Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Ashok Tiwari

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

- and -

Canadian Auto Workers Union

Respondents

Ruling

Member: Sophie Marchildon
Date: October 7, 2011
Citation: 2011 CHRT 16

Table of Contents

I. Complaint & Motion

[1] The complainant, Mr. Ashok Tiwari, is a Customer service agent at Air Canada. He filed a complaint with the Canadian Human Rights Commission (the Commission) on September 14, 2009, on the ground of age within the meaning of sections 7 and 10 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *CHRA*). Specifically, the complainant alleges that the respondents, his employer, Air Canada, and his union, the Canadian Auto Workers-Canada Union (CAW), engaged in a discriminatory practice when his employment was to be terminated on the first day of the month after the month in which he turned age 65, on September 8, 2009, according to the mandatory retirement policy in the collective agreement. On August 12, 2010, pursuant to paragraph 44(3)(a) of the *CHRA*, the Commission requested that the Canadian Human Rights Tribunal (the Tribunal) inquire into this complaint.

[2] On March 3 2011, the complainant filed a motion seeking a ruling on the three following matters:

1) That the Tribunal make a finding that a *prima facie* case of discrimination has been made out against the respondents by reason of the termination of the complainant's employment on the basis of age, contrary to the provisions of the *CHRA*;

2) That the Tribunal rule that it is bound by the Federal Court decision in *Air Canada Pilots Association v. Kelly*, 2011 FC 120 [*Kelly*], and make a finding that section 15(1)(c) of the *CHRA* is not available to the respondents as a defense to the alleged contravention of the *CHRA*; and,

3) That the Tribunal rule that the termination of the complainant's employment constitutes a discriminatory practice in the absence of any other defense raised by the respondents in respect of the *prima facie* case of discrimination.

II. Positions of the Parties

[3] The complainant's position in sum is as follows:

(a) The parties to this proceeding agree that the sole reason for the termination of the complainant's employment is the mandatory retirement provision of the collective agreement in force between the respondents.

(b) The Federal Court in the *Kelly* decision and in *Vilven v. Air Canada*, 2009 FC 367, determined that section 15(1)(c) of the *CHRA* violates section 15(1) of the *Canadian Charter of Rights and Freedoms* [the *Charter*] and is not saved by section 1 of the *Charter*; that determination is binding upon the Tribunal.

(c) Re-litigation of the constitutionality of section 15(1)(c) of the *CHRA* before this Tribunal would constitute an abuse of process and could have significant adverse consequences on the integrity of the judicial system and the administration of justice.

(d) The interests of justice and the balance of convenience favor the Tribunal predetermining the availability of the section 15(1)(c) defense in the circumstances in this case.

(e) CAW did not make a formal motion to adjourn the proceedings therefore, is not properly before the Tribunal.

(f) Air Canada did not oppose the complainant's allegation that section 15(1)(c) of the *CHRA* is unconstitutional and Air Canada stated that it did not plan on adducing evidence on the issue.

(g) The complainant concedes any defense on the merits of section 15(1)(c) and pleads only that because of the constitutional invalidity of the section, that

defense is not available to Air Canada. The motion seeks only to foreclose re-litigation of the constitutional issue.

(h) There is no requirement for a general declaration of invalidity that a statutory provision is of no force and no effect for this determination to be binding upon the Tribunal.

(i) There is no legal requirement or valid reason for suspending the operation of this Tribunal's jurisdiction to hear and decide similar cases in respect of section 15(1)(c) of the *CHRA* until all appeals of the *Kelly* decision have been exhausted, indeed there are strong statutory and constitutional reasons for not doing so.

(j) Air Canada has failed twice to persuade this Tribunal and the Federal Court of the complainant's allegation that section 15(1)(c) is of no force and no effect.

(k) Neither of the respondents deny the complainant's assertion of the constitutional invalidity of section 15(1)(c) of the *CHRA* in the circumstances of this case; they only assert the decision is non-binding.

(l) Air Canada does not contemplate calling any witnesses with respect to the constitutionality of paragraph 15(1)(c) of the *CHRA.* Air Canada in its pleadings has already determined the conclusion of the constitutional issue. Absent any supervening superior court authority for the Tribunal to interfere with the determination made by the way of the parties pleadings, absent any authority for the Tribunal to address both respondent's not to plead, not to provide evidence and not to argue against the complainant's assertion of the constitutional invalidity of section 15(1)(c), the Tribunal has no jurisdiction to consider or permit a defense under 15(1)(c).

(m) The Tribunal ought to expedite its proceedings by concluding, in consideration of all the arguments put forward by the complainant, that absent any valid reason to

do otherwise, it must follow the prior determinations of the Tribunal and the Court in respect of the central question before it with respect to the constitutionality of section 15(1)(c) and conclude its deliberation of the issue of liability without convening an unnecessary hearing.

[4] Air Canada's position is that the Tribunal should dismiss the complainant's motion for the following reasons:

(a) Air Canada has a fundamental right to present a full defense under section 15(1)(c) of the *CHRA*.

(b) They are entitled to rely upon section 15(1)(c) of the *CHRA* because, contrary to the position advanced by the complainant, Air Canada still has an available defense.

(c) The Tribunal's ruling in *Vilven v. Air Canada*, 2009 CHRT 24, and the Federal Court's decision in *Kelly*, did not provide for a general declaration of invalidity of section 15(1)(c).

(d) In respect of the Charter, in *Kelly*, it was only applied to the two pilots involved in the case.

(e) Mandatory retirement is and continues to be permitted under the *CHRA*.

(f) In the absence of a successful constitutional challenge of section 15(1)(c) of the *CHRA*, raised in the context of the present complaint, it is entirely open and appropriate for Air Canada to rely upon section 15(1)(c) of the *CHRA* as a defense. The Tribunal is free to entertain a defense based on the normal age of retirement in relation to mandatory retirement at age 65 for Customer Sales and Service Agents represented by the CAW.

(g) Air Canada is therefore entitled to rely upon and argue the normal age of retirement defense as it did in two previous complaints that were dismissed by the Commission before they were referred to this Tribunal.

(h) Air Canada contends the Federal Court decision in *Kelly* is currently under appeal before the Federal Court of Appeal. The conclusion on section 15 of the *CHRA* and section 1 of the Charter of this Tribunal is subject to review.

(i) The complainant cannot simply rely upon the *Kelly* decision in order to conclude that the findings in that decision support a conclusion of *prima facie* discrimination in the present case.

(j) Fairness dictates that the respondents be provided with an opportunity to make a full defense.

(k) The respondents are not attempting to re-litigate an issue already resolved by the Courts.

(l) The complainant will not suffer a prejudice if the motion is dismissed since the complainant has been reinstated in his previous employment and will not suffer ongoing damages.

[5] The CAW's position is the Tribunal should dismiss the motion for the following reasons:

(a) The complainant appears to rely on the Federal Court ruling in *Kelly*, pertaining to the validity of section 15(1)(c) of the *CHRA*, as the final word of the Courts of Canada upon this issue when clearly it is not.

(b) The Federal Court did not issue a general declaration to the effect that section 15(1)(c) of the *CHRA* is void and of no effect pursuant to section 52(1) of the Charter.

(c) The CAW on behalf of the complainant and others, filed a grievance and a decision was made by Arbitrator Martin Teplitsky declaring void and contrary to the law any rule relating to mandatory retirement at age 65 for CAW bargaining unit employees subject to a final judgment from the Federal Court of Appeal or the Supreme Court of Canada regarding the *Kelly* decision. The Arbitrator ordered re-hiring employees and reinstatement of employees that were terminated because of reaching age 65, including the complainant.

(d) In respect of the doctrine of stare decisis, that the Tribunal is bound by the Federal Court decision in *Kelly* in the absence of a section 52(1) declaration of constitutionality invalidity is a moot point. CAW acted upon the decision of the Federal Court and filed a grievance on behalf of the complainant and obtained an order reinstating him pending the final outcome of the decision at the Federal Court of Appeal or the Supreme Court.

(e) CAW wish to proceed in the most cost-effective and practical way and asks that the Tribunal adjourn these proceedings pending the appeal of the *Kelly* decision to the Federal Court of Appeal and/or the Supreme Court of Canada.

(f) The only issue is the constitutionality of section 15(1)(c) of the *CHRA*.

(g) The complainant will suffer no prejudice since he will be at work pending the final outcome of the matter.

(h) CAW should not pay for damages until the law is finally clarified.

III. Ruling

[6] Pursuant to section 50(2) of the *CHRA*, the Tribunal has jurisdiction to consider and apply the Charter and provide remedies for breaches thereof in accordance with its powers under the *CHRA* (see *R v. Conway*, 2010 SCC 22). However, no provision in the *CHRA* grants the

Tribunal jurisdiction to issue a general declaration concerning the constitutionality of a statutory provision that would apply to all future cases. In *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 [*Martin*], the Supreme Court of Canada stated:

> In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the Charter is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases.
>
> (Martin at para. 31)

[7] These principles were also stated by the Tribunal in *Vilven v. Air Canada*, 2010 CHRT 27 at para. 6, and by the Federal Court in the *Kelly* decision at para. 479. Therefore, the Tribunal must take a case by case approach to considering and applying the Charter and it would not be an abuse of process or re-litigation of the Tribunal's previous decision to consider the constitutionality of section 15(1)(c) of the *CHRA* within the context of the present case. While the facts in the present case are similar to those in the *Kelly* decision, the parties are not the same and Mr. Tiwari is a Customer service agent employee, not a pilot. Therefore, a hearing on the merits and factual evidence must be adduced for the Tribunal to make a finding regarding the constitutional validity of section 15(1)(c) in this case.

[8] The complainant asks the Tribunal to accept his position on the constitutional invalidity of section 15(1)(c) based on the documents filed, such as the statements of particulars. The complainant adds that Air Canada did not oppose the complainant's allegation of unconstitutionality and it did not plan on adducing evidence on the issue. I do not agree with this argument. It is not the Tribunal's role to perform a second screening of the complaint resembling that of the Commission. The following is instructive:

> It is true that in *Cremasco et al. v. Canada Post Corporation*, Ruling No. I, 2002/09/30 (aff'd: *Canada (Human Rights Commission v. Canada Post Corp.*,

> 2004 FC 81 (CanLII), 2004 FC 81), the Federal Court affirmed the Tribunal's power, as master of its own procedures, to prevent abuse of those procedures by dismissing a case that was eight years old and had already been subject to two arbitrations and a separate complaint to the Commission (*Cremasco*, at para. 14). However, the Court's affirmation of the Tribunal's decision in those circumstances does not lead to a conclusion that it has the jurisdiction to dismiss complaints on the grounds that the Statement of Particulars fails to disclose a *prima facie* case. **In my view, if Parliament had intended the Tribunal to exercise what would essentially be a second screening function following the Commission's initial decision under s. 41(1)(d), it would have provided express statutory authority to do so.**
>
> (*Harkin v. Canada (Attorney General)*, 2009 CHRT 6 [*Harkin*] at para. 21, **emphasis added**).

[9] Statements of particulars and pleadings should not be considered the only evidence presented to make a party's case. At a hearing, parties may bring forward witnesses and make other arguments that further explain what they have briefly laid out in their statement of particulars. Full disclosure of documents ensures neither party is caught by surprise at the hearing, but it is not the parties' final word. The hearing is also an opportunity for the presiding member to ask questions and to observe and hear witnesses. Ultimately, the Tribunal must ensure that all the parties have had an opportunity to be heard in a fair and impartial manner. As the Tribunal stated in *Harkin*:

> It must also be borne in mind that s. 50(1) provides the parties with a full and ample opportunity to present evidence and argument on the matters raised in the complaint. Granted, Justice von Finckenstein in Cremasco stated that where it is apparent that the parties have, in fact, been heard in another forum, the Tribunal is permitted to dismiss the complaint without a hearing. However, the Tribunal exercises great caution in dismissing complaints on that basis (*Telecommunications Employees' Association of Manitoba Inc. et al v. Manitoba Telecom Services*, 2007 CHRT 26; *O'Connor v. Canadian National Railway* 2006 CHRT 05); it must be clear that the parties have truly been heard and the issues conclusively resolved in the other forum.
>
> (*Harkin* at para. 22)

[10] Furthermore, in First Nations Child and Family Caring Society of Canada, Assembly of First Nations v. Indian Affairs and Northern Development Canada, 2011 CHRT 4 [AFN], the Tribunal stated:

> The instruction in s. 48.9(2) of the *CHRA* to proceed with informality and expedition is subject to two important limits: the principles of natural justice and the Canadian Human Rights Tribunal Rules of Procedure, May 3rd, 2004 (Rules of Procedure).
>
> (*AFN* at para. 33)

[11] Air Canada wants to present a full defense and is entitled to according to the principles of natural justice and fairness and the Canadian Human Rights Tribunal Rules of Procedure. In this regard, the complainant must respect the choice of procedure that the Tribunal has put in place:

> Finally, one must consider the choices of procedure made by the Tribunal itself, particularly when the Act leaves to the Tribunal the ability to choose its own procedures, and further where the Tribunal has an expertise in determining what procedures are appropriate in the circumstances. Regarding the latter, Members of the Tribunal are appointed for their expertise, experience and sensitivity to human rights (*CHRA*, s. 48.1(2)). Moreover, where a case proceeds to a viva voce hearing it is noteworthy that Parliament has expressly entrusted the Members with the authority to decide any procedural question arising therein (*CHRA*, s. 50(3)(e)).
>
> (*AFN* at para. 48)

[12] The Tribunal has instituted new initiatives that may help the parties in expediting their case in a cost-efficient manner. These initiatives are designed to achieve access to justice within the parameters of natural justice. There are many proactive ways to deal with the matters in this case without preventing the respondents from presenting their case. Through active case management, issues can be narrowed to shorten the hearing. Facts, issues and questions of law may be agreed and filed as such. Process mediation with the assistance of a Member of the Tribunal may be an alternative to prepare for the hearing. These are all examples of ways, if

parties agree, in which they may use their resources in an efficient manner without denying the respondents the defense they want to bring forward.

[13] The CAW wants an adjournment but did not make a formal motion to adjourn; therefore, I do not consider it a live issue in the present motion.

[14] The complainant has not convinced me that the Tribunal has jurisdiction to grant the motion he requests.

[15] For these reasons, the motion is dismissed.

Signed by

Sophie Marchildon
Administrative Judge

Ottawa, Ontario
October 7, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1506/5210 & T1507/5310

Style of Cause: Ashok Tiwari v. Air Canada and Canadian Auto Workers Union

Ruling of the Tribunal Dated: October 7, 2011

Appearances:

Raymond D. Hall, for the Complainant

François Lumbu, for the Canadian Human Rights Commission

Christianna Scott and Lewis Gottheil, for the Respondents