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Mandatory Retirement of School Bus Drivers Again Before Alberta Human Rights Tribunal

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Case Commented On: *Mortland and VanRootselaar v Peace Wapiti School Division No 76*, 2015 AHRC 9

Once again, the Human Rights Tribunal has been asked to address the issue of mandatory retirement for school bus drivers in Alberta. In an earlier case involving a preliminary hearing, *Pelley and Albers v Northern Gateway Regional School Division No 76*, 2012 AHRC 2 (*Pelly and Albers*), the Tribunal held that the School Division was an "employer" for the purposes of the *Alberta Human Rights Act,* RSA 2000 c A-25.5 (AHRA), section 7. (See my previous post on *Pelly and Albers*).

Mortland and VanRootselaar were each school bus drivers employed by the Peace Wapiti School Division No 76. They were mandatorily retired at the end of the school year in which they attained the age of 65. They filed individual complaints of age discrimination under section 7 of the AHRC (employment) with the Alberta Human Rights Commission. The School Division argued that the "age 65 or less" standard for bus driver employment was a *bona fide* occupational requirement under subsection 7(3) of the AHRA.

The Tribunal resolved a number of interesting preliminary issues raised by the School Board, such as constitutional jurisdiction (the Board argued its transportation services are under federal regulation and thus are subject to federal human rights legislation - see paras 12 - 71), *res judicata* and abuse of process (at paras 72-96), unreasonable delay (at paras 97-108) and some other procedural complaints, all in favour of the complainants.

The Tribunal concluded that *prima facie* age discrimination was established (at paras 215-222), and that a *bona fide* occupational requirement defence was not established (at paras 387-435). Nor could the respondents rely on AHRA section 11 (reasonable and justifiable discrimination) to defend their actions (at paras 223-227).

The Tribunal heard expert evidence relating to driver age and the safe transportation of students, and concluded that an absolute age 65 or less standard applied to mandatorily retire school bus drivers, was not reasonably necessary for the safe transportation of students (at para 10). While visual and cognitive functioning declines slowly with age, the rate of change affects individuals differently. Individual driver assessment should be used to monitor safe driving performance and safe transportation of children by individual drivers, rather than a blanket age restriction at age 65 (at para 11).

The bulk of the case focused on whether mandatory retirement at the age of 65 is a *bona fide* occupational requirement or is reasonable and justifiable. The respondents sought to rely on *Ensign and Board of Trustees of Clearview Regional School Division No 24* (1999), Alta HR

Panel [CHRR Doc 99-054] to support their argument that it was reasonably necessary to assure the efficient and economical performance of the job of school bus driver, to require one to be less than 65 years of age. However, the jurisprudence on *bona fide* occupational requirement and mandatory retirement has changed and developed significantly since that case was decided.

The Tribunal relied on subsequent cases on mandatory retirement and adopted the test for *bona fide* occupational requirement set down in the case of *British Columbia (Public Service Employee Relations Comm) v BCGSEU*, [1999] 3 SCR 3 (*Meiorin*) at para 54:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
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> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In applying the test to the case at hand, the Tribunal concludes as follows:

1. The Tribunal was satisfied that the rule of "age 65 or less" was rationally connected to job performance because it related to safe student transportation (at para 391).

2. The Tribunal was satisfied that the School Division maintained a mandatory retirement policy in an honest and good faith belief that it was necessary to its purpose of safe student transport (at para 395).

3. The Tribunal held that the third step of the test was not met. First, the School Division had not demonstrated that the blanket restriction of "age 65 or less" standard was actually reasonably necessary. The Tribunal held that the expert evidence did not establish at what age, if any, an increase in collision rate or negative driving performance exists for school bus drivers (at para 397). Second, the Tribunal held that there were better approaches and alternatives to the issue of safety than maintaining an absolute age-based restriction. For example, if an employer has concerns about the risk of driver performance (regardless of the driver's age), there can be more frequent medical exams and road evaluations. Other possible accommodations may include equipment modification such as mirrors or rear-view cameras (at para 430).

In finding that the mandatory retirement policy was discriminatory, the Tribunal found that the School Division could not rely on the defence of *bona fide* occupational requirement (at para 434). The Tribunal ordered reinstatement with updated training before the complainants were permitted to drive students. Mortland was awarded 18 months of lost wages and benefits. VanRoostelaar was to receive lost wages and benefits from the date of termination to the date he leased his farmland (less some deductions that the parties agree upon) (at paras 466-469). Each complainant was awarded $10,000 for injury to dignity and loss of self-respect (at para 478). In addition, the School Division was ordered to cease to mandatorily retire school bus drivers (at para 480).

Commentary

It is interesting to see that, perhaps because of the nature of the relationship between the bus drivers and the School Division, the respondent did not try to make the argument that the two bus drivers were not "employees" of the School Division. If this argument had been successful, the case against the School Division would have been dismissed. There is contradictory caselaw on the issue of whether school bus drivers are employees of School Divisions or of the contracting bus companies. For example, in *Pelly and Albers*, the School Division argued unsuccessfully it was not an employer because the employers (First Student Canada and 1098754 Alberta Ltd.) were contractors with the School Division. On the other hand, in *Jurek v Rocky View School Division No 41*, 2011 AHRC 6, Jurek complained to the AHRC that he was not allowed to bid in Southland's rural bus routes under Rocky View School Division No. 41 because of his age. The School Division had a policy that drivers had to be less than 66 years of age as of September 1 of each school year. Jurek's complaint against Southland was dismissed because Southland accommodated Jurek by assigning him to bus routes other than those in the Rocky View School Division (these others did not have an age restriction). He then complained against Rocky View School Division for age discrimination in employment. Tribunal Chair Shirley Heafy held that the School Division was not an employer, and hence was not an appropriate respondent.

These cases illustrate the unfortunate circumstance that, despite the current legal trend that discourages blanket mandatory retirement policies, whether or not a School Board can legally mandatorily retire a bus driver will depend on whether it is considered an employer of the driver under the AHRA. As with the case of *Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3 I argued that an overly legalistic interpretation of "employment" for the purposes of human rights law would result in off-loading the liability from the policy-maker to the contractor who is the immediate employer, thus forcing the contractor to abide by the offensive policy in order to retain the policy-maker's business and forestall an undue hardship (See my earlier post on *Lockerbie*). This would, once again, mean that human rights are violated simply by setting up the working relationship in a way that would avoid the application of human rights legislation. And, the practical outcome will be that some school divisions will continue to be able to have mandatory retirement policies, while others will not.