Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Ronaldo Filgueira

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Garfield Container Transport Inc.

Respondent

Decision

Member: Dr. Paul Groarke
Date: August 17, 2005
Citation: 2005 CHRT 32

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I. Introduction

[1] Mr. Capp, counsel for the Respondent, has applied for a non-suit. He submits that the Complainant has not led any evidence to support the essential allegations in the complaint.

[2] The Complainant alleges discrimination on two grounds. The first is national or ethnic origin. The second is age. Mr. Filgueira says that Garfield paid him $1.00 less an hour than other employees. It also gave him less overtime.

II. Preliminary Issues

[3] There are two preliminary issues. The first is whether the Complainant withdrew his allegations in the course of giving testimony. The second is whether he should be allowed to return to the witness box to explain his previous testimony.

A. Was the Complaint Withdrawn?

[4] Mr. Capp submitted that the Complainant withdrew his allegations in the course of cross-examination. At one point, he questioned Mr. Filgueira as follows:

> Mr. Capp: And in your complaint, sir, part of your complaint is that you're complaining because the company discriminated against you based on your national or ethnic origin, is that correct?
>
> Mr. Filgueira: I didn't say that. It could be a possibility or because I did not speak English.

This kind of exchange is typical.

[5] Mr. Filgueira tried to clarify his testimony:

> Mr. Filgueira: Initially that was placed there, but then what we thought was that it was really because I didn't speak English.

He then stated:

> Mr. Filgueira: I was not sure whether the discrimination was on the basis of my being Chilean or because I did not speak English. Nobody told me.

Although Mr. Filgueira equivocates, in responding to some of the questions, it does not affect the substance of these remarks.

[6] At a later point in the examination, Mr. Capp asked:

> Mr. Capp: And if someone were looking at determining whether or not there was discrimination based upon the country of origin or their ethnic background, you and I can agree that that wouldn't appear to be the case as far as Garfield Container Transport Inc. is concerned, isn't that correct?
>
> Mr. Filgueira: Correct.

This is in keeping with the rest of the cross-examination. Mr. Filgeuira conceded point after point.

[7] The cross-examination became a pursuit. When pressed, Mr. Filgueira shifted ground. Mr. Capp followed. If there was no problem with the salary, there was the overtime. He wasn't given the overtime that he was entitled. Mr. Capp went through the salary records, and forced him to agree that he was paid his overtime. At one point, he agrees that he was not discriminated against on the basis of age. At another point, he agrees that the company did not retaliate against him. Elsewhere, he agrees that other guards were paid a dollar more an hour because they checked the reefer temperatures.

[8] There is no escaping the reality that much of the Complainant's testimony contradicts the position he is taking as a party in the hearing. Having said this, I think the Tribunal should proceed cautiously in this kind of situation. After all, it is for the Complainant to decide whether he wants to continue with the case or withdraw the allegations. It is clear that Mr. Filgueira

continues to stand by the allegations in the complaint, whatever he testified. In the circumstances, I think it would simply be wrong to say that he has abandoned his case.

B. Mr. Filgueira's Hearing

[9] During the course of her submissions on the application for a non-suit, Ms. Rubio also advised the Tribunal that Mr. Filgueira had a problem with his hearing. She did not become aware of this until after he had finished his testimony. This would apparently explain the passages in which he appears to withdraw his allegations. Ms. Rubio then suggested that Mr. Filgueira should be allowed to return to the witness box and explain his previous testimony.

[10] Mr. Capp submitted that it was too late to raise this kind of matter. I have to agree. If there was a problem with Mr. Filgueira's hearing, it should have been apparent while he was in the witness box. It seems rather convenient to raise it now, in the face of an application to dismiss the case. I think Mr. Filgueira's testimony was coherent and intelligible. Some of his responses were cryptic. But evidence is always imperfect. The transcript does not raise any serious doubts as to his understanding of the questions that were put to him. He understood the difference, for example, between "training" and "orientation".

[11] The idea that the Complainant should be allowed to return to the witness box after he closes his case and clarify his previous answers is new to me. The efficiency and fairness of the process is premised on the understanding that the hearing will proceed in an orderly and timely fashion, one witness at a time. The law is full of exceptions, but the whole process would unravel if witnesses were allowed to come back and refurbish their evidence. It would be a mistake to let Mr. Filgueira to return to the witness box.

III. Application For Non-Suit

[12] A Tribunal that rules on a non-suit should confine itself to the application before it. As a matter of natural justice, it may be necessary to provide reasons or refer in some neutral way to the evidence that is before it. This is a different kind of analysis, however, than the analysis

carried out at the end of a hearing. There is no reason to weigh evidence or evaluate the merits of the case.

A. Law

[13] The Respondent has given me case law that deals specifically with the test for a non-suit in an administrative context. In *International Brotherhood of Electrical Workers, Local 348 v. AGT Ltd*. [1997] A.J. No. 1004 (Alta. Q.B.), at para 15, Brooker J. held:

> I am satisfied that the board must correctly apply the "no evidence" test to a non-suit application. In doing so its function is not to weigh the evidence. Its function is to determine if there is any evidence adduced on the material element in question. The board can only grant a non-suit when it finds that there was no evidence in relation to one or more of the essential elements of the grievance.

This has been referred to as the "any evidence" test.

[14] As it turns out, there is a second test in the jurisprudence. This has been discussed in *Gerin v. I.M.P. Group Ltd. (No. 1)* (1994), 24 C.H.H.R. D/449 (NS Bd. Inq.), at para. 24, where Bruce Wildsmith stated:

> ... the "any evidence" standard is probably too low; there must be some *reasonable basis* on which a conclusion in the complainant's favour could be reached.

The second test accordingly holds that there must be evidence on which a Tribunal could find in favour of the Complainant.

[15] David Mullan follows the lead of Mr. Wildsmith in *Modi v. Paradise Fine Foods Ltd.*, 2005 HRTO 24, at para. 13, and applies the second test. This is in keeping with the comments of MacIntyre J. in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.* [1985] 2 S.C.R. 536, at para. 28, where he described a *prima facie* case as:

> … one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

This is not a high threshold and the difference between the two tests is easily exaggerated.

[16] The decision in *Gerin* cites an old English case, *Ryder v. Wombwell* (1868) L.R. 4 Exch. 32 at 38-39, which formulates the test in a manner that seems particularly helpful in the present instance.

> [T]here is in every case … a preliminary question which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a non-suit . . .

[17] The point I wish to make is that the use of the words "any evidence" in the context of a non-suit has some limits. The evidence led by the prosecuting party must meet a certain standard. It must be evidence that could be relied upon. I notice that MacIntyre J. writes that a *prima facie* case must be "sufficient". I think the evidence must also be appreciable. There is a threshold below which the probative value of the evidence is so minimal that it has no legal effect.

B. Allegations

(i) Age

[18] The Complainant makes two allegations. One is that Mr. Filgueira was discriminated against on the basis of age.

[19] There is no evidence of this. The only evidence with respect to age is that Mr. Filgueira was older than the other employees. There is also evidence before me that another night watchman may have been paid more. This is not enough.

[20] I realize that some of the case law suggests that the mere fact that a Complainant in a particular group was treated differently is enough to establish a *prima facie* case of discrimination. I think this reading of the law would probably empty the process of any meaningful requirement. Since Mr. Filgueira was the oldest employee, any evidence that another employee was paid more would give rise to an inference of discrimination. I think there must be more. There must be a causal connection. There must be evidence that the difference was based on a prohibited ground.

(ii) National or Ethnic Origin

[21] The other allegation in the complaint is that Mr. Filgueira was discriminated against on the basis of his national or ethnic origin. There are two factual allegations here. The first relates to pay-scale; the other to overtime.

(a) Pay-scale

[22] Mr. Filgueira was described as a night watchman. Mr. Capp called him a "guard". There were night guards and day guards. Mr. Filgueira alleged that he was paid less than other guards.

[23] There is an evidentiary matter that requires comment. Ms. Rubio relied on a single salary sheet, which contained pay stub information for Mr. Filgueira and a number of other employees. The parts of this document that relate to other employees were never properly entered into evidence. I have no information as to who these individuals were, what their duties were, or why they were employed. The parts of the document relating to other employees have no weight whatsoever.

[24] The major problem that Mr. Filgueira faces on the non-suit is that he did not lead evidence to establish the pay-scale for guards. At this point in time, I simply do not know what other guards were paid. There is the testimony of Mr. Beaudoin, but he had additional duties. More to the point, he was not a night watchman. Mr. Beaudoin worked days and the evidence established that the workload was higher during the day.

[25] The only piece of evidence that might give rise to an inference of discrimination comes from the Complainant himself. Mr. Filgueira testified that Mr. Pahar, another night watchman, said that he was paid a dollar more an hour. Mr. Pahar was slated to testify but did not answer the subpoena. Ms. Rubio decided not to insist on his appearance. I am left with Mr. Filgueira's testimony.

[26] The testimony does not establish that Mr. Pahar was paid more for performing the same duties. Mr. Filgueira agreed, in cross-examination, that other gate guards were paid more because they recorded reefer temperatures. Mr. Filgueira did not perform this function. The obvious question is whether Mr. Pahar recorded the reefer temperatures. The evidence does not tell us.

[27] It is true that Mr. Filgueira testified that he trained Mr. Pahar. This might arguably be construed as evidence that they had the same duties. There are still deficiencies in the record, however. The evidence establishes that Mr. Pahar was East Indian and a member of a minority. It follows that the evidence regarding his pay does not support the allegation that Garfield discriminated against Mr. Filgueira because he was a member of an ethnic minority.

[28] I suppose it could still be suggested that the employer treated Mr. Filgueira, a Chilean, differently than employees from India. There is a suggestion that Mr. Jasbir, the yard manager, may have been hiring his own people. This is speculation, however. There is no evidence that Mr. Pahar was paid more because he belonged to a particular ethnic group. The complete paucity of evidence on the employer's practices makes it impossible to say why different wages might be paid.

(b) Overtime

[29] Mr. Filgueira has also alleged that Garfield discriminated against him in awarding overtime. There are two separate claims. The first is that Garfield failed to pay him overtime prior to 2001. The second is that it reduced his overtime, as a result of the present complaint.

1. Prior to 2001

[30] The first claim requires some explanation of the facts. When Mr. Filgueira was originally hired by Garfield, he worked 72 hours a week. He was not paid overtime. This eventually led to a complaint to Labour Canada regarding the company's failure to pay overtime.

[31] The complaint to Labour Canada was subsequently settled. There is a letter from a labour inspector. It is dated June 1, 2001 and states that Mr. Filgueira is entitled to $13,104.00 for unpaid overtime.

[32] The final paragraph of the letter states:

> As required by Section 251(2) [of the *Canada Labour Code*], please indicate by your signature below that the amount stated above, when deposited into your RRSP, is the full amount owed to you for overtime worked to this date.

This is followed by a signature line.

[33] There is no reason to go any further into the details of the matter. Subsection 251(2) of the *Canada Labour Code* states that the employer and employee must agree on the amount owed. Mr. Filgueira accepted the figure in the letter as full payment of the overtime. Ms. Rubio acknowledged at the outset of the hearing that the monetary claim for overtime prior to 2001 had been settled. She nevertheless submitted that the company's failure to pay the overtime was evidence of discrimination.

[34] The problem is that there is no evidence that the failure to pay overtime was discriminatory in a legal sense. The only evidence before me was that Mr. Filgueira had a conversation with an officer of the company, who said that the company did not pay overtime. But there is no real information relating to other employees. There is nothing in the evidence that would demonstrate that Mr. Filgueira was treated differently than employees in other national or ethnic groups.

2. Retaliation

[35] There is also an allegation of retaliation. There are two versions of this allegation. The first is that the company retaliated against Mr. Filgueira because he filed a complaint under the *Canada Labour Code*. The second is that it retaliated against him because he filed a complaint with the Human Rights Commission.

[36] The fundamental factual assertion is that Mr. Filgueira's overtime was reduced after the previous claim was settled. There is no evidence of this. Mr. Capp went through Mr. Filgueira's salary record laboriously, paycheque by paycheque. Mr. Filgueira was forced to agree that he worked 80 hours a week during 2001, 2002 and 2003. This was what he was working before the complaint was filed.

[37] I should add that the information relating to other employees is completely lacking. There is no evidence that Mr. Filgueira was treated differently than employees in different national or ethnic groups.

(c) Conclusions

[38] The fundamental requirement on this side of the case is relatively simple. The Complainant must lead some evidence that Garfield treated Mr. Filgueira differently than employees in other national or ethnic groups. The matter is complicated by the fact that Mr. Filgueira changed his position in the course of his testimony and suggested that the real

basis of any discrimination was language. I nevertheless agree in the present case that this would be enough to establish discrimination on the basis of national origin.

[39] I think the exchanges in cross-examination demonstrate the speculative nature of the claim before me. Mr. Filgueira believed he was being paid less than other employees. On the basis of this fact, he assumed that he was being discriminated against. This was an assumption. Mr. Filgueira was not particularly interested in the reason why he was being treated differently. But of course this is precisely what concerns the Tribunal.

[40] The only evidence before me is Mr. Pahar's remark that he was making a dollar more an hour. Mr. Filgueira was upset by the remark and assumed that he was being discriminated against. I suppose this is within the realm of possibility. But there must be some proof of this. By "proof" in law we mean something that makes it more likely than not that a particular claim is true. There must be something in the evidence that would support a conclusion in the Complainant's favour.

[41] The question that I am left with is this: if an employee believes that someone in a different ethnic group is doing the same job, and receiving a higher wage, is that enough to establish a *prima facie* case of discrimination? I think there must be something more. There must be something in the evidence, independent of the Complainant's beliefs, which confirms his suspicions. I am not saying that a Complainant's beliefs do not have any evidentiary weight. It depends on the circumstances. But an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough.

[42] There are always possibilities. This is not sufficient. Proof is something more than a bare possibility. I see nothing in the evidence before me that makes this possibility real or introduces a measurable degree of probability into the equation.

[43] I am left with a single statement from Mr. Pahar, who was never called as a witness. I think this evidence falls well below the standard needed to sustain a legal claim. If there is any evidence before me, it is not appreciable. It is so minimal that it has no effect in law.

IV. Ruling

[44] The test for a non-suit has been met. The application for a non-suit is granted and the complaint is dismissed.

Signed by

Dr. Paul Groarke
Tribunal Member

Ottawa, Ontario
August 17, 2005

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T952/7204

Style of Cause: Ronaldo Filgueira v. Garfield Container Transport Inc.

Decision of the Tribunal Dated: August 17, 2005

Date and Place of Hearing: July 11 and 13 to 15, 2005
July 25 to 27 and 29, 2005

Toronto, Ontario

Appearances:

Ronaldo Filgueira, for himself

Consuelo Rubio, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Harvey Capp, for the Respondent