a) Not less than 23 years of age and not more than 50 years of age; and

(b) ..."

It may be questioned whether the Pacific Pilotage Authority has an authority to stipulate that eligibility should depend on an applicant not being over 49 years of age. It may reflect the federal stipulation that an apprenticeship may be for a duration of not less than 6 months and not more than 12 months (Regulation 27 applicable to pilots generally in the Pacific region) but since amended in the case of Area 1 (Fraser River) to 3 months.

Be that as it may, evidently Captain Arnison's eligibility was extended to his 50th birthday, which accords with the stipulation in Regulation 4 of the General Regulations. It is to be noted that Regulation 3 of the General Regulations says that:

"These Regulations apply in all the regions set out in the Schedule to the Act in respect of every Authority named therein."

There was some suggestion that Section 18 of The Pilotage Act should have been exhausted by Captain Arnison before he had recourse to The Human Rights Commission. Section 18 says:

"An Authority shall, before refusing to issue a licence ... afford the applicant therefor ... or his representative a reasonable opportunity to be heard."

I have no doubt that the short answer of the Authority would have been to simply refer to Regulation 4(1) of the General Regulations quoted above. The evidence to which I will allude a little later is that the Authority considered itself bound by that Regulation made pursuant to the Act which constituted the Authority and that that was the reason for its removing Captain Arnison from the eligibility list.

I conclude that there was no legal impropriety in Captain Arnison complaining directly to The Human Rights Commission to have the issue he seeks to have addressed and dealt with.

Refusing opportunity for employment if based on age is prima facie a discriminatory practice, which is prohibited by Section 3 of The Human Rights Act. Relevant exceptions are found in Section 14 of the Act which provides:

"14. It is not a discriminatory practice if

(a) any referral, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

(b) employment of an individual is refused or terminated because that individual

(i) ...

(ii) has reached the maximum age that applies to that employment by law or under regulations which may be made by the Governor in Council for the purposes of this paragraph;

(c) ... reached the normal age of retirement ..."

As to the first exception (Paragraph (a)) it puts an onus on the employer to establish age discrimination as a bona fide occupational requirement. I am not satisfied that in the case of Captain Arnison the employer satisfied that onus. He was and is, to date, medically fit by the standards established by The Pilotage Act and Regulations pursuant thereto.

The required retirement age of pilots is 65. Pilotage Certificates may be issued to persons up to the age of 65 if medically fit. Presumably in those cases a slower reaction time would be balanced by experience, as Captain Arnison was of the opinion was the case with licenced pilots. Reference was made to stress and agility. Obviously experience would tend to diminish stress, but I suppose temperament is a factor in stress effect. Agility would appear to be a matter of medical assessment.

In any event, a pilot must complete the apprenticeship period satisfactorily but thereafter meet medical and technical standards, which may from time to time be imposed. Finally I

assume satisfactory job performance is a sine qua non to continued employment.

Most significant in justifying the upper age limit in question was Captain Barry's testimony as to the limitations imposed on pilots by what he called "a probationary period" of one year, followed by a further period of service to a total of three years before being considered competent to deal with any size of vessel. Captain Barry added the opinion that he thought 5 years of experience necessary to become a fully qualified or matured pilot.

He referred to Exhibit P2 - "Pacific Pilotage Authority Guidelines for Fraser River Dispatching" providing that a probationary (now called a Class II pilot) remains such for a year subject to restrictions based on size of vessel and type of passage and that restriction on size of vessel continues until three year's experience is accumulated according to those "Guidelines".

The inference invited to be drawn from the evidence of these restrictions is that if, for example, Captain Arnison were licenced at age 52, he would be at least 55 before becoming fully qualified (perhaps even longer in Captain Barry's opinion) and the time left for fully qualified service before compulsory retirement at age 65 diminished his economic utility to the Authority in comparison with that derived from a pilot starting his career as such before the age of 50.

Perhaps happily, in this case, because a presently employed pilot is due to retire this year and a vacancy thus occurs this year, I conclude that, without rejecting this consideration as relevant for consideration, it does not constitute a bona fide occupational requirement in the case of Captain Arnison.

One would want more information as to the relationship between a 3 month apprenticeship, a year's experience with a Class II licence and the "Guidelines" requirement of up to three years experience being a prerequisite to full confidence in the pilot's capability to handle the largest vessels in all circumstances.

The very word "guidelines" is interesting. It is used in this context and apparently more formally in the Human Rights Act itself where Section 14(e) speaks of:

"... prescribed by guidelines issued by the Canadian Human Rights Commission."

I cannot find the word, let alone a definition of it, in any of the six dictionaries I was able to consult. In the one guideline thus far issued it is translated as "ordonnance sur l'age".

Thus though I have concluded that age 50 is not proper because

these matters have to be decided on the basis of reasonableness. It might, for example, be possible to regard a minimum of 5 years fully qualified availability for service prior to retirement as

a basis for fixing an upper age limit on eligibility and be regarded as a bona fide occupational requirement.

There remains for consideration what emerged as the crux of this case - the exception constituted by Section 14(b) (ii):

"... is refused ... because that individual ... has reached the maximum age that applies to that employment by law or

under regulations, which may be made by the Governor in Council for the purposes of this paragraph."

I agree with the submission of Counsel that there have been no relevant regulations made by the Governor in Council for the purposes of this paragraph, so that (to paraphrase) I am asked to determine whether depriving Captain Arnison of his opportunity to be employed as a pilot because he is over 50 years of age (which I have found not to be a bona fide occupational requirement which would have excused the deprivation) is nevertheless excusable because he has reached the maximum age that applies to that employment by law.

The "law" which it is submitted excepts the application of The Human Rights Act, is Section 42 of the Pilotage Act. Parliament by it said:

"42. The Governor in Council may make Regulations:
(a) prescribing for any region or part thereof the minimum qualifications respecting the navigational certificates, experience at sea, age and health of an applicant that an applicant shall meet before he is issued a licence or pilotage certificate."

Pursuant thereto the Governor in Council made Regulation 4 of the General Pilotage Regulations. It reads:

"4(1) Every applicant for a licence shall be
(a) not less than 23 years of age and not more than 50 years of age."

Mr. Bird, Counsel for the Respondent Authority, took a series of positions in defence of the Authority's conduct vis à vis Captain Arnison.

He submitted that because the Human Rights Act is general and the Pilotage Act and Regulations thereto are particular, the Human Rights Act is inapplicable.

As to this, Mr. Jurianz for the Commission, submitted that it was the intention of Parliament in the resolution of any repugnancy between the Human Rights Act and other federal legislation that the repugnancy be resolved in favour of the Human Rights Act. He alluded to old principles of interpretation described by Dreidger, such as consideration of the particular versus the general and the chronological order in which statutes were passed, but submitted that there was only one principle today - to determine what Parliament intended.

I conclude that the Human Rights Act is general in its application. It was passed by Parliament subsequently (on the evidence at least 20 years after) the Regulation in question. Thus I would conclude that if, for example, a pilotage authority simply had a policy of

not hiring after 50 years of age,
in view of my finding as to the bona fide employment
requirement I would have no hesitation in saying the Human Rights
Act applied and that that policy was indefensible and could not be
justified.

A submission was made to me that I should allow a distinction
between the statute and the regulations made pursuant thereto. Mr.
Jurianz relied on the case of the Rex v. Singer (1940) 4 DLR 151,
a prosecution under the War Measures Act, for breach of a
regulation. No penalty was specified for breach of the regulation
so the Crown proceeded under the Code which provided penalty for
breach of a federal or provincial statute. The court rejected the
submission that breach of the regulation was a breach of the
statute. The court declined to convict on the footing that unless
Parliament specifically provided for punishment for breach of
regulation, it would not punish for breach of a regulation even
though it might be stipulated that a regulation should have the
same force as if forming part of the Act pursuant to which they
might be made.

I conclude that that which may constitute defence to a criminal
charge does not constitute a basis for drawing the distinction
sought to be allowed between law and regulation. I conclude that
regulations properly made pursuant to an enabling statute is "law"
as contemplated by the Human Rights Act.

The propriety of the regulation in question was attacked by Mr.
Jurianz on another footing. He pointed out that the Pilotage Act
does not itself refer to "age limitation" but it clearly (by
Section 42) gives the Governor in Council power to prescribe:

"... the minimum qualifications respecting ... age ... of an
applicant ..."

I am satisfied that Regulation as to age made pursuant to Section

42 is "law" as that word is employed in the Human Rights Act. I
accept Mr. Carruthers' submission that the Martineau case if it is
necessary to do so, be preferred over the Singer decision.

Mr. Black with some force and ingenuity submitted however that the
Governor in Council had regulated beyond the power to do so granted
by Parliament in fixing a maximum age for applicants when
Parliament had said it might by regulation fix:

"... the minimum qualifications respecting ... age ... of an
applicant ..."

I had asked during the Hearing (in relation to Mr. Jurianz's
submission, if a "maximum age" could not be a minimum
qualification. Mr. Black grasped that nettle. He said:

"Now, the issue that you raised with my friend whether or not age 50 cannot be a minimum I want to address because I would submit that it cannot. Minimum means just that, the base requirement ... Parliament, in its wisdom, decided to include the word minimum, so some effect must be given to the use of the word minimum ... The minimum is age 23."

He went on to point out that the other criteria regulated were of a minimum character, sea experience, health, etc.

I am persuaded that Mr. Black's submission is correct and that the Governor in Council acted beyond the authority given by Parliament in purporting to fix a maximum age for employment when it was authorized only to fix a minimum one.

This conclusion leads directly to a consideration of my jurisdiction to reach it and perhaps more significantly, having reached it what jurisdiction I have to direct consequent relief. I see no problem with my entertaining the opinion that the regulation in question is ultra vires the Governor in Council.

A normal expectation might be that the Governor in council would simply in the light of that opinion, rescind the limitation which is affecting Captain Arnison and direct his restoration to the eligibility list without more being said by me.

Mr. Bird argued that in the event I made a finding regarding the validity of the regulations, I would in effect assume a judicial function reserved for the courts under Section 96 of the British North America Act. He cited Reid's Administrative Law and Practice where at Page 231 he said:

"Whether regulations are ultra vires is for the court, not the tribunal, to determine."

He referred to the Provincial Lands Act case where a Board of Public Utility Commissioners reached such a conclusion and the Heggan case which is in my view equivocal as is of course the decision of Mr. Justice Thurlow, relied on by Mr. Jurianz in the Income Tax Act case. In it, the Attorney-General sought prohibition vis à vis a Human Rights tribunal. At most, in declining to issue the writ, Mr. Justice Thurlow said:

"The preferable course for the court is to leave the Tribunal free to carry out its inquiries and not to prohibit it save in a case which is clear and beyond doubt that the Tribunal is without jurisdiction to deal with the matter before it."

I am constrained because there is really no authoritative decision on the extent of the jurisdiction of a Human Rights Act tribunal to assume the jurisdiction in question.

It is evidently with some anxiety that I do so. A tribunal under the Human Rights Act is new and unique, itself established by the Governor in Council, and although I incline to deplore the proliferation of extrajudicial tribunals, I have determined to assume the question of jurisdiction and direct the restoration of Captain Arnison to the top of the eligibility list maintained by the Pacific Pilotage Authority.

May I summarize my conclusions in this matter:

1. The limitation of eligibility to age 50 was not established as a bona fide occupational requirement.
2. The finding in Paragraph 1 above does not preclude a limitation of eligibility by age which can be established to be a bona fide occupational requirement.
3. Regulation properly made pursuant to the Pilotage Act is law within the meaning of Section 14 of the Human Rights Act.
4. Parliament did not accord the Governor in Council authority to regulate a maximum age for employment as a licenced pilot by Section 42 of the Pilotage Act and hence Regulation 4(1) is ineffective as it purports to require that an applicant be not more than 50 years of age.
5. That the Complainant be restored to his former position on the eligibility list for employment by the Respondent Pacific Pilotage Authority.

Dated at Vancouver, B.C. this 28th day of July, 1980.

I should like to add my unreserved appreciation of the assistance

I received from all counsel involved. I am grateful for the depth of their research and the fairness and lucidness of their submissions.

R.G. Herbert