Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

William Charles Bailie, Richard Galashan, Robert G. Williams, Robert Harrison, Alvin Gerrard, Sheldon K. Cullen, Garth Vickery, Arthur Randolph Gouge, Warren Young, Gary Nedelec, Jorg Bertram, Lloyd Fraser, Colin Jordan, Mervyn Andrew, Alexander Samanek, Michael S. Sheppard, Robert Harrold Mitchell, Francis J.R. Jeffs, Douglas Goldie, Stephen Ritchie St. Pierre, James Stanley Caldwell, Brian Scott Hope, Trevor Alexander Nicol, James Dow, David R. Lance, Gary Bedbrook, Marcel Duschesne, John Burridge, Chirs Evans, John Bell, Tim Ockenden, Kent Jeffrey Benson, David R. England, Pierre Garneau, Jacques Couture, Dave Lineker, William C. Nickerson, Larry James Laidman, John Stephen Gibbs, Robert Bruce Macdonald, Gordon A.F. Lehman, Michael Dell, Dennis Smith, James F. Dietrich, Ralph Tweten, Eric William Rogers, John D. Hargreaves, Peter J.G. Stirling, David Malcom Macdonald, Robert William James, Camil Geoffroy, Brian Campbell, Trevor David Allison, Robert Ferguson, Kenneth David Douglas, Benoit Gauthier, Bruce Lyn Fanning, Marc Carpentier, Mark Irving Davis, Allan Brian Cary, Richard Dale Purvis, Raymond Calvin Scott Jackson, John Bart Anderson, James Shawn Cornell, Raymond D. Hall, Michael Stanley Bellinger, Donald Clifford Eddie, Peter Douglas Keefe, Robin Patrick Mclean Barr, David Leonard Mehain, Jacques Robillard, Errold Dale Smith, Glenn Donald Torrie, David Alexander Findlay, Warren Stanley Davey, Raymond Robert Cook, Keith Wylie Hannan, Michael Edward Ronan, Gilles Desrochers, William Lance Frank Dann, Robert Francis Walsh, Alban Ernest Maclellan

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada
Air Canada Pilots Association

Respondents

Ruling

Member: Matthew D. Garfield
Date: October 14, 2011
Citation: 2011 CHRT 17

Introduction

[1] These are my Reasons for Ruling on two motions brought by all of the Hall-represented Complainants (calling themselves the "Coalition Complainants") at the time the Notice of Motion was filed, regarding the Statement of Particulars ("SOP") of the two Respondents – Air Canada and the Air Canada Pilots Association ("ACPA").

Main Proceeding

[2] By way of context, the main proceeding involves the Complaints of retired Air Canada pilots who claim that Air Canada engaged in a discriminatory practice and applied a discriminatory policy by requiring them to retire at the age of 60. This was pursuant to the collective agreement negotiated between Air Canada and the bargaining agent, ACPA, and the pilots' pension plan. As a result, companion Complaints have been filed by these retired pilots against ACPA, and have been combined into a single hearing by the Tribunal. The pilots claim that requiring them to retire at age 60 was in violation of sections 7, 9 and 10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended ("*CHRA*").

[3] At the first Case Management Conference, on consent of the parties, I bifurcated the proceeding into a liability and remedy stage. As of the date of these Reasons, other complaints of retired Air Canada pilots involving the same issues have been referred by the Canadian Human Rights Commission ("Commission") to the Tribunal. The Chair of the Tribunal has assigned those complaints to me. There is now a total of 164 complaints (82 complainants) in the cluster of complaints cited as "*Bailie et al.*" They are all represented by counsel Raymond D. Hall (also a Complainant), except for one self-represented Complainant, Eric Rogers.

Motion Re: Air Canada's Statement of Particulars

[4] The Coalition Complainants seek an Order requiring Air Canada to serve and file "further and better particulars" with regard to its *bona fide* occupational requirement ("BFOR") defence, including the "accommodation to the point of undue hardship" component. This request includes a "detailed description" of the evidence the Respondent intends to rely upon.

[5] In the alternative, if Air Canada is unable to establish in its Response to the motion "in law and in proposed evidence" a defence that established the BFOR defence, the Complainants ask that I strike out all paragraphs of Air Canada's SOP related to a BFOR defence.

[6] The Coalition Complainants also seek an Order striking out twelve other paragraphs of Air Canada's SOP, specifically paras. 19-20, 37-38, 40 and 48-54. Some of those paragraphs relate to Air Canada's BFOR defence, others to facts unrelated to the BFOR defence. The moving parties add the proviso "that Air Canada be permitted to restate any purported defence…provided that the defence is pleaded with a sufficient degree of specificity…"

Grounds of the Motion

[7] Extensive materials on the motion have been filed. Below is my paraphrasing and condensing of the grounds and argument to its core.

[8] The moving parties assert that Air Canada has misstated throughout its SOP the central issue before the Tribunal as being the abolition of mandatory retirement at age 60 for its pilots. "The ***only*** issue that is before this Tribunal is whether the termination of employment of each respective Complainant constituted a discriminatory practice as of the date of each Complainant's termination of employment." Not only does Air Canada's SOP misstate the issues in dispute, the Coalition Complainants also claim Air Canada is attempting "to bring into

evidence and argument issues that are totally irrelevant to any issue in dispute in this proceeding." Much of this centres around the characterization of the BFOR defence.

[9] Regarding striking out paras. 19-20, 37-38, 40 and 48-54, the moving parties argue that the information contained therein bears no relationship to any issue before the Tribunal and/or is moot. Such evidence/argument "would result in a waste of scarce, valuable Tribunal resources and would constitute an abuse of process."

Air Canada's Response

[10] Air Canada submits that the motion should be dismissed. However, if I were to find merit to the moving parties' request, then I should order further particulars, rather than the "excessive relief" of striking out those parts of the SOP and thus preventing Air Canada from providing a full answer and defence to the Complaints.

[11] Air Canada argues that it has clearly informed the other parties of its defences, including the nature of the evidence on which it intends to rely. The moving parties improperly seek further details of evidence required at this stage of the proceeding. Regarding the BFOR defence, Air Canada states that it has complied fully with the requirements of the SOP pursuant to the Tribunal's *Rules of Procedure*.

[12] Air Canada submits that the moving parties are improperly expecting it "to present in advance of the hearing all of the evidence which will be adduced at that time." The Complainants' motion is not properly one of further particulars, "but is a challenge [to] the credibility of the facts themselves. Such challenges are to be addressed in the hearing when both sides can test each others' evidence and make submissions as to its credibility."

[13] Furthermore, the Respondent states that this is the third Tribunal panel to deal with the mandatory retirement policy for Air Canada pilots. Indeed, two panels have recently rendered

Decisions: *Vilven/Kelly*, 2011 CHRT 10 and *Thwaites*, 2011 CHRT 11 (judicial review of both Decisions pending). Earlier Decisions have been reviewed by the Federal Court too. There are currently judicial review applications before the Federal Court and an appeal before the Federal Court of Appeal. Air Canada also points out that the Coalition Complainants have been represented by the same counsel as the Complainants in the other Air Canada pilots mandatory retirement cases before the Tribunal (and the courts on review and appeal). There are no surprises from Air Canada's SOP.

Analysis

Providing Better Particulars: Purpose and Scope of the SOP

[14] Rule 6 of the Tribunal's *Rules of Procedure* deals with the Statement of Particulars, disclosure and production. It states that each party's SOP shall include:

> (1) the material facts that the party seeks to prove in support of its case;
>
> (2) its position on the legal issues raised by the case;
>
> (3) the relief that it seek;
>
> (4) a list of all documents, privileged and otherwise; and
>
> (5) a list identifying all witnesses the party intends to call (other than experts) with a summary of anticipated evidence (or "will-say").

Sub-rule 6(4) requires the parties to produce a copy of the documents to each other, but not file them with the Tribunal. Sub-rule 6(5) imposes a continuing, ongoing duty of disclosure and production on the parties.

[15] *What is the purpose of the foregoing?* It is to allow each of the parties to effectively run their respective cases, and to assist the Tribunal in effectively case-managing the matter to a fair

and efficient hearing, negating the need for adjournments due to “surprises”. The SOP is more extensive than pleadings in civil matters before the courts. It requires not just what one would find in a Statement of Claim/Defence in the civil courts, but also, a list of documents (similar to an Affidavit of Documents), list of witnesses and will-says. The SOP requires the pleading of material facts, not the *pleading of evidence*. The SOP is not meant to be a *factum*. Indeed, the will-says do not require the *verbatim* proposed testimony of a witness, but rather, the main issues to be covered by the witness, so that the other party can prepare its cross-examination and general case.

What Has Been Disclosed/Produced To Date?

[16] There has been extensive disclosure/production to date. First, the parties have filed their SOPs. I understand that there are some issues of outstanding disclosure of documents and productions thereof. The Commission has served and filed its extensive 45-page “disclosure package” of the “fruits of its investigation”. List of witnesses have been provided to varying degrees and “will-says” remain outstanding. And of course, the Tribunal does not receive a copy of productions. Any outstanding disclosure/production issues will be addressed at the upcoming Case Management Conference in Ottawa.

[17] This motion must be understood in the broader context of the previous Air Canada pilots mandatory retirement cases before the Tribunal and the past and present judicial review applications/appeals thereof before the courts. Part of the disclosure/production herein includes the voluminous pre-hearing productions and the *viva voce* and documentary evidence, as well as argument, at the hearings in the *Vilven/Kelly* and *Thwaites* cases before the Tribunal. As well, there are the materials filed in two completed judicial review applications to the Federal Court including Judgments thereof and current judicial review applications and an appeal to the Federal Court of Appeal.

[18] Furthermore, as Air Canada points out, the moving parties' counsel, Mr. Hall was also counsel in the previous similar cases before the Tribunal and the courts. There is significant overlap in issues and evidence: the Coalition Complainants refer in their SOP at p. 18 to "the two prior identical hearings." Indeed, their SOP reads at para. 13: "With respect to the liability portion of the hearing, the Complainants expect to rely on the evidence and argument adduced in both the *Vilven-Kelly* hearing and the *Thwaites* hearing."

[19] Air Canada asserts that Mr. Hall and the rest of the moving parties cannot claim "surprise" or "ambush" of any kind. Air Canada's position has not changed. I agree. I have read the 15-page SOP of Air Canada and its reiteration of its particulars in its responding motion materials. I am satisfied that the moving parties have sufficient information to prepare their *prima facie* case and respond to Air Canada's BFOR defence. They do not require further and better particulars. As a result, the moving parties' motion for further and better particulars is dismissed. Consequently, I need not determine their alternative claim to strike out those parts of Air Canada's SOP dealing with the BFOR defence. However, that still leaves their claim for relief in para. 3 of their Notice of Motion: i.e., to strike out paras. 19-20, 37-38, 40 and 48-54 of Air Canada's SOP.

Striking Pleadings: Statutory Provisions and Case Law

[20] The *CHRA* and the Tribunal's *Rules of Procedure* do not expressly provide for the striking of our version of a pleading – the SOP. Indeed, the Tribunal in *Harkin v. Attorney General*, 2009 CHRT 6 found that the Tribunal is not authorized to do so, and that the striking of pleadings does not fall within the narrow pre-hearing dismissal category enumerated by von Finckenstein J. in *Canada (Human Rights Comm.) v. Canada Post Corp.*, 2004 FC 81 ("*Cremasco*"). *Harkin*, *supra* involved a respondent moving to strike the pleading for failure to establish a *prima facie* case of discrimination. In the instant motion, the moving parties are complainants and of course are not seeking the striking of part of the pleading for failure to establish a *prima facie* case. In *Harkin* the Tribunal found in the alternative that the facts in that

case did not even meet the civil courts' "plain and obvious" test as stated in *Hunt v. Carey*, [1990] 2 S.C.R. 959.

[21] The Chair of the Tribunal in *FNCFCS et al. v. Attorney General of Canada*, 2011 CHRT 4 (judicial review pending), while determining that *Cremasco, supra* did not set out an exhaustive list for the pre-hearing dismissal of complaints, also cautioned at para. 60 with regards to the *Hunt v. Carey* "plain and obvious test": "I agree with the Crown that it is not appropriate to import such tests from the civil courts, which have a very different legal foundation, into the legal scheme of the *CHRA*." I agree that the Tribunal should exercise caution when considering whether to import such tests.

[22] Perhaps the Tribunal should consider the legal tests and practices before other human rights tribunals in Canada before resorting to the courts'. There are strong policy reasons why the Tribunal's *Rules of Procedure* contain only ten rules, whereas the *Federal Courts Rules* are over 500 in number. Notably, there is also a statutory basis as subsection 48.9(1) of the *CHRA* provides: "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." (See also Rule 1(1)(c)).

[23] Consistent with the approach taken by the Tribunal in *Harkin, supra* in the alternative, I will consider now whether the "plain and obvious test" has been established in the instant motion with regards to the motion to strike those twelve paragraphs of Air Canada's SOP, as set out in para. 3 of the Notice of Motion. Some of those paragraphs relate to Air Canada's BFOR defence, others are facts providing background and contextual history to the mandatory retirement of pilots issue and employment conditions of Air Canada pilots. I have reviewed those specific sections and find that they meet the low threshhold required to be properly included in a SOP.

[24] As for the moving parties' assertion that those paragraphs "would result in a waste of scarce, valuable Tribunal resources and would constitute an abuse of process," that raises the

broader question of the proceeding as a whole. This motion is not the appropriate vehicle to deal with the abuse of process argument, in a piece-meal fashion, with regards to those paragraphs in Air Canada's SOP.

> If anything, based on the comments made by the parties in their respective SOPs and/or motion materials, there is an arguable issue about the re-litigation of issues in this entire proceeding, invoking the doctrines of *res judicata*, issue estoppel, abuse of process, etc. For example, page 11 of the moving parties' Notice of Motion reads in part:

[25] The issues in this proceeding are largely similar, if not identical to the issues that the Tribunal heard in the *Vilven-Kelly* hearing, and in the *Thwaites* hearing. Were it not for the fact that the Tribunal's decision in the *Thwaites* hearing has yet to be rendered by the Tribunal [it has since been released: 2011 CHRT 11], it would be correct to say that all of the issues in this proceeding have already been heard and decided before the Tribunal, and this hearing might not be required at all.

[26] The parties were asked if they intended to bring a motion to dismiss for abuse of process. The Coalition Complainants indicated that they would await the Ruling herein before making their decision. The Commission stated it would not "file a separate motion [for abuse of process] but will instead object to any attempt at adducing evidence that would attempt to contradict the decisions of the Federal Court [in the *Vilven/Kelly* matter]." This issue shall be addressed at the upcoming Case Management Conference.

Motion Re: ACPA's Statement of Particulars

[27] The Coalition Complainants seek an Order striking out section (d) of ACPA's SOP, i.e., the section entitled, "Are the Provisions of the Collective Agreement Which Mandate Retirement at Age 60 a Bona Fide Occupational Requirement?"

Grounds of Motion

[28] The moving parties assert that a section 15(1)(a) BFOR defence to an alleged discriminatory practice is only available if established by an *employer*. It is not open to a bargaining agent. Therefore ACPA has no entitlement to argue such a defence and any pleading doing such should be struck out. Furthermore, even if such a defence were available to a non-employer, the moving parties submit that the provision of the collective agreement that mandates such a requirement is not an *occupational requirement*, but only an Air Canada-ACPA one. "Transport Canada, the regulatory body that establishes the relevant occupational requirements for the pilot occupation in Canada has no maximum age limitation whatsoever on pilot licensing."

ACPA's Response

[29] ACPA responds that the moving parties are improperly preventing it from mounting a defence to the instant allegations of discrimination against the union. Re: the issue of a BFOR defence only being available to an employer, ACPA counters that "that proposition is inconsistent with the provisions of the Act and the obligations to accommodate which the Act imposes on employee organizations." Counsel for ACPA cites the Supreme Court of Canada decision in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970. ACPA also submits that this issue was determined recently in its favour by the Tribunal in *Thwaites*, *supra*, at paras. 336-40.

[30] Re: the issue of what constitutes an "occupational requirement", ACPA states the Complainants' assertions are "baseless" and that per the Supreme Court of Canada's decision in *BC Public Service Employee Relations Comm. v. B.C.G.S.E.U.*, [1993] 3 S.C.R. 3 ("*Meiorin*"), "the "standard", "rule" or "occupational requirement" is one that has been adopted by an employer and not imposed by statute…The "rule or standard" which is at issue in the cases before the Tribunal is the one that requires mandatory retirement at age 60. That is clearly

identified in the particulars…" ACPA argues that this was also determined recently by two different panels in *Vilven/Kelly*, *supra* and *Thwaites*, *supra*, respectively.

Analysis

[31] I agree with ACPA's submissions. Re: both the issues of whether a BFOR defence is open to a non-employer (in this case, ACPA) and whether there exists an *occupational requirement* within the meaning of the BFOR defence, the positions of both the moving parties and ACPA are arguable. Hence, they should be left to argument at the hearing after the presentation of evidence. ACPA's arguable defence should not be struck out at the pleading stage, assuming that the Tribunal even has the statutory authority to do so.

[32] Furthermore, the "plain and obvious" test has not been established as the moving parties' assertion that a BFOR defence is only open to an employer was argued before and rejected by the Tribunal in *Thwaites*, *supra*, at paras. 336-40. On the other issue, in both recent Decisions in *Vilven/Kelly* and *Thwaites*, *supra*, each of the two respective panels, while disagreeing as to whether a BFOR defence was established, nevertheless concurred that the mandatory retirement at age 60 provision was a work standard and thus an "occupational requirement". Again, this raises the broader question of the re-litigation of issues already determined by the Tribunal.

Conclusion

[33] Based on the foregoing reasons, both motions are dismissed.

Signed by

Matthew D. Garfield
Tribunal Member

Ottawa, Ontario
October 14, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1338/6409
T1516/6210 to T1607/5310;
T1630/17610 to T1645/17610;
T1646/0111 to T1649/0411
T1664/01911 to T1681/03611;
T1707/6211 to T1722/7711;
T1723/7811 & T1724/7911

Style of Cause: Mehain et al. v. Air Canada and Air Canada Pilots Association
Bailie et al. v. Air Canada and Air Canada Pilots Association
Hargreaves et al. v. Air Canada and Air Canada Pilots Association
Douglas and Ferguson v. Air Canada and Air Canada Pilots Association
Gauthier et al. v. Air Canada and Air Canada Pilots Association
Findlay et al. v. Air Canada and Air Canada Pilots Association
Alban Ernest MacLellan v. Air Canada and Air Canada Pilots Association

Ruling of the Tribunal Dated: October 14, 2011

(last submissions received September 9, 2011)

Appearances:

Raymond D. Hall, for the Complainants (except Mr. Rogers)

No submissions filed, Eric William Rogers

Daniel Poulin, for the Canadian Human Rights Commission

Fred Headon, for Air Canada

Bruce Laughton, for Air Canada Pilots Association