

T.D. 4/80

Decision rendered on July 11, 1980

THE CANADIAN HUMAN RIGHTS ACT

BETWEEN:

EDWARD J. WHITE,  
Complainant,

- and -

HER MAJESTY THE QUEEN

as represented by

MINISTER OF PUBLIC WORKS CANADA,  
PRESIDENT OF THE TREASURY BOARD,  
CHAIRMAN OF THE PUBLIC SERVICE COMMISSION.

Respondents.

APPEARANCES:

Russell Juriansz for the Complainant, and  
the Canadian Human Rights  
Commission,

Robert Cousineau for the Respondents.

A HEARING BEFORE:

William Tetley, appointed a Human Rights Tribunal  
pursuant to Section 39 of the Act.

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DECISION

This is a complaint of Edward J. White, retired stationary engineer of Fredericton N.B. filed under Sections 7 and 10 of the Canadian Human Rights Act (25-26) Elizabeth II, 1976-77, c.33 against the Treasury Board and the Department of Public Works. The complaint against the Public Service Commission was withdrawn at the beginning of the hearing with the consent of all parties. Notice of hearing was also given to the Public Service Alliance of Canada.

Mr. White declared in his complaint form (Exhibit C-2) "I was denied severance pay on retirement because I was not entitled to superannuation". In the complaint form Mr. White indicated that the discrimination was "because of age". The severance pay he consequently did not receive was \$1,147.44 and the proof of this sum was neither contested nor contradicted.

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The facts of the case are as follows. Mr. White was employed as a stationary engineer in the Department of Public Works from December 25, 1975 to July 27, 1979, the day of his compulsory retirement on reaching the age of 65. His pensionable service as of retirement was calculated to be three years and 33 days.

Article 22.05 of the pertinent Collective Agreement (Exhibit C-5) states that "on retirement an employee who is entitled to an immediate annuity or an employee who has attained the age of fifty-five (55) and is entitled to an immediate annual

allowance under the Public Service Superannuation Act, shall be paid severance pay" according to a specified formula. Section 11 of the Public Service Superannuation Act required five years of pensionable service for an employee to be eligible for an immediate annual allowance; as Mr. White had completed just over three years he failed to qualify for severance pay.

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The Canadian Human Rights Act in section 3 lists "age" amongst nine prohibited grounds of discrimination. Section 7 cites as a discriminatory practice "directly or indirectly (b) in the course of employment to differentiate adversely in relation to an employee, on a prohibited ground of discrimination". Section 10 of the Act was not raised by the complainant in his Memorandum or at the hearing. The main question raised by Mr. White's complaint is, therefore, whether his failure to qualify for and receive severance pay was caused by discrimination on the grounds of age prohibited by the Act.

A number of preliminary questions were raised at the hearing and should be dealt with immediately. The first such question is a troubling one and is found in section 2 of the Act: "The purpose of this Act is to extend the present laws of Canada to give effect...". The Title to the Act also mentions "to extend the present laws of Canada". Does this mean that the Act only applies to "present laws" i.e., laws adopted by the time the Canadian Human Rights Act came into force or does it apply to laws adopted subsequently? Counsel for the parties at the hearing agreed, however that the laws in force here, were in effect when the Act came into force and so the question of later laws is not material.

The next question to be answered is whether the loss of severance pay occurred "in the course of employment", under section 7(b) of the Act. It was argued energetically by counsel for respondents, that the severance pay came after employment and therefore was not covered by the Act.

In answer, it can be said first that several sections of the Canadian Human Rights Act - in particular, sections 14, 16, and 17 - deal with rights accruing with the termination of employment. These sections make specific exceptions for pension plans to the prohibition

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discriminatory practices in employment, practices described in sections 7 and 10. To exclude severance pay from the purview of the Act, especially in a case such as the present where the employee's eligibility for severance pay depends on his pension status, would require a narrow reading of its provisions. The

generous language of the Act as well as its broad purpose set out in all encompassing general terms in section 2 suggests that such a limited reading would be inappropriate, as does the Interpretation Act 1970 R.S.C. cI-23 section 14 which says that all statutes must be given a "fair, large and liberal interpretation". This accords with what Thurlow, A.C.J. The Associate Chief Justice (as he then was) said in A.G. Canada v. Peter Cumming et al, unreported, Federal Court of Canada No. T-3578-79, July 31, 1979, at page 10 concerning the meaning of "services" in section 5 of the Canadian Human Rights Act:

The statute is cast in wide terms and both its subject-matter and its stated purpose suggest that it is not to be interpreted narrowly or restrictively.

I conclude, therefore, that the question of discrimination in the distribution of severance pay comes within the scope of the Canadian Human Rights Act, specifically section 7(b).

Having dealt with the foregoing preliminary matters we may now approach the main question - whether Mr. White's retirement and his failure to receive severance pay resulted from discrimination on the grounds of age, i.e., because he was 65 years old, or for some other reason.

Claimant's counsel pointed out that if White had been laid-off one day before his 65th birthday rather than retired, he would have received severance pay. Both lay-off and retirement, it was

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- 4 argued, are unilateral acts of the employer. Counsel's Memorandum is explicit on this point:

2.2 "Mandatory retirement" and "lay-off" are both terminations of employment by unilateral act of the employer.

2.3 Had Treasury Board and the Department of Public Works terminated the Complainant's employment when he was one day younger he would have received severance pay. Upon the Complainant attaining the age of 65, the employer changed the word used to describe the termination of his employment from "lay-off" to "retirement" and then denied the

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Complainant severance pay.

2.4 The Complainant states he was denied severance pay because the termination of his employment took place at age 65. He does not complain that he has been made subject to mandatory retirement, and he

does not complain that he has no pension entitlement.

3.2 The Complainant and the Commission will ask that the complaint against the other Respondents be substantiated and that the Complainant be awarded the severance pay he would have received had the Respondents used the word "lay-off" to describe the termination of his employment.

Respondent's Counsel argued that the difference in eligibility conditions for severance pay following lay-off and retirement was a term of the collective agreement (Exhibit C-6), a bilateral agreement reached after negotiations between the government and the Public Service Alliance of Canada representing Mr. White and other workers.

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Two officers of the Public Service Alliance of Canada testified to the effect that of approximately eighty collective agreements in the government service, five contain clauses providing for severance pay where the period of employment is less than five years. Such a clause was negotiated into a collective agreement where there was a need or a desire by union members. Severance pay was described as a replacement for retirement leave and it was proposed by those witnesses that severance pay was as justified in cases of retirement as in cases of lay-off. This was of course the opinion of Counsel for Mr. White who argued in his Memorandum that White "be awarded the severance pay he would have received had the Respondents used the word 'lay-off' to describe the termination of his employment".

Counsel for complainant urged that the distinction between the effect with respect to severance pay of the words "lay-off" and "retirement" in the collective agreement conflicts with the Canadian Human Rights Act because it is discriminatory. He further argued that the Act supersedes the collective agreement as well as the statutes in question, and cited for this argument *Re Prince Rupert's 19 Labour Arbitration Cases* 308 at 321; *McLeod and Egan* 46 D.L.R. (3d) 150; *Re Board of Education (1975)* 9 Labour Arbitration Cases 184; 31 D.L.R. (3d) 385.

The predominance of the Canadian Human Rights Act becomes a question to be answered, however, only when there is discrimination. The problem is to discover if Mr. White failed to receive severance pay because of age discrimination. This required determining how Mr. White's age affected his eligibility for severance pay. Because of his age he was forced to retire; complainant's Memorandum states that the retirement itself is not

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being challenged, nor could it be with success, as sections 14(b) and (c) of the Canadian Human Rights

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state that mandatory retirement ages are not discriminatory practices. On retiring, an employee must meet criteria established by the collective agreement to receive severance pay, criteria that amount to qualifying for a pension. Qualifying for the pension depends on meeting certain age requirements, which Mr. White did meet, but these are also ruled non-discriminatory by the Act in section 14(d).

Mr. White did not receive his severance pay because he had less than five years pensionable service and because he was retired at age 65, not in itself a discriminatory practice. Had he started his employment for the public service two years earlier he would have received severance pay; had he been laid off at age 64 and 364 days he would also have received severance pay. In both cases not age but another factor, length of service or being laid-off, is determining. Similarly, when he fails to work five years before retirement, and is not laid-off, age is not the causa causans of his not receiving severance pay.

Mr. White's case is nevertheless a very moving one. From evidence not objected to, although it might have been rejected as immaterial, it was shown that Mr. White worked from age 13 in a textile mill in Fredericton N.B. until age 61, when fearing for his livelihood because of the precarious financial position of the mill, he left that employment (there was no pension plan) and went to work for the Public Works Department. When he left Public Works four years later he had neither severance pay nor pension. The Public Service Alliance officers who testified and the complainants Memorandum point out that had he been laid-off one day earlier, he would have received severance pay and intimate that this should have been done.

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This raises a major dilemma of our society, the individual need as against the public good. In other words the humane treatment of individuals in society by public officials who are also the guardians of the other half of the social contract.

The Canadian Human Rights Act is designed to protect the individual in cases of discrimination due to age and eight other causes. But just as it would have been improper for the Department of Public Works to have laid-off Mr. White, with his acquiescence, as being contrary to their duty under the law and contrary to the terms and spirit of the collective agreement which represents a negotiated agreement between society and a group of individuals, so it would be improper for this Tribunal to equate retirement with

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lay-off, alleging age discrimination under the Canadian Human Rights Act.

The Canadian Human Rights Act has an important role in Canadian society to rectify discriminatory statutes and acts. Its importance and validity should not be compromised by attempts to rectify individual anomalies or general social problems not caused by discrimination no matter how deserving the complainant.

The complaint must therefore be dismissed.

There remains only to address a note of appreciation for the dignified and sincere testimony of Mr. White and the other witnesses and to thank Mr. White for bringing this question to the Commission. I understand his travel and living expenses will or have been paid no matter what the outcome. I am also indebted to counsel Russell Juriansz and Robert Cousineau for having avoided all technical wrangles in order to direct their energies to a clear presentation of

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facts and the law. Lastly, Mr. Michael Glynn of the Commission, organized the hearing with expedition and efficiency.

The complaint is dismissed.

DATED at Montreal, 9th day of July, 1980.

William Tetley, Q.C.,  
Tribunal Chairman