Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Denise Seeley

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian National Railway

Respondent

Decision

File No.: T1355/8508
Member: Michel Doucet
Date: March 14, 2014
Citation: 2014 CHRT 11

[1] On September 29, 2010, the Tribunal rendered a decision finding that the Complainant, Denise Seeley, had been subjected to discrimination on the basis of her family status. Among other remedies, the Tribunal ordered that the Complainant be compensated for all lost wages and benefits that she would have earned between March 1, 2007 and September 29, 2010, had she been actively working for CN during that time. More specifically, the Tribunal ordered as follows:

> [183] The complainant seeks compensation for all wages and benefits lost pursuant to s. 53(2)(c) of the *CHRA.* Considering my conclusion as to the date of reinstatement, I order that the Complainant be compensated for all loss of wages and benefits from March 1st, 2007 to today. **The parties are ordered to calculate the amount of wages owing using the formula provided for in the Collective Agreement. In regards to extra payments that a road Conductor could receive, since it would be difficult for the Tribunal to set an amount, it is ordered that the parties establish this amount by looking at the extras that were paid for the period to a Conductor with similar seniority working in the terminal, assuming that that Conductor had no unusual absences. The parties could, for example, take into consideration the extra payments that were paid to the employee who was set up in Jasper in March 2006.** (The emphasis is mine.)

[2] In another ruling of the Tribunal dated October 2nd, 2013, the parties were directed to provide submissions on two issues;

a) The proper methodology for calculating wages (inclusive of "extras") owed to the Complainant?;

b) Whether the Complainant is entitled to compensation in lieu of benefits she did not receive, and if so, the amount of the compensation to which she is entitled?

[3] Having taken into consideration the submissions of the parties, the Tribunal is now ready to render its decision in the hope that it might bring some closure to this matter.

[4] Establishing the appropriate compensation is not an exact science. In the instant case, this exercise is complicated even more by reason of the complex nature of the Collective Agreement,

specifically in regards to the payment of wages and extras. In this regard, it is also important to remember that the parties had ample opportunity, at the hearing, to submit evidence in support of their arguments regarding both the issue of discrimination and the issue of damages. Likewise, I must be careful in dealing with the matters put before me. This procedure must not been considered as if there has been a bifurcation of these two issues. This is not the case. I must also be careful not to allow the parties to submit new evidence on the issue of damages. The questions put to me here must be answered with the evidence that was submitted at the hearing.

[5] Subsection 53(2)(c) of the *Canadian Human Rights Act*, RSC 1985, c. H-6 provides that the person found to be engaging in a discriminatory practice can be ordered to "compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice". Hence, the Complainant is to be put, as much as possible, in the same position she would have been in had she been actively employed with the Respondent.

[6] In her brief, the Complainant argues that her wages should be calculated by multiplying the applicable mileage rates in the Collective Agreement by the figure of 4 300 miles per month. The Complainant, referring to Article 22.10(a) of the Collective Agreement, argues in essence that she was guaranteed wages of 4 300 miles per month. Article 22.10(a) provides as follows:

> 22.10 (a) Employees assigned to runs identified in article 36.2 or road or joint spareboard at terminals that included extended run territory and who are available for duty for their entire mileage month will be entitled to :
>
> - 4300 miles if working as a conductor;
>
> - such guarantee will be prorated for each 14 day board adjustment period.

[7] Although CN's obligation is to enable employees to earn 4 300 miles, by providing sufficient numbers of work opportunities, the language of Article 22.10(a) also specifies that the guarantee of 4 300 miles applies only to conductors "who are available for duty for their entire

mileage month". So, if a conductor chooses not to make himself or herself available for part of a month, for whatever reason, then he or she will not be entitled to the 4 300-mile guarantee for that month. In this regard, Article 22.01(b) provides that the 4 300-mile guarantee "will be reduced proportionately by the number of miles in road service for each tour of duty the employee would have earned had they been available, and for each call missed". It further provides that an employee who misses more than two calls in a 14-day period "will not be entitled to any guarantee" and will be paid only for those miles actually worked. Article 22.10(c) provides for the guarantee to be reduced if an employee books rest in excess of 14 consecutive hours. I agree with the Respondent that, when taken together, these provisions establish that Conductors are not entitled to be paid 4 300 miles each and every month of their employment. Various decisions made by Conductors may have the effect of reducing their guaranteed wages or even eliminating them altogether.

[8] In order to sustain her claim for wages calculated at 4 300 miles per month, the Complainant would need to demonstrate that in each and every month between March 1st, 2007 and October 17th, 2010, she was available for duty the entire month. There was no evidence submitted at the hearing to support this contention. In their briefs, both parties referred to events that occurred after 2010 to try to support their respective arguments regarding the interpretation that should be given to this Article. I will not consider this evidence, since it was not available to the Tribunal when it rendered its decision.

[9] The test I will apply is how the Tribunal would have determined the matter in 2010 had it been asked to render a specific decision on the issue of lost wages. Having taken into consideration the arguments of both parties on this matter and having reviewed the decision of 2010 and the evidence submitted then, I conclude that the Respondent's approach would have been the approach retained. The Tribunal would have chosen a comparative approach and, since the parties had referred during the hearing to Mr. Thom and to no other employees, Mr. Thom would have been considered as the appropriate comparator. In her brief, the Complainant does make reference to other employees who, according to her, would be better comparators, but given that none of these were identified at the hearing, I will not consider them in this decision.

[10] Mr. Thom was a Conductor working at the Complainant's home terminal of Jasper throughout the relevant period and it was established at the hearing that he had similar seniority to the Complainant. I agree with the Respondent that, because of their similar seniority, the Complainant would possibly have received the same amount of work opportunities as Mr. Thom. For those periods when Mr. Thom was absent from work, the Respondent substituted the earnings of the non-absent employee who was immediately junior to Mr. Thom at the relevant time. Therefore, by examining the work Mr. Thom performed when he was working and the work that the Conductor immediately junior to him performed when he was not working, the Respondent arrived at a reflection of the work that would have been assigned to the Complainant. This might not be as precise or as accurate as the Complainant would like, but without a crystal ball this is as precise as can be and I fail to see how the Tribunal would have arrived at a different conclusion had the matter been put to it during the hearing.

[11] In regards to "extras", the Respondent uses the same methodology as it used to calculate wages. In fact, the Respondent paid to the Complainant an amount equivalent to the total compensation that Mr. Thom earned during the relevant time, inclusive of wages and "extras". As with wages, the Tribunal is of the opinion that the methodology used by the Respondent to calculate the "extras" is the most accurate possible. If the Tribunal had had to calculate the "extras", considering the evidence that was before it, it would also have "used" the same methodology.

[12] In regards to benefits, the Tribunal's decision states that the Complainant must be compensated for all loss of benefits. It does not specify any particular methodology for calculating her loss of benefits. The Complainant submits that she is entitled to compensation in lieu of the benefits she did not receive and that the proper methodology for determining the amount of compensation payable to her is a comparative one, based on the value of yearly premiums paid by the Respondent to procure the benefit plan. The Respondent, for its part, argues that the Complainant is not entitled to compensation in lieu of benefits because she continued to be covered under her husband's employee benefits plan. The Respondent also employs her husband.

[13] Having reviewed the parties' arguments on this issue, the Tribunal concludes that the position of the Complainant is the most sensible one. The Tribunal therefore concludes that the Complainant is entitled to compensation in lieu of benefits in the amount of the value of yearly premiums paid by the Respondent to procure the benefit plan, less any amounts paid by the plan provider for the Complainant's benefits under her husband's plan during the relevant time period. According to figures exchanged by the parties during the tentative negotiations to resolve this matter, the amount of the yearly premiums was fixed at $2 965.90 per year, for a total amount of $10 627.88. Therefore, the Complainant is entitled to the amount of $10 627.88, less the net dollar amount of benefits paid for her under her husband's plan. In order to determine what this amount is, the Complainant will consent to the plan provider releasing this information to her and to the Respondent simultaneously.

[14] The answer to the two questions is therefore as follows:

a) What is the proper methodology for calculating wages (inclusive of "extras") owed to the Complainant?

   The Tribunal concludes that the methodology used by the Respondent for calculating wages, inclusive of extras, is the proper methodology.

b) Is the Complainant entitled to compensation in lieu of benefits she did not receive, and if so, the amount of the compensation to which she is entitled?

   Yes, the Complainant is entitled to compensation in lieu of benefits she did not receive. The total amount of these benefits is fixed at $10 627.88, less any amount of benefits paid for her under her husband's plan. The Complainant will consent to the plan provider releasing what these amounts were to her and to the Respondent simultaneously.

Signed by

Michel Doucet
Tribunal Member

Ottawa, Ontario
March 14, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1355/8505

Style of Cause: Denise Seeley v. Canadian National Railway

Decision of the Tribunal Dated: March 14, 2014

Appearances:

Meryl Zisman Gary, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

William Hlibchuk, for the Respondent