Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Jozef Otto Antalik et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

British Columbia Maritime Employers Association

- and -

International Longshore and Warehouse Union

Respondents

Ruling

Member: Wallace G. Craig
Date: March 27, 2013
Citation: 2013 CHRT 8

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I. Introduction

[1] On December 20, 2012, the respondent British Columbia Maritime Employers Association (BCMEA) filed a preliminary motion seeking dismissal of complaints of discrimination (the Complaints) made against it by the several longshore workers (the "Complainants"). In support of its application BCMEA tendered an Affidavit of Eleanor Marynuik, Vice President, Human Resources, BCMEA, sworn December 12, 2012 (the "Marynuik Affidavit").

[2] On January 16, 2013, the International Longshore and Warehouse Union (ILWU) filed a formal letter dated January 2, 2013, constituting its application for dismissal of the Complaints. ILWU's application is based on the facts in the Marynuik Affidavit.

[3] On January 21, 2013, the Canadian Human Rights Commission (the "CHRC") filed its brief seeking dismissal of the motion.

[4] On January 23, 2013, ILWU filed a supplementary letter in response to the CHRC brief.

II. Complaints

[5] The Complaints allege age-based discrimination under sections 7 and 10 of the *Canadian Human Rights Act* (*CHRA*) by reason of termination of their employment at age 65. Each of the complainants was mandatorily retired during the period May 1, 2009 to June 1, 2010.

> Section 7:
> It is a discriminatory practice, directly or indirectly,
> (a) to refuse to employ or continue to employ any individual, or
> (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

> Section 10:
> It is a discriminatory practice for an employer, employee organization or employer organization
> (a) to establish or pursue a policy or practice, …
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[6] The Respondents rely on section 15 (1) (c) to justify the termination of the Complainants' employment at age 65.

> Section 15 (1):
> It is not a discriminatory practice if
> (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual.

III. Basis of Motions for Dismissal

[7] ILWU framed the issue before the Tribunal:

> "At the time the complaints were made and referred to the Tribunal by the Commission, there was uncertainty as to the constitutional validity of Section 15 (1) (c). That uncertainty has now been removed as a result of the Federal Court of Appeal decision of *Air Canada Pilot's Association v. Robert Neil Kelly et al* 2012 FCA 209 ("*Air Canada"*). **Accordingly the only issue for the Tribunal to determine is whether age 65 was the normal age of retirement within the meaning of Section 15 (1) (c). …** (emphasis added)
>
> "The statistical analysis contained in the Marynuik Affidavit at paragraph 27 to 30, establish(es) that the normal age of retirement for Longshore workers was 65 or less during the relevant period."

[8] BCMEA also relies on *Air Canada* stating "… **at all material times**, mandatory retirement was, and continues to be permitted under the (*CHRA*)." (emphasis added)

IV. The Federal Court of Appeal Decision in *Air Canada*

[9] The *Air Canada* decision of the Federal Court of Appeal is decisive on the issues raised in the Respondents preliminary motions for dismissal of the Complaints. The Court considered whether Section 15 (1) (c) was a breach of the constitutional protection against age-based discrimination but nonetheless constitutionally valid, being saved by s. 1 of the *Charter*.

[10] In *Air Canada* The Federal Court of Appeal ruled that it was bound by the doctrine of *stare decisis* to follow the Supreme Court of Canada decision in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122. (*McKinney*); and that *McKinney* was binding on the Tribunal and the Federal Court.

[11] *McKinney* involved a provision in the *Ontario Human Rights Code* which permitted mandatory retirement. The Supreme Court of Canada decided that even though the provision was a breach of the constitutional protection against age-based discrimination, it remained constitutionally valid being saved by s. 1 of the *Charter*.

[12] *Air Canada* dealt with the mandatory retirement at age 60 of pilots George Vilven and Robert Kelly under the terms of a collective agreement and pension plan between Air Canada and the Air Canada Pilots Association. Each pilot filed a complaint under the *CHRA*, Vilven in 2004, Kelly in 2006. The Tribunal heard their complaints together in 2007. Air Canada and the Air Canada Pilots Association relied on the exception to age discrimination in s. 15 (1) (c). The Tribunal decided that in the particular circumstances of the case *McKinney* was no longer binding authority; and in its review of the case the Federal Court affirmed the decision of the Tribunal but did not declare that s. 15 (1) (c) was invalid, rather it engaged in a detailed analysis why *McKinney* did not apply to the Vilven and Kelly complaints.

V. Summary of Litigation

A. Tribunal's Jurisdiction to Adjudicate the Respondents' Preliminary Motion for Dismissal of the Complaints

[13] BCMEA cited *Canada (Human Rights Commission) v. Canada Post Corp*, 2004 F.C.J. No. 439, 2004 FC 81 (affirmed 2004 FCA 363) as authority clarifying the Tribunals jurisdiction to entertain preliminary motions. The Federal Court determined that, notwithstanding the lack of any specific provision in the *Act*, the Tribunal has jurisdiction to dismiss, on a preliminary motion, a complaint referred to it by the Commission.

[14] I conclude that I have jurisdiction to consider the Respondents' preliminary motions. I accept the assertion of counsel for ILWU that "The issue to be resolved is a narrow one and the factual underpinnings of the motions are straight forward."

B. Marynuik Affidavit: Relevant Facts

[15] The Marynuik Affidavit establishes the following facts and circumstances:

1. BCMEA is the bargaining agent for its member companies.

2. Longshore workers employed by BCMEA companies carry out loading and unloading of cargo in all ports of British Columbia.

3. Longshore workers in British Columbia do not work in other jurisdictions.

4. BCMEA negotiates a master collective agreement with ILWU and administers the Collective Agreement in conjunction with various Locals of ILWU.

5. The Complainants, whether they were members of ILWU or casual workers, were sheltered by the Collective Agreement.

6. The filing dates of each complaint of discrimination:

Jozef Antalik – April 15, 2010
Werner Hofer – September 15, 2009
Dennis Horgan – January 20, 2010
Bob Kopeck – September 22, 2010
Kenneth Geroge Martens – November 25, 2010
David Williams Gibbs – November 19, 2010
Enricco Diricco –November 25, 2010

7. At all times during the period 1989 to the fall of 2010 the Complainants were employed pursuant to a Collective Agreement which did not include an age limit for retirement. However the Collective Agreement included a provision for pensions in Article 13 - PENSIONS. "13.01 The Pension arrangements governing employees covered by this Agreement are as set forth in the Waterfront Industry Pension Plan and the Waterfront Industry Pension Agreement." Pension arrangements for union members including the Complainants were established under the Collective Agreement and governed by the Waterfront Industry Pension Plan (WIPP).

8. During the period 1989 to the fall of 2010 WIPP defined the normal age of retirement as age 65. The Complainants attained age 65 on the following dates, and as of the first day of the month following, they were no longer eligible for longshore work:

Mr. Hofer – April 17, 2009
Mr. Horgan – June 24, 2009
Mr. Diricco – July 7, 2009
Mr. Gibbs – December 14, 2009
Mr. Kopeck – January 1, 2010
Mr. Antalik – March 19, 2010
Mr. Martens – May 15, 2010

9. In September 2010 the Trustees of WIPP filed changes to the pension plan with the Superintendent of Financial Institutions of Canada which entitled longshore workers who turned 65 after October 31, 2010 to either retire or continue working and take their pension after age 65. In the amended WIPP the normal age of retirement is stated to be age 65.

10. On November 2, 2010, BCMEA informed longshore workers that effective November 1, 2010, they had the option of working after age 65; and BCMEA also informed all workers who had retired between Nov. 1, 2009 and November 1, 2010 that they could choose to return to work. Complainant Gibbs did not respond and Complainant Antalik responded but chose not to be dispatched to work.

11. In 2010 there were 4,662 longshore workers employed by BCMEA employers.

12. Until November 1, 2010, 100% of longshore workers retired by age 65 under the terms of WIPP, and a significant number of those retirees retired before age 65.

13. During the period 1989 to the fall of 2010 Union Foremen had similar pension arrangements to longshore workers requiring retirement on or before age 65.

14. The Marynuik Affidavit contains a statistical analysis of the total number of Union, Welfare Paying Casual and Casual longshore workers – dispatched on a daily basis to BCMEA employers – who retired at or before age 65 in the period January 1, 2005, to October 31, 2010. The analysis was based on data retrieved from the BCMEA's internal Waterfront Human Resources Information System which contains information including birth dates and dates of change of status from active to retired with respect to all longshore workers.

[16] I conclude that Eleanor Marynuik is significantly knowledgeable concerning the longshore industry in British Columbia, particularly with respect to the Collective Agreement between BCMEA and ILWU, and the terms and conditions of employment of longshore workers. Her affidavit is evidential, probative and comprehensive.

[17] The Marynuik Affidavit provides a factual basis for the period during which the complainants retired; and it underpins the BCMEA/ILWU motions for dismissal of the Complaints. The Marynuik affidavit also embraces and undermines the Complainants' allegations of discrimination.

[18] In his letter of January 23, 2013, responding to the Commission's submissions on the motions, Mr. Bruce Laughton, Q.C., counsel for ILWU, stated that "The essence of the motion is to assert that the complainants have no chance of success on the merits of the case as they cannot dispute that age 65 is the normal age of retirement for persons in positions similar to theirs. … This motion does not in any way deprive the complainants of the ability to address the issue. They are free to file their own affidavits and produce facts which would dispute the position taken by the ILWU. … neither the complainants nor the Commission have availed themselves of that opportunity. …"

C. Was Age 65 the Normal Age of Retirement within the Relevant Period?

[19] It is a discriminatory practice under Sections 7 and 10 (a) of the *CHRA* to refuse to continue to employ an individual by reason of age or to establish a policy or practice that deprives the individual of employment by reason of age.

[20] The retirement of the Complainants was mandated by pension provisions in the Collective Agreement; provisions integral to their employment and retirement as longshore workers; provisions which ensured certainty of income and entitlement to a pension. I conclude that the consequence of these longstanding contractual provisions, the mandatory retirement of the Complainants, was not an age-based discriminatory practice under sections 7 and 10 of the *CHRA.*

[21] Most importantly the Respondents argued " … that the normal retirement age exception in section 15 (1) (c) applies to the circumstances of these Complainants. … (an) exception … that is all that is necessary to dispose of these Complaints on the merits."

[22] To fit within the exception the Respondents must either identify a comparator group with positions similar to the Complainants or rely on the singularity of the longshore industry in B.C. There is no comparator group with employees in similar positions at waterfront terminals in the province. However as a consequence of the singular and dominant position of BCMEA and the ILWU I conclude that the comparator group is the aggregate of ILWU long shore workers employed by BCMEA. An anomalous determination of this kind was considered appropriate in *Vilven v. Air Canada*, [2009] F. C. J. No 475, confirmed on appeal in *Air Canada.*

[23] The stipulation in the WIPP section of the Collective Agreement that age 65 is the Normal Retirement Age in B.C.'s longshore industry in B.C. is consequential, it defines age 65 as the normal age of retirement; and the statistical evidence in the Marynuik Affidavit persuades me that age 65 was the normal age of retirement in the period 2005 to 2010.

VI. Ruling

As a result of the foregoing reasons and determinations I find that the Respondents did not subject the Complainants to a discriminatory practice under s. 7 and 10 of the *CHRA* in the matter of their mandatory retirement at age 65. Therefore the Respondents' motions are granted and the Complaints are dismissed.

Signed by

Wallace G. Craig
Tribunal Member

Ottawa, Ontario
March 27, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1734/8911, T1735/9011, T1736/9111, T1737/9211, T1738/9311, T1739/9411, T1740/9511, T1741/9611, T1742/9711, T1744/9911, T1745/10011, T1750/10511

Style of Cause: Josef Otto Antalik et al. v. British Columbia Maritime Employers Association and International Longshore and Warehouse Union

Ruling of the Tribunal Dated: March 27, 2013

Appearances:

Werner Hofer, David Gibbs, for the Complainants

Daniel Poulin, for the Canadian Human Rights Commission

Marino Sveinson, for British Columbia Maritime Employers Association

Bruce Laughton, Q.C., for International Longshore and Warehouse Union