Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Robert Adamson, Robert David Anthony, Jacob Bakker, Donald Barnes, Michael Bingham, Doug Boyes, Kenneth Buchholz, Daniel Burrows, David G. Cameron, Wayne Caswill, George Cockburn, Bert Copping, Gary Delf, James E. Denovan, Maurice Durrant, Colm Egan, Eldon Elliott, Leon Evans, Robert Ford, Larry Forseth, Grant Foster, Guy Glahn, Kenwood Green, Jonathan Hardwicke-Brown, Terry Hartvigsen, James Hawkins, George Herman, James Richard Hewson, Brock Higham, Larry Humphries, George Donald Iddon, Peter Jarman, Neil Charles Keating, George Kirbyson, Robin Lamb, Stephen Lambert, Les Lavoie, Harry G. Leslie, Robert Lowes, George Lucas, Donald Madec, Don Maloney, Michael Marynowski, Brian McDonald, Peter McHardy, Glenn Ronald McCrae, James Millard, Brian Milsom, Howard Minaker, George Morgan, Greg Mutchler, Ha; Osenjak, Sten Palbom, Donald Paxton, Michael Pearson, David Powell-Williams, Paul Prentice, Michael Reid, Patrick Rieschi, Steven Ross, Gary Scott, Phillip Shaw, Andrew Sheret, Michael Shulist, Donald Smith, Owen Steward, Ray Thwaites, Dale Trueman, Andre Verschelden and Douglas Zebedee

Complainants

- and –

Canadian Human Rights Commission

Commission

- and –

Air Canada and Air Canada Pilots Association

Respondents

Ruling

Member: J. Grant Sinclair
Date: April 18, 2012
Citation: 2012 CHRT 9

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I. Background

[1] This case ("*Thwaites*") involves sixty-nine Air Canada pilots ("Complainants") whose employment was terminated for no reason other than that they had reached the mandatory retirement age of sixty. The Complainants filed complaints with the Canadian Human Rights Commission ("CHRC") alleging discrimination by Air Canada and Air Canada Pilots Association ("ACPA") ("Respondents") on the basis of age.

[2] The Tribunal hearing into the complaints was held in the months of October 2009 and January 2010. One of the issues raised by the Complainants was the constitutionality of s. 15(1)(c) of the *Canadian Human Rights Act* ("*CHRA*"). They served a Notice of Constitutional Question as required.

[3] At the request of the Complainants, the Tribunal directed that the constitutionality question would not be considered by the Tribunal at this time. After the conclusion of the evidence on ss. 15(1)(c), 15(1)(a) and 15(2) of the *CHRA*, the parties, if so advised, could make submissions as to whether the Tribunal should hear evidence and argument on the constitutional question and if so, the Tribunal would set dates for the hearing of this question.

[4] The Tribunal released its decision, 2011 CHRT 11, on August 10, 2011. In its decision, the Tribunal concluded that the Respondents could rely on s. 15(1)(c) of the *CHRA* as a defense so that the mandatory retirement policy at age 60 did not amount to a discriminatory practice. Accordingly, the Tribunal dismissed the complaints.

[5] Shortly after the release of the decision, the CHRC advised the Tribunal of the inconsistency of the dismissal of the complaints and the earlier directive of the Tribunal to defer the hearing of submissions on the constitutionality of s. 15(1)(c) of the *CHRA*.

[6] The CHRC filed a motion on September 9, 2011 with the Tribunal seeking an order to review and amend the Tribunal's decision (2011 CHRT 11) and to provide that the hearing

resume to determine the question of the constitutional validity, applicability and operability of s. 15(1)(c) of the *CHRA*. The Tribunal granted this motion on February 20, 2012. The Tribunal directed that the parties provide written submissions on this question.

[7] The Complainants and the CHRC argue that the Federal Court decision, 2011 FC 120 ("*Vilven* # 2") is determinative of this issue and the complaints must therefore be upheld. The Respondents' position is that this Federal Court decision is not binding on the Tribunal. Further, the Respondents argue that the determination of the constitutional question by the Tribunal and the status of the complaints should be postponed until the Federal Court of Appeal issues its judgment on this question.

II. Federal Court Decision 2011 FC 120 (Vilven # 2)

[8] The genesis of *Vilven* # 2 is the Tribunal decision in the case of *Vilven & Kelly v. Air Canada & ACPA*, 2007 CHRT 36. In this case dealing with the mandatory retirement of Air Canada pilots, the Tribunal ("*Vilven* Tribunal") decided that s. 15(1)(c) of the *CHRA* did not contravene s. 15(1) of the *Charter*. Vilven & Kelly applied to the Federal Court for judicial review of this decision. The Court found that s. 15(1)(c) of the *CHRA* did contravene the *Charter* and remitted the matter to the *Vilven* Tribunal to determine whether s. 15(1)(c) could be justified under s. 1 of the *Charter*.

[9] Following a hearing on this question, the *Vilven* Tribunal decided that s. 15(1)(c) was not saved under s. 1 of the *Charter*. The Respondents, Air Canada and ACPA sought judicial review of this decision.

[10] The Federal Court dismissed the Respondents' application for judicial review on this question. In reaching this conclusion, the Court first noted that the Tribunal's finding on s. 1 of the *Charter* is reviewable against the standard of correctness. The Court reviewed in detail the reasoning of the Tribunal's s. 1 decision; reviewed the Supreme Court of Canada's mandatory retirement jurisprudence; considered why the Supreme Court's decision in *McKinney* does not

determine the results in this case; and finally engaged in an extensive analysis on the question of whether paragraph 15(1)(c) of the *CHRA* was justifiable under s. 1 of the *Charter*.

[11] With respect to this latter question, the Court considered whether the four criteria required under the s. 1 *Oakes* analytical framework were satisfied. The Court did so on the basis of the *Oakes* jurisprudence and on the basis of the evidentiary record including the expert evidence that was before the *Vilven* Tribunal. In its reasons, the Court made it clear that it agreed with some but not all of the conclusions of the Tribunal with respect to the four *Oakes* tests.

[12] In particular, the Court did not agree with the finding of the *Vilven* Tribunal which found that the Respondents had failed to satisfy any of the four branches of the *Oakes* test. Rather, the Court found that the Respondents were able to satisfy two branches of the *Oakes* test, namely, that the objectives of s. 15(1)(c) were pressing and substantial and that there was a rational connection between the legislative objective and the impugned legislation. However, the Court did find that the Tribunal was correct in its assessment of the proportionality criterion and the minimal impairment criterion.

[13] Having done its own analysis of the issues relating to s. 1 of the *Charter*, the Court concluded,

> For the reasons given in this case, I find that the Tribunal was correct in concluding that Air Canada and ACPA had not satisfied the onus on them to demonstrate that paragraph 15(1)(c) of the *CHRA* is saved under section 1 of the *Charter*. Air Canada and ACPA have not shown that the broadly-worded exception to the otherwise discriminatory practice of mandatory retirement contained in paragraph 15(1)(c) of the *CHRA* is a reasonable limit justifiable in a free and democratic society. (para. 351, *Vilven # 2*)

[14] Shortly before the hearing on the judicial review applications, Vilven and Kelly filed a motion with the Federal Court to amend their memorandum of fact and law to include a request a declaration that s. 15(1)(c) of the *CHRA* was inconsistent with the *Charter* and was of no force or effect by reason of s. 52(1) of the *Constitution Act, 1982*.

[15] The Court refused to grant this motion. The Court noted that, although it had the jurisdiction to hear constitutional challenges that may arise in a judicial review application and to grant declaratory relief, it must be the applicant who seeks the declaratory relief, not the respondent. And the Court can only grant such relief if the Court finds that the Tribunal erred in its conclusion, which was not the case here.

[16] Further, even assuming that declaratory relief could be granted to a respondent, this was not a case for such an award. The reason for this was two-fold. First, the Court considered the motion to be a collateral attack on the *Vilven* Tribunal's remedy decision, 2010 CHRT 27 which was not before the Court.

[17] Secondly, it was ACPA who served the Notice of Constitution Question relating to its judicial review application and the Attorneys General could not have anticipated that Vilven & Kelly would be seeking a general declaration of invalidity.

[18] ACPA, supported by Air Canada, appealed the Federal Court decision in *Vilven* # 2 to the Federal Court of Appeal, requesting that the decision in *Vilven* # 2 be set aside, its application for judicial review be allowed and the decision of the *Vilven* Tribunal on the constitutionality of s. 15(1)(c) of the *CHRA* be quashed.

[19] Vilven & Kelly cross-appealed *Vilven* # 2, claiming that the Federal Court should have issued a declaration of invalidity once it decided that s. 15(1)(c) of the *CHRA* was inconsistent with the *Charter*. They requested that the Court of Appeal dismiss ACPA's appeal and issue a declaration that s. 15(1)(c) is invalid and of no force and effect.

[20] The appeal and cross-appeal were heard by the Federal Court of Appeal on November 22-23, 2011 and are under reserve.

III. The Parties' Submissions

[21] The Complainants' position is that the Federal Court in *Vilven* # 2 decided that s. 15(1)(c) of the *CHRA* is unconstitutional. That decision is binding on the Tribunal in this case and the complaints must be upheld. They argue that to find otherwise would run counter to the doctrines of *stare decisis, res judicata* (issue estoppel) and abuse of process.

[22] The Respondents' submissions are to the contrary. The essence of their arguments are that the Court in *Vilven # 2* did not determine that s. 15(1)(c) of the *CHRA* violated the *Charter*. It went no further than to confirm that the *Vilven* Tribunal's decision was correct. Further, the Complainants are seeking in this case to reverse the Federal Court's decision denying their motion for a general declaration of invalidity and to reverse the *Vilven* Tribunal's refusal to grant a general cease and desist order.

[23] I do not agree with the Respondents' arguments. It is clear that the Court engaged in an extensive, detailed, independent analysis of the issues raised in the judicial review applications (the Court's reasons on this issue amounted to three hundred paragraphs in the judgment of four hundred and ninety-three paragraphs). On this basis the Court concluded that the Respondents had not met the onus upon them under the *Oakes* test. Thus, the Court held that the Tribunal was correct and dismissed the judicial review applications.

[24] I also disagree with the Respondents' assertion that the Complainants would achieve a general declaration of invalidity or a general cease and desist order, if this Tribunal finds that *Vilven # 2* is binding on it. In such case, all the Tribunal can do is to refuse to apply s. 15(1)(c) to the facts of this case, which it has the power to do.

[25] Having concluded that *Vilven # 2* decided that s. 15(1)(c) of the *CHRA* was not saved under s. 1 of the *Charter*, the question remains whether the decision is binding on this Tribunal. The Complainants say yes and rely on the principles of *stare decisis*, *res judicata* and abuse of process in support of their position.

[26] Under the doctrine of *stare decisis*, courts and tribunals exercising inferior jurisdiction are required to follow the decisions of courts exercising superior jurisdiction. That is, courts and tribunals lower in the judicial hierarchy are bound by decisions of law by courts higher in the judicial hierarchy of the same jurisdiction. But it is only if an issue before a lower court comes within the scope of the *ratio decidendi* of a decision of a higher court that the lower court is bound to apply such *ratio* to the case before it.

[27] Although there is much debate over how to determine the *ratio decidendi* of a particular decision, there is general acceptance of the view that the *ratio decidendi* derives from the facts that the court treats as material facts and the decision that is based upon them.

[28] In my opinion, the material facts relied upon by the Court were those relating to the application of the *Oakes* test and the resulting decision based on these material facts constitute the *ratio decidendi* of *Vilven # 2.*

[29] The issue before this Tribunal comes squarely within the *ratio decidendi* of *Vilven* # 2. There is nothing in the material facts on the record in the proceeding before this Tribunal to materially distinguish it from material facts relating to the constitutional issue in the proceeding of the Federal Court. The Federal Court's determination of the constitutionality of s. 15(1) involved the identical legal and fact situation as is present in this proceeding. Thus, I have concluded that the decision in *Vilven # 2* is binding on this Tribunal with respect to the constitutionality of s. 15(1)(c) of the *CHRA.*

IV. Order

[30] In view of the above, I hereby amend Tribunal decision 2011 CHRT 11 as follows:

(a) Paragraph 182 of Tribunal decision 2011 CHRT 11 is deleted.

(b) Paragraph 430 of the Tribunal decision 2011 CHRT 11 is deleted, and the following substituted therefore:

> [430] I have concluded that the Respondents cannot rely on the BFOR defence under s. 15(1)(a) of the *CHRA*. I have also concluded on the evidence adduced that the Complainants' employment was terminated at the "normal age of retirement" within the meaning of s. 15(1)(c). However, given the fact that the Complainants' constitutional challenge to s. 15(1)(c) remains to be determined, I cannot make any dispositive finding in respect of the application of this provision. Nor am I in a position to make a final decision as to whether the complaints have been substantiated or not. Further submissions from the parties will be required in regard to the next steps to be taken in this proceeding.

[31] Having considered the parties' submissions on the legal effect of the decision of the Federal Court in *Vilven* #2, and having concluded that this decision is binding on this Tribunal, I refuse to apply s. 15(1)(c) to the present case before the Tribunal, on the grounds that it is unconstitutional, giving rise as it does to a breach of s. 15 of the *Canadian Charter of Rights and Freedoms* which breach cannot be saved by s. 1.

[32] Given that the Respondents have been unable to demonstrate the applicability of either of the justificatory defenses invoked, (s. 15(1)(a)/15(2), and s. 15(1)(c) of the *CHRA*), I find that the complaints have been substantiated.

[33] I hereby reserve jurisdiction in this case to address any outstanding matters and issues.

Signed by

J. Grant Sinclair
Tribunal Member

OTTAWA, Ontario
April 18, 2002

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1196/0807, T1197/0907, T1246/5807, T1247/5907, T1263/7507, T1280/1008, T1336/6608, T1337/6708, T1380/0609, T1390/1609, T1402/2809 & T1418/4409

Style of Cause: Thwaites et al. V. Air Canada and Air Canada Pilots Association
Boyes et al. & Adamson et al. v. Air Canada and Air Canada Pilots Association
Bakker et al. v. Air Canada and Air Canada Pilots Association
Delf et al. v. Air Canada and Air Canada Pilots Association
William Burrows et al. v. Air Canada and Air Canada Pilots Association
George Herman et al. v. Air Canada and Air Canada Pilots Association
Jonathan Michael Hardwicke-Brown et al. v. Air Canada and Air Canada Pilots Association
Robert Peter Ford v. Air Canada and Air Canada Pilots Association
Kenneth Charles Buchholz v. Air Canada and Air Canada Pilots Association

Ruling of the Tribunal Dated: April 18, 2012

Appearances:

Raymond Hall and David Baker, for the Complainants (except Donald Paxton)

No submissions filed, for Donald Paxton

Daniel Poulin , for the Canadian Human Rights Commission

Maryse Tremblay and Fred Headon, for Air Canada

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