Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2025 CHRT 11
Date: February 6, 2025
File Nos.: T2733/10921 and T2734/11021

Between:

Kewal Sidhu & Robert Kopeck

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

International Longshore and Warehouse Union Local 500

Respondent

Decision

Member: Paul Singh

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I. INTRODUCTION AND DECISION

[1] The Complainants Robert Kopeck and Kewal Sidhu say that the Respondent International Longshore and Warehouse Union Local 500 (the "Union") engaged in age-based discrimination contrary to sections 9 and 10 of the *Canadian Human Rights Act* R.S.C., 1985, c.H-6 ("CHRA") when the Union instituted a policy limiting their work opportunities because they collected a pension (the "Complaints"). The Union denies discriminating.

[2] By consent of the parties, the Complaints were joined and the issue of liability and remedy was bifurcated. The Tribunal would first determine the Union's liability for the Complaints. If liability was established, the Tribunal would then determine remedies in a subsequent hearing.

[3] A five-day liability hearing was completed in June 2024 and closing submissions were completed in September 2024. The Canadian Human Rights Commission did not participate at the hearing.

[4] For reasons that follow, the Complaints are substantiated. The Union's actions constitute discrimination contrary to sections 9 and 10 of the CHRA.

II. FACTS

[5] Eight witnesses testified at the hearing. The Complainants testified on their own behalf. Six witnesses testified for the Union:

- Pino Fatiguso (Union dispatch coordinator)
- Antonio Pantusa (Union Executive and Pension Trustee)
- Scarlet Kelly (Union member)
- Mike Rondpre (Union member)
- Stephen Ross (Union business agent)
- Adam Rennison (Expert witness on pension valuations)

[6] I found all witnesses to be credible and forthright in their testimony. They were candid and straight-forward, acknowledging when they could not remember the details. This led to no major evidentiary inconsistencies on the key issues the Tribunal was to decide.

[7] To contextualize the Complaints, I have set out some relevant uncontested evidence entered at the hearing.

[8] Longshoring is the work of loading and unloading ships, which includes operating cranes, handling containers, and performing labour tasks and related maintenance work by electricians, millwrights, and heavy-duty mechanics. The Union represents all longshore workers working at container, cruise ship, and resource terminals at the Burrard Inlet and Squamish, British Columbia.

[9] At all material times, the Complainants were members of the Union and were employed on the Vancouver waterfront by various employers under the provisions of a collective agreement (the "Collective Agreement") in force between the Union and the various employers represented by the BC Maritime Employers Association ("BCMEA").

[10] The Complainants Kewal Sidhu and Robert Kopeck became employed at the Vancouver waterfront in 1975 and 1996 and became Union members in 1988 and 2006, respectively. Mr. Kopeck retired in May 2019 while Mr. Sidhu continues to be a Union member and employed at the waterfront.

[11] The Union consists of about 1,250 casual employees and about 1,250 Union members. Historically, it took at least 10 years of work for a casual employee to earn sufficient seniority to become a Union member, but that period has lengthened in the last decade.

[12] Longshore workers start in the industry as casual employees, working only during peak labour demands when other workers are unavailable. The number of Union members is constant and is based on the number of full-time year-round jobs available. A casual worker can only become a Union member when the Union membership declines because a member retires, dies, becomes a foreman, or terminates their employment. Union members have the first opportunity to work, followed by casual workers in order of seniority.

[13] Pursuant to the terms of the Collective Agreement, workers are assigned work for employers at the waterfront on a daily basis. Work is allocated based on a member's accrued seniority, with the more senior Union members being assigned work ahead of less senior members and ahead of casual workers.

[14] As the volume of available work for longshore workers is inconsistent and dependent on the number of ships at the terminals, most workers are assigned jobs through a dispatch system.

[15] Employers provide orders for labour to BCMEA, which assigns workers who make themselves available for work at a dispatch hall. Dispatch hall officers assign work in accordance with various rules which include employee choice, worker seniority, and ratings.

A. Dispatch process

[16] About 1,000 of the 2,500 workers in the Union's workforce are not dispatched from the dispatch hall. These are the regular workforce employees. They report for each shift directly to a terminal and are guaranteed five shifts per week. Almost all of these coveted jobs are held by Union members based on seniority.

[17] The remaining 1,500 longshore workers are dispatched from a dispatch hall. Dispatch of these workers is shared between the BCMEA and the Union from a dispatch hall in East Vancouver. The hall is divided into a member side and casual side. The dispatch process is run by BCMEA dispatcher officers, based on dispatch rules set by the Union. Union dispatch coordinators are present at the dispatch hall to ensure the proper process is followed as set out in the Collective Agreement, and to resolve issues arising during dispatch.

[18] Regardless of whether someone is a Union member or a casual worker they must report to the dispatch hall prior to dispatch to make themselves available for work on any given shift. If they are not present at the dispatch hall, they will not be assigned work.

[19] Union members indicate their availability to work by attending the dispatch hall and physically turning a plate assigned to them on one of many job boards at the member side of the hall. Dispatchers assign jobs to members by giving them slips of paper with the job assignment.

[20] Casual workers have an electronic dispatch system. They make themselves available for work by swiping an electronic pass on the casual side of the dispatch hall and receive computer-generated job assignments.

[21] Union members are dispatched to available jobs first and generally have the right to pick their preferred jobs. Once Union members are dispatched, casual workers are then assigned jobs based on their accrued seniority. The boards in order of seniority are the A, B, C, T, OO, and R Boards. “A” Board casual workers are the most senior workers and get available work first, whereas “R” Board casual workers are the most junior and get available work last. Casual workers start on the “R” Board and progress to the “A” Board over time.

B. Ratings

[22] There are many categories of longshore jobs on the waterfront such as driving tractor trailers to haul containers, operating cranes, and performing labour jobs.

[23] Each position other than a labour job requires workers to be specifically trained for that job. When a worker is trained for a certain position, they are “rated” for that job. There are at least 30 different ratings on the waterfront.

[24] Union members are given priority over casual workers for all levels of training. Union members have a right based on their seniority to seek training for different ratings while casual employees have a much more limited right to training. The jobs available to Union members are generally the more skilled jobs on the waterfront where significant experience and training is necessary to perform the job safely.

C. Repeal of mandatory retirement

[25] In 2011, the Canadian government repealed mandatory retirement at age 65 in the federal labour sector. At that time the CHRA was also amended to remove provisions that allowed mandatory retirement.

[26] Following the repeal, the Union and BCMEA eliminated mandatory retirement in the industry. Union members who had acquired the age of 65 and who elected to continue working were allowed to avail themselves of Waterfront Industry Pension Plan income and benefits (the “Pension income”) that they had accrued over the term of their employment and membership in the Union.

[27] The Union says that many of its members objected to the fact that members could continue earning full wages after availing themselves of Pension income, a term that the Union referred to as “double dipping”.

[28] In response to these objections, the Union instituted a rule in 2014, known as the Pensioner Dispatch Rule (“PDR”), whereby if a Union member elected to receive Pension income, they would be given work allocation only after other Union members and casual workers were provided work allocation, despite any accrued seniority.

[29] The PDR impacted those workers over the age of 65 but under the age of 72 who elected to receive Pension income. However, as workers grew older, there came a point when receipt of Pension income was no longer optional. Pursuant to the regulations under the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.) (the “Income Tax Act”) receipt of Pension income was mandatory for those over the age of 71.

[30] In 2017, the Union passed a rule, known as the Pension Equalization Rule (“PER”), whereby Union members were required to follow the PDR once they were required to start collecting Pension income under the Income Tax Act, if they had not already elected to do so earlier.

[31] In 2018, the Complainants filed their Complaints. At the time, both Complainants were over the age of 71 and mandated to receive Pension income under the Income Tax Act. They both sought to continue working and say that other Union members and casual workers were assigned work before them despite their decades of accrued seniority due to the operation of the Union’s PDR and PER (collectively, the “Policy”). The Complainants alleged that the Union’s actions discriminated against them on the basis of age and caused them to sustain income loss and other damages.

III. SCOPE OF THE COMPLAINTS

[32] The Complainants say the Union implemented the Policy as a result of a biased view that it is unfair to allow older Union members to remain employed and collect Pension income at the expense of younger workers whose career progression and income growth is delayed. They claim age-based discrimination in employment contrary to sections 9 and 10 of the CHRA.

[33] The Union denies discriminating and says the Tribunal's analysis should be restricted to whether the PER creates an adverse impact by providing the Complainants with the same dispatch priority as other workers collecting Pension income since 2014 when the PDR was initiated. The Union says a restricted analysis by the Tribunal is warranted to avoid negative repercussions, including possible conflicts with prior decision from the Canada Industrial Relations Board ("CIRB").

[34] I do not accept the Union's position. The Union raised similar arguments in a prior motion to dismiss the Complaints. In that motion, the Union argued that CIRB previously dismissed related complaints by the Complainants and that the Complaints should be dismissed on the basis of issue estoppel, abuse of process, and a collateral attack on CIRB rulings.

[35] In dismissing the Union's motion, I determined that the scope of the issues before the CIRB and the Tribunal were distinguishable. I found that CIRB did not fully address the broader issues of discrimination before this Tribunal nor did CIRB apply the necessary legal test for discrimination when analyzing the issues before it. I also held that, in any event, the Complainants should not be estopped from proceedings with their human rights complaints given my concerns about the quality of the evidence presented and relied upon in the CIRB proceedings: *Sidhu and Kopeck v. ILWU 500*, 2023 CHRT 4. Given my ruling, the Union is not permitted to relitigate matters at the hearing that were previously settled by the Tribunal.

[36] The Complainants allege broad violations of sections 9 and 10 of the CHRA. Section 9(1)(c) of the CHRA deals with how employee organizations (like unions) must treat their members. It says that it is a discriminatory practice for an employee organization to limit or classify their members in ways that would hurt their job opportunities or work status. In short, a union could not create categories that prevent certain members from accessing job opportunities or benefits that other members can access, if those categories are based on prohibited grounds of discrimination, like age.

[37] Section 10 of the CHRA is broader and addresses discriminatory policies in employment. It prohibits unions from making agreements or policies about any aspect of employment that could deprive job opportunities to individuals or groups based on a prohibited

ground of discrimination, such as age. This aims to prevent discrimination stemming from policies or agreements.

[38] Given the broad nature of the Complainants' allegations, the Tribunal's analysis is not restricted to whether the PER created an adverse impact for the Complainants vis-à-vis other workers collecting Pension income since the PDR was initiated. Rather, the Tribunal's analysis must necessarily consider the Union's entire process for altering dispatch procedures.

IV. TEST FOR DISCRIMINATION

[39] Under sections 9 and 10 of the CHRA, complainants need to establish three key elements to make out their *prima facie* case. First, they must demonstrate they have a characteristic protected by the CHRA. Second, they need to show adverse treatment - that is, that the policy or practice at issue has or could cause a deprivation of employment opportunities. Third, they must establish a connection between this deprivation and one of the prohibited grounds of discrimination, in this case age: *Moore v. British Columbia,* 2012 SCC 61 ("*Moore*").

[40] A protected characteristic need only be a factor in the adverse treatment, and not necessarily a significant factor or the only factor: *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30 ("*Stewart*") at para. 46. In addition, discrimination does not require intent - rather, the focus is on the effect of a respondent's actions on the complainant: *Ontario Human Rights Commission v. Simpsons-Sears,* [1985] 2 SCR 536 at para. 18.

[41] If a complainant proves the elements of a *prima facie* case, the onus shifts to the respondent to prove on a balance of probabilities that the conduct is a *bona fide* occupational requirement ("BFOR") or has a *bona fide* justification. If the conduct is justified, there is no discrimination. In order to establish justification, the respondent must prove that:

i. they adopted the policy or standard for a purpose or goal rationally connected to performance of the job or function being performed;

ii. they adopted the policy or standard in good faith in the belief that it is necessary for the fulfillment of the purpose or goal; and

iii. the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate persons with the characteristic of the claimant without incurring undue hardship.

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 SCR 868 at para. 20; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 SCR 3 ("*Meiorin*") at para. 54.

[42] A respondent's duty to accommodate to the point of undue hardship is a high threshold. It requires them to demonstrate that they could not have done anything else reasonable or practical to avoid the negative impact on the individual: *Quebec (Commission des norms, de l'équité, de la santé et de la sécurité du travail) v. Caron* 2018 SCC 3 at para. 27. Undue hardship is assessed considering health, safety, and costs: CHRA section 15(2).

[43] The Union says the Tribunal must adopt a more relaxed BFOR test than the test set out by the Supreme Court of Canada in *Meiorin*. Specifically, the Union says the test set out by the Federal Court in *Adamson v. Air Canada* 2014 FC 83 ("*Adamson*") should be adopted. In *Adamson*, the Federal Court set out the following test to determine whether mandatory retirement in the airline industry was *bona fide:*

i. the employer adopted the standard for a purpose rationally connected to the performance of the job;

ii. the union adopted the particular standard in an honest and good faith belief that it was in the collective best interests of its membership;

iii. the standard is reasonably necessary to the accomplishment of the legitimate work-related purposes of the union. For a union to show that the standard is reasonably necessary, it must be demonstrated that it cannot accommodate the individual members of the union sharing the characteristics of the complainant without imposing undue hardship on other members of the union; and

iv. the degree of hardship must be weighed against the nature of the discrimination to ensure that the importance of promoting freedom from the discriminatory conduct, in this case freedom from age discrimination, can admit a lower standard.

[44] I do not accept the Union's position. The Federal Court in *Adamson* did not mandate the use of the test and stated that "a hybrid BFOR test incorporating the requirements of *Meiorin* and *Renaud* could be advanced for the purpose of determining whether ACPA's joint participation in the discriminatory practice with the employer is justified". (at para. 220) (emphasis added)

[45] In addition, the Federal Court's decision in *Adamson* was overturned by the Federal Court of Appeal (2015 FCA 153). In its decision, the Federal Court of Appeal declined to endorse the modified test and stated the following:

> 103. Here, the Judge was of the view that a proceeding where a union raises a BFOR defence constitutes "a novel situation" requiring the modification of the *Meiorin* test. To this end, he established a "hybrid BFOR test" which resulted in a four-part test …
>
> 104. Because of my ultimate conclusion, I need not analyse the Judge's reasoning on that question and decide whether *Meiorin* needed to be modified to fit the factual matrix of this case and the parties thereto. I would therefore limit myself to saying that these reasons shall not be taken as an endorsement of the Judge's approach on this question…
>
> (emphasis added)

[46] Accordingly, in the absence of clear, binding authority to the contrary, the Tribunal will apply the Supreme Court of Canada's BFOR test in *Meiorin* to the facts of this case.

V. *PRIMA FACIE* CASE

A. Protected characteristic

[47] There is no dispute that the Complainants satisfy the first element of the *Moore* test. They allege age-related discrimination, and their age is a protected characteristic based on one of the prohibited grounds of discrimination enumerated in section 3 of the CHRA.

[48] The Union, however, disputes the remaining two elements of the test. They say that the Complainants have not demonstrated adverse impact and, in any event, there is no nexus between adverse impact and the Complainants' age.

B. Adverse impact

(i) Characterizing Pension income

[49] The Union says the Complainants' sense of entitlement to both full seniority rights and a full pension does not, on its own, establish adverse impact. They say the purpose of Pension income is to replace wage income with a guaranteed income stream when employees retire. Pension income, according to the Union, was not established to provide employees with supplementary income during employment. The Union says their Policy allocates work to those not collecting a pension because pensioners are receiving Pension income which was intended to replace wage income.

[50] The Union further says the Complainants' Pension income is not an absolute entitlement as the Complainants suggest. Given that pension benefits are intended to simply replace wage income, the Union says the Complainants cannot demand full seniority rights and concurrent full pension benefits. Conversely, the Complainants cannot argue that a denial of full seniority rights while they collect full pension benefits constitutes adverse impact.

[51] On review of the caselaw, I do not accept the Union's *de minimis* characterization of pension entitlement. For example, in *IBM Canada Limited v. Waterman,* 2013 SCC 70 ("*Waterman*") the Supreme Court of Canada set out a more substantive legal status for pension benefits when determining that pension benefits are not deductible from a damages award. Justice Cromwell, writing for the majority, stated the following:

> 82. … The purpose of the pension benefits, as expressed in the plan documents, "is to provide periodic pension payments to eligible employees . . . after retirement and until death in respect of their service as employees": art. 1.01, A.R., at p. 117. The pension plan is, in essence, a retirement savings vehicle to which an employee earns an absolute entitlement over time…. Pension benefits are clearly not intended to provide an indemnity for loss of income.
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> 83. …. As Prowse J.A. points out in her reasons in the Court of Appeal, pension benefits like those in issue here bear many of the hallmarks of a property right. They, as she put it, are regarded as belonging to the employee….
>
> 84. This view is supported by basic principles of pension law. Mr. Waterman's pension was vested. As A. Kaplan and M. Frazer explain in *Pension Law* (2nd ed. 2013), at p. 203:
>
> > Vesting is the "foundation stone" of employee protections upon which pension regulation is based…. An employee who is vested

> has an enforceable statutory right to the accrued value of his or her pension benefit earned to date, even if the employee terminates employment and plan membership prior to retirement age. It is the vesting of pension benefits that shift our perception of pensions from purely contractual entitlements to quasi-proprietary interests.
>
> […]
>
> 97. To conclude: in this case, the pension benefits are markedly different in nature than the disability benefits in issue in *Sylvester*, the intention of the parties in relation to the issue of deduction is much more uncertain in this case than in *Sylvester* and the broader policy considerations point in the opposite direction. Unlike the disability benefits in *Sylvester*, the pension benefits are not an indemnity for loss of earnings, they are not reduced by other benefits or income received and the employee over time receives a legal entitlement to the commuted value of the benefits. Unlike the situation respecting disability benefits in *Sylvester*, there is no general bar against an employee receiving both pension income and employment income, and receipt of the benefits and income is not based on opposite or incompatible assumptions. Pension benefits are not reduced by other income. Not deducting the pension benefits serves the goal of equal treatment of employees and provides better incentives for just treatment of all employees.
>
> (emphasis added)

[52] While the Union has characterized pension benefits as mere wage replacement which serves to offset adverse impact to the Complainants from the loss of seniority rights, cases such as *Waterman* are authority for a more substantive characterization of pension benefits. I accept this characterization, which includes the following:

i. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings to which an employee earns an absolute entitlement over time.

ii. Pension benefits are the sole property of the plan member to which the member acquires specific and enforceable rights.

iii. Pension benefits should not be set-off against employment income, and there is no bar to an employee receiving both pension income and employment income at the same time from the same employer.

iv. The law should not provide an incentive to treat pension benefits as interchangeable with other forms of income given that pension benefits bear many of the hallmarks of property rights.

[53] Accordingly, given the Complainants' entitlement to Pension income, I cannot conclude that its receipt necessarily negates adverse impact to the Complainants from loss of their seniority rights and deprivation of employment opportunities.

(ii) Availability of work opportunities

[54] The Union also says that the Complainants do not provide sufficient evidence to prove that the Union denied them work opportunities and instead rely solely on speculation to assert adverse impact.

[55] The Union relies on information provided to the Complainants when the PER was passed to suggest that the Complainants neither followed proper procedure to obtain work nor requested additional training to increase work opportunities. The Union says that had the Complainants taken advantage of their status as Union members to gain access to additional training, their work opportunities would have increased.

[56] After the PER was passed in September 2017, the Complainants were provided letters in October 2017 explaining the impact of the PER on their dispatch rights. The letters set out that the Complainants would "be despatched after Union Members and "R" Board Casuals who report to the despatch hall for that shift".

[57] The letters stated that effective October 16, 2017, the Complainants would be treated as all other workers collecting a pension and would go out after "R" Board casuals. Each letter stated, "you must report to the Union despatch coordinator in person at the despatch hall before the despatch begins to check in to make yourself available for work. There is no phone despatch".

[58] The letters also stated that should either Complainant wish to receive additional training or ratings to increase work opportunities they could contact their Union executive.

[59] The Union says the Complainants did not follow the protocols set out in the letters. The Union dispatch coordinator Pino Fatiguso testified that he could not recall Mr. Kopeck reporting to him at all in the fall of 2017 when the PER was passed, or since then. Mr. Fatiguso stated he did recall Mr. Sidhu reporting to the dispatch hall a few times and Mr. Fatiguso found him work on a few occasions. However, after a few months, Mr. Sidhu also stopped reporting to the dispatch hall.

[60] In cross-examination, Mr. Kopeck stated he could not remember reporting to the coordinator at the dispatch hall after the PER was passed. He said “there was no point” in attending the dispatch hall given his loss of seniority rights and lack of available work opportunities. Mr. Sidhu also testified about his loss of seniority and lack of available work opportunities. He stated he did report to the dispatch coordinator after the PER was passed but was only occasionally sent for work by Mr. Fatiguso. He also stated he may have gone to the dispatch hall but did not report to the dispatch coordinator on some days.

[61] The Complainants both testified that they did not seek out additional training or ratings. While Mr. Sidhu stated he did some basic training to maintain his driver rating that he already had, he did not seek out additional skills to make himself more employable.

[62] In light of this evidence, the Union says the Complainants cannot claim adverse impact when they themselves failed to pursue reasonable alternatives and when their own actions created alleged adverse impact.

[63] The Union relies on the Tribunal’s ruling in *Emmett v. Canada Revenue Agency*, 2018 CHRT 23 (“*Emmett*”) to support their position. In that case, Ms. Emmett alleged she experienced age and sex related discrimination when her employer Canada Revenue Agency (“CRA”) passed her over for promotions on several occasions. She also alleged this pattern was reflective of systemic discrimination by CRA.

[64] In dismissing her complaint, the Tribunal held that Ms. Emmett failed to prove adverse impact. The Tribunal found that Ms. Emmett relied on personal perceptions and a sense of entitlement to be promoted to suggest adverse impact when, in fact, CRA had made several efforts to support her career advancement which she failed to take advantage of.

[65] In *Emmett*, the Tribunal stated that “mere perceptions” are not sufficient to establish a *prima facie* case. Similarly, in this case, the Union says the Complainants rely on mere perceptions to assert that they have suffered adverse impact while refusing to take reasonable steps to address their loss.

[66] I do not accept the Union’s position. The Complainants’ case is distinguishable from *Emmett* as the adverse impact alleged by the Complainants is based on more than mere perceptions. The nature of the Union’s Policy, which serves to strip pensioners of their seniority and place them behind the lowest-level “R” board casual workers reduces their employment opportunities on its face, since shifts are allocated based on seniority.

[67] Additionally, the Union’s own witnesses gave evidence of the adverse impact of the Policy on pensioners. For example, Antonio Pantusa testified under cross-examination that the terms and conditions of the Complainants’ employment changed with the implementation of the Policy. He agreed that the change had an adverse impact on pensioners’ employment income due to reduced employment opportunities which could be mitigated through, for example, additional training.

[68] Testimony from other Union witnesses such as Scarlet Kelly and Mike Rondpre established that casual workers would initially spend years mired with limited work assignments and low income. Their income would, unsurprisingly, increase as their seniority level increased and they were admitted into the Union where work opportunities were more plentiful and lucrative.

[69] Their testimony was consistent with the evidence of Adam Rennison, the Union’s expert witness on pension valuations. In his report, Mr. Rennison provided income projections for an employee entering the longshore workforce and progressing from the lowest level “R” Board casual worker to a Union member over a 15-year period. The projections were based on a representation of Board earnings and hours worked provided by the Union and showed a progression of annual earnings of under $5,000 for a casual worker on the “R” Board to over $115,000 as a Union member.

[70] Accordingly, an inference can clearly be established that if a Union member lost his seniority and was placed behind the lowest level “R” Board casual workers, their employment income would generally be reduced. Indeed, this was the admitted purpose of the Policy, which was to eliminate “double dipping” by pensioners.

[71] The presence of adverse impact is also supported by Mr. Kopeck’s evidence on the issue, which I accept. He testified that on several occasions in 2018 there were no casual workers being dispatched as the employee plate numbers did not change from day to day. Being dispatched after casual workers, who themselves are not being dispatched, suggests an adverse deprivation of employment regardless of whether the Complainants regularly attended the hiring hall or sought out additional training opportunities.

[72] Any alleged failure by the Complainants to regularly attend the dispatch hall or seek training is not determinative of an absence of adverse impact as submitted by the Union. The Complainants did not report to the dispatch hall because they understood, as the evidence has shown, that the Policy stripping pensioners of their seniority rights limited their work opportunities, making attendance appear unproductive. To be clear, the adverse impact of the Policy itself, not their decision to refrain from attending dispatch, was the reason for their limited work opportunities.

[73] Any alleged failure of the Complainants to attend the dispatch hall or seek training more properly pertains to the issue of mitigation of damages, which can be addressed at a remedy hearing.

[74] Given the Complainants’ entitlement to Pension income, the witness evidence noted above, and the admitted purpose of the Policy to eliminate “double dipping”, I am satisfied that the Complainants have demonstrated adverse impact. A loss of seniority rights leads to a deprivation of employment opportunities as contemplated by section 10 of the CHRA.

C. Nexus

[75] The Union says that even if adverse impact is found, there is no nexus with a protected characteristic as the change in dispatch priority is based on the collection of Pension income and not age.

[76] The Union says it is not axiomatic that collection of pension benefits must be based on age. They say workers may be required to collect pension in many different circumstances, including by the terms of their collective agreement, terms of their pension plan, agreement of the worker, or by requirements beyond the control of the parties. They say the Policy would continue to operate even if the Income Tax Act did not have an age requirement for collection of pension benefits. For example, if the Income Tax Act required beneficiaries to commence collecting benefits once they had accumulated a set number of years of service, age would not be a factor in pension collection.

[77] The Union says that only individuals aged 71 and older are impacted by the PER. However, that alone does not establish a nexus between age and adverse impact, given that the Union's Policy was based on pension collection and not age. The Union says that, for example, some workers on the waterfront start late in the industry and are not able to accrue a pension or may have accrued pension from a different job, and thus will not be affected by the Policy. Similarly, a worker who becomes a manager and returns to the Union at age 70 would not acquire the two years of service necessary to collect Pension income.

[78] I do not accept the Union's position. Not all workers need to be affected by a specific workplace policy for discrimination to be found. For example, in *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 the complainant was affected because of her religious beliefs, while others were not. In that case, the Supreme Court of Canada determined that the impact on the complainant alone was sufficient to establish discrimination in the form and effect of the workplace policy.

[79] The Union also relies on a decision from the Human Rights Tribunal of Ontario, *Thames Valley District School Board*, 2011 HRTO 953, for authority that it is possible to distinguish between the issues of age and pension. That case, however, is distinguishable because the specific pension plan in question placed a "cap" on the number of days that occasional work could be provided without affecting one's pension. In that case, there was a contractual restriction in place precluding retired teachers from taking work that would diminish the ability of newly trained teachers to enter the profession. No equivalent contractual restrictions are present in this case.

[80] In this case, the Complainants allege violations of sections 9 and 10 of the CHRA resulting from the effect of changes to the Respondent's dispatch Policy. The Union's witnesses testified that these changes were implemented to offset the adverse impact to the career progression, work opportunities, and income of Union members arising from an age-precipitated event (i.e. repeal of mandatory retirement at age 65).

[81] I note that almost every aspect of the Complaints deals with the treatment of the Complainants by the Union based on age – from the time their age permitted them to receive Pension income through to the date at which each, after turning 71 years of age, was required to receive Pension income had they not previously elected to do so.

[82] The PDR and PER were both invoked as a result of the age of Union members who were either qualified to elect to receive Pension income or who were forced to receive Pension income after having turned 71 years of age. Therefore, while age may not have been the only factor in the implementation of the Union's Policy and its resulting adverse impact on pensioners, it was clearly one factor in that determination. That is all the Complainants need to demonstrate: *Stewart* at para. 46.

[83] The nexus between age and adverse impact is also demonstrated through the testimony of the Union's own witnesses. For example, Antonio Pantusa and Mike Rondpre both testified under cross-examination that the end of mandatory retirement at age 65 led to the Union developing the PDR and that, but for the end of mandatory retirement, the PDR would not have been needed.

[84] When asked about the purpose of the PDR, Mr. Rondpre testified under cross-examination that "it's to give [pensioners] employment if they want to continue working…but if you want to continue working, [PDR] are the rules that the membership voted upon…it's the will of the membership. That what the membership wanted. We have casuals, we have other people that are trying to make membership, and it's a way to equalize things…collectively the membership came up with these rules and this is what we went forward with".

[85] Mr. Rondpre further testified that "… within our industry, we had always had the rule that if you had pay in your pocket you didn't go to work ahead of other people. And that is what [PDR] was basically clarifying, was that pensioners that were collecting pension…would not go out before other people who are not collecting pension".

[86] Mr. Rennison was asked in cross-examination whether the PDR reduces the work opportunities for older workers and increases the work opportunities for younger workers. He testified that, "…not giving people that are collecting pension opportunities to get shifts, putting them down to the bottom…for shifts, it absolutely is shifting hours – let's call it hours and shifts and therefore eventually pension income, shifting it down to younger members".

[87] When asked in cross-examination whether the reason older pensioners got fewer shifts was because the Union is "taking away the job opportunities of older workers and giving them to younger workers", Mr. Rennison answered in the affirmative.

[88] The testimony of the Union's witnesses demonstrates that the Union implemented the Policy for the purpose of reducing the work and income of older workers collecting a pension in order to enhance work and income opportunities for younger workers. This was in response to an age-related event (i.e. repeal of mandatory retirement) which indicates that age was one factor in the implementation of the Union's Policy and its resulting adverse impact on pensioners

[89] Accordingly, I am satisfied that the Complainants have demonstrated a nexus between their age and adverse impact.

[90] The Complainants have successfully shown that the Union's Policy deprives or tends to deprive individuals receiving pension from employment opportunities based on age. They have proven the elements of a *prima facie* case for discrimination within the meaning of both sections 9 and 10 of the CHRA. The effect of the Policy has been to deprive unionized workers receiving pension from employment opportunities commensurate with their accrued seniority rights. The Policy has had a disproportionate impact on older workers.

[91] As the Complainants have proven the elements of a *prima facie* case for discrimination, the burden now shifts to the Union to justify their conduct.

VI. UNION'S JUSTIFICATION

A. The Policy's purpose is rationally connected to its effect and adopted in good faith

[92] As noted earlier, in order to justify their conduct the Union must prove that they i) adopted the standard for a purpose or goal rationally connected to performance of the job or function being performed; ii) adopted the standard in good faith in the belief that it is necessary for the fulfillment of the purpose or goal; and iii) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate persons with the characteristic of the complainant without incurring undue hardship.

[93] I am satisfied that the Union has proven the first element of the test. The purpose of the Policy was to enhance work and income opportunities for younger workers who were not collecting a pension. By removing the accrued seniority of pensioners and placing them behind the lowest level "R" Board casual workers, the Policy served to limit pensioners' work and income opportunities and restrict "double dipping". This served to enhance work and income opportunities for younger workers. The purpose of the Policy is therefore rationally connected to its effect.

[94] On the second element of the test, I am satisfied that the Union adopted the standard in good faith. I accept the Union's evidence that there were concerns within the membership because Union members working past 65 were perceived as an obstacle preventing new members from joining the Union and thereby limiting their work and income opportunities. As a result, the collective voted in good faith to approve a dispatch rule which it determined was fair and in the best interest of the majority of its members.

B. The Policy is not reasonably necessary

[95] On the third element of the test, however, the Union has failed to prove that the Policy was reasonably necessary to accomplish its purpose.

[96] The Union submits that the Policy is not discriminatory because they have a reasonable explanation for its implementation when all relevant factors are considered. The Union relies on the Tribunal's decision in *Bélanger v. Canada (Correctional Service)* 2010 CHRT 30 where

the Tribunal states, “the Respondents can provide “reasonable” or satisfactory” explanations for the otherwise discriminatory practice” (at para. 88).

[97] However, any “reasonable” or “satisfactory” explanation must nevertheless comply with the requirement that the explanation be within the framework of exemptions available within human rights law: *Moore* at para. 33.

[98] In this case, the explanation from Union witnesses for the implementation of the Policy was perceived unfairness that pensioners could “double dip” with full seniority rights and Pension income while limiting work, income, and pensionable service opportunities for younger workers. While there may have been discontent amongst Union members with the practice of “double dipping”, that alone is not a sufficient justification under human rights law. What is required is for the Union to demonstrate undue hardship, which they have failed to do.

[99] The Tribunal heard evidence that of the 2,500 workers in the Union’s workforce, only three Union members currently collect Pension income while working. This serves to mitigate any undue hardship based on costs to the Union workforce from those pensioners maintaining their seniority.

[100] In addition, Mr. Rennison’s expert evidence does not demonstrate undue hardship. In his report, Mr. Rennison provides an analysis of a hypothetical employee entering the longshore workforce in 2012 and progressing over fifteen years from the lowest level “R” Board casual worker to a Union member. Two scenarios are presented for this employee – one with PDR and one without PDR - and income projections are compared based on hypothetical hours and earnings progression.

[101] While the scenarios suggest that the hypothetical employee may earn less income without PDR than with PDR, the Union fails to adequately explain why this difference in earnings constitutes undue hardship such that pensioners’ seniority rights must be stripped.

[102] Mr. Rennison also testified that older employees entering the workforce would see a larger positive relative impact from the PDR. For example, he found that the most significant impact would be on a worker of about 52 years of age entering the workforce. If the PDR was not in effect, Mr. Rennison stated that these older employees would not have a long-time

horizon to catch up to any difference in earnings/pension accrual that the same employee under an environment with the PDR would have.

[103] While Mr. Rennison provided evidence about hypothetical impacts to older employees entering the workforce, the Union failed to provide evidence on whether and to what extent any older employees actually entered the workforce and what impact, if any, the Policy had on their progression.

[104] The PER and the PDR were implemented by the Union majority at the expense of older workers in order to avoid or minimize the negative impact of the government's decision to repeal the mandatory retirement exemption. However, possible negative impacts to the Union majority cannot, without more, justify creating adverse impact on those who avail themselves of their legal right to continue employment beyond the Union's expected date of retirement.

[105] The Union submits that the PDR and PER are accommodations. While not a perfect resolution from the perspective of some pensioners such as the Complainants, the Union says the Policy is a reasonable and balanced approach based ultimately on government policy setting directions for collecting pensions. They say the alternative was requiring employees to stop working when receiving a pension, a rule which was considered and then rejected by the Union membership based on legal advice.

[106] I do not accept the Union's position. Neither the PDR nor PER can be considered accommodations in the context of human rights jurisprudence. The point of the repeal of mandatory retirement was to eliminate discrimination on the basis of age. The Complainants simply assert their right to continue employment while exercising their accrued seniority and while being required, pursuant to the provision of the Income Tax Act, to receive their rightfully acquired pension benefits.

[107] The Union provided insufficient evidence that it contemplated other options or incentives to achieve the same workplace objectives that would mitigate the adverse impact on the Complainants.

[108] The Union urges the Tribunal to take a broad contextual approach to pension income as it did when dismissing the complaint in *Bentley v. Air Canada and Air Canada Pilots*

Association, 2019 CHRT 37 ("*Bentley*"). In that case, the Air Canada Collective Agreement allowed the termination of long-term disability benefits for pilots who were eligible for an unreduced pension. Mr. Bentley, a pilot, complained that termination of long-term disability benefits upon pension eligibility discriminated against him based on age.

[109] *Bentley*, however, is distinguishable from this case. Disability income plans, like insurance plans, have long been exempted from discrimination on the basis of age because of the availability of determinative actuarial data that supports different provisions for different ages. The claimed disability benefits increase with the increasing age of the plan member to the point where they become unduly expensive after a certain point, thereby justifying their differential treatment. In contrast, the Union has not provided adequate actuarial data or other evidence justifying undue hardship in this case.

[110] The Union also says it has a statutory duty to refer workers for longshoring jobs in a fair manner under the *Canada Labour Code* R.S.C. 1985 c L-2 (the "Code"). They say the function of the Union is to establish rules for the fair dispatch of members and casuals to fill longshoring jobs. The PDR and PER were one of many dispatch rules which the Union membership developed as a means to ensure the fair dispatch of work. The Union says a rule adopted to further the fair distribution of work required under the Code is a *bona fide* rule which the Tribunal must respect.

[111] However, the Union's justification for implementing the Policy based on its duty to comply with the requirements of the Code does not account for the words "without discrimination" set out in section 69(2) of the Code. The duty to distribute work fairly includes a duty not to discriminate on the basis of age or other enumerated ground in the CHRA, which the Union has failed to do.

[112] The Union has conflated its duty to fairly allocate dispatch rights and associated income with its lack of authority to govern the distribution of pension income. Pension benefits are fixed by the terms of the pension plan and managed by a trust in accordance with the provisions of the *Pension Benefits Standards Act* R.S.C. 1985, c 32 (2nd Supp.). This is not related to the Union's duty under the Code to provide fair distribution of work and income. Pension income is not employment income and is generally not subject to revision once earned.

[113] Accordingly, the Union has not established a BFOR for the discrimination because the Policy is not reasonably necessary to accomplish its goal. The Union has not established that allowing seniority to workers receiving pension income would cause undue hardship in terms of health, safety or costs.

VII. CONCLUSION AND ORDER

[114] The Complaints are substantiated. The Union's implementation of the PDR and PER constitutes discrimination contrary to sections 9 and 10 of the CHRA.

Signed by

Paul Singh
Tribunal Member

Ottawa, Ontario
February 6, 2025

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2733/10921 and T2734/11021

Style of Cause: Kewal Sidhu & Robert Kopeck v. International Longshore and Warehouse Union Local 500

Dates of Hearing: June 24, 25, 26, 27, and 28, 2024

Written closing submission completed: September 9, 2024

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Appearances:

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Craig D. Bavis and Caitlin Meggs, for the Respondent