Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Raymond Thwaites, Leon M. Evans, Ken Green,
Paul Prentice, Donald Barnes, Gary Scott and Brian McDonald

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada Pilots Association

Respondent

Between:

Raymond Thwaites, Leon M. Evans, Ken Green

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

Member: Karen A. Jensen
Date: December 7, 2007
Citation: 2007 CHRT 54

[1] Raymond Thwaites is a pilot with Air Canada. Mr. Thwaites and six other pilots with Air Canada were required to retire at age 60 under the Air Canada Pilots Pension Plan. Their retirement dates range from May 1, 2005, to April 1, 2006.

[2] The Complainants filed complaints with the Canadian Human Rights Commission alleging that Air Canada's mandatory retirement policy discriminated against them on the basis of their age contrary to sections 7, 9 and 10 of the *Canadian Human Rights Act*.

[3] Air Canada, a Respondent in all 7 complaints, and the Air Canada Pilots Association, a Respondent in 3 of the complaints, have brought a motion requesting that the Tribunal dismiss the 7 complaints without a hearing. They argue that this Tribunal's decision in *Vilven and Kelly v. Air Canada* 2007 CHRT 36 has conclusively determined the factual and legal issues that are raised in the present complaints. It would be an abuse of process to hold a hearing into the present complaints since the circumstances of the present complainants do not differ from those of Mr. Vilven and Mr. Kelly.

[4] In *Vilven and Kelly*, the Tribunal examined whether Air Canada's mandatory retirement policy, which forced the complainants in that case to retire in 2003 and 2005, was discriminatory. Section 15(1)(c) of the *CHRA* stipulates that it is not a discriminatory practice to terminate an individual's employment because that person has reached the normal age of retirement for employees working in positions similar to the position of that individual. The Complainants argued that the Tribunal should not apply s. 15(1)(c) to their complaints because it violated s. 15 of the *Canadian Charter of Rights and Freedoms.*

[5] The Tribunal held that s. 15(1)(c) did not violate the *Charter*. It further held that Mr. Vilven and Mr. Kelly had reached the normal age of retirement for employees working in similar positions to theirs'. On that basis the Tribunal dismissed the complaints.

[6] In determining what the "normal age of retirement" was in 2003 and 2005, for employees working in similar positions to those of the complainants, the Tribunal used two approaches.

The first was the normative approach which directed the Tribunal to search for a rule governing the maximum age of retirement in the airline industry. The International Civil Aviation Organization (ICAO) adopted standards for the maximum age of pilots flying commercial airlines internationally. In September of 2003 and May of 2005, the ICAO standard for pilots in command required retirement at age 60.

[7] The second approach to determining the normal age of retirement that the Tribunal employed in *Vilven and Kelly* was the empirical approach. The empirical approach involved a consideration of the evidence on retirement ages for major international airlines. That evidence established that in 2003 and 2005, age 60 was the mandatory retirement age for the majority of positions that were similar to those of the complainants.

[8] On November 23, 2006, a new ICAO standard came into effect that established 65 as the maximum age for pilots-in-command. All of the complainants in the present case retired before this new standard came into effect. Given that in *Vilven and Kelly* the Tribunal established that prior to the new ICAO standard of November 2006, the "normal age of retirement" was age 60, it would be an abuse of process to permit the Complainants to relitigate this issue now, according to the Respondents.

[9] The doctrine of abuse of process is used to preclude relitigation in circumstances where the strict requirements of issue estoppel have not been met, but where allowing the litigation to proceed would nonetheless violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79* [2003] 3 S.C.R. 77 at para. 37. The application of the doctrine in the context of the Tribunal's proceedings has been approved by the Federal Court: *Canada (Canadian Human Rights Commission) v. Canada Post Corportion (Cremasco)* 2004 FC 81 at para. 41; aff'd 2004 FCA 363).

[10] As the Tribunal noted recently in *Morten v. Air Canada* 2007 CHRT 48, at para. 23, the doctrine of abuse of process is used to prevent relitigation because it can have negative

consequences. For example, relitigation can yield contradictory results. It may waste judicial resources and involve unnecessary expenses for the parties (*Toronto v. CUPE*, 2003 SCC 63, at paras. 37 and 51).

[11] However, the Tribunal should exercise caution in applying doctrines such as abuse of process which result in the dismissal of a complaint without a hearing. Such action deprives the parties of the opportunity to present evidence and make representations regarding the alleged violation of their human rights (*O'Connor v. Canadian National Railway* 2006 CHRT 5, at para. 22). Where it is apparent that the dismissal of a complaint could lead to unfairness or create an injustice, the doctrine should not be applied (*Morton*, at para. 24; *Toronto v. C.U.P.E.*, para. 52).

[12] I find that dismissing the complaints at the present time on the basis of the doctrine of abuse of process could lead to unfairness or create an injustice. The issues in the complaints have not been conclusively determined. The complainants and the Canadian Human Rights Commission have applied to the Federal Court for judicial review of the Tribunal's decision in *Vilven and Kelly*. Depending upon the outcome of those applications, the issues in the present complaints may remain unsettled. The right to have those issues determined by this Tribunal would be irrevocably lost if the Tribunal dismissed the complaints now without a hearing. This would be an unjust result. The filing of new complaints would not remedy that injustice since the new complaints would likely be outside of the one year time period for filing complaints (s. 41(1)(e) of the *CHRA).*

[13] Accordingly, the Respondents' motion to dismiss the complaints is denied, without prejudice to their right to bring a motion for an adjournment of the present proceedings pending the outcome of the applications for judicial review in *Vilven and Kelly*.

Signed by

Karen A. Jensen
Tribunal Member

Ottawa, Ontario
December 7, 2007

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1196/0807 and T1197/0907

Style of Cause: Raymond Thwaites et al. v. Air Canada Pilots Association and Raymond Thwaites et al. v. Air Canada

Ruling of the Tribunal Dated: December 7, 2007

Appearances:

Raymond D. Hall, for the Complainants, Raymond Thwaites, Ken Green, Paul Prentice, Donald Barnes, Gary Scott and Brian McDonald

No submissions made, for the Complainant, Cpt. Leon M. Evans

No submissions made, for the Canadian Human Rights Commission

Bruce Laughton, Q.C., for the Respondent , Air Canada Pilots Association

Fred Headon, for the Respondent, Air Canada