

The Prince Edward Island Human Rights Panel

BETWEEN:

**THOMY NILSSON
RICHARD WILLS
YOGI FELL**

COMPLAINANTS

AND:

THE UNIVERSITY OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION ON PRELIMINARY MATTERS

Hearing Date: May 7, 2007

Panel Members

Lou Ann Thomson - Commissioner

Ann Sherman - Commissioner

Maurice Rio - Commissioner

Prince Edward Island Human Rights Commission

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Preliminary Issues

The parties, as well as representatives from the Faculty Association and CUPE 1870, appeared before the Panel on May 7, 2007 so that submissions on preliminary issues could be heard. Our analysis and rulings on the issues are as follows:

a) Hearing Dates

The Respondent, the University of Prince Edward Island (“U.P.E.I.”), requested that the hearing not be held before December as its legal counsel has no available time before then. All other parties advised that they were ready to proceed as soon as possible and the Complainants objected to the adjournment.

Taking into consideration the rules of natural justice, we feel that it would be unfair to force U.P.E.I. to go ahead with a hearing without its legal counsel. For that reason, we agree to not have the hearing before the month of December. Each party must advise the Clerk of their available dates in December and the Clerk will schedule the hearing for the earliest possible dates.

b) Status of the U.P.E.I. Faculty Association and the Canadian Union of Public Employees

The University of Prince Edward Island Faculty Association (the “Faculty Association”) has requested that it be permitted to intervene in these matters. In response to that request, the U.P.E.I. requested that the Faculty Association not be permitted to be added on as intervener, but added on as a full party, pursuant to s.27(e) of the Human Rights Act, R.S.P.E.I. 1998, Cap. H-12 (“Act”). U.P.E.I. also requested that the Canadian Union of Public Employees (“C.U.P.E.”) be added on as a full party, in the same manner as the Faculty Association.

The Faculty Association, of which Complainants Thomy Nilsson and Richard Wills are members, confirmed to U.P.E.I. its approval of the mandatory retirement policy by letter dated December 20, 1995. The Faculty Association maintains that the said letter is irrelevant to these proceedings and that it has consistently opposed the mandatory retirement policy. The Faculty Association indicated that it presented its position on this matter at the negotiations table with U.P.E.I. on June 10, 1995, and that the issue remained unresolved when the negotiations came to an end. Regardless of the Faculty Association’s opposition, the mandatory retirement provisions were inserted into the current collective agreement between the U.P.E.I. Board of Governors and the Faculty Association. The relevant provision in the collective agreement signed in March 2004 and the subsequent collective agreement, which is currently in force and expires June 30, 2010, reads as follows:

B7.2 Retirement at Age 65

- a) All Faculty Members and Librarians shall retire upon attaining the age of 65 years.*
- b) The retirement date for a Member whose date of birth falls*

between January 1 and June 30 shall be July 1 following his or her 65th birthday. Likewise, the retirement date for a Member whose date of birth falls between July 1 and December 31 shall be January 1 following his or her 65th birthday.

The Supreme Court of Canada, in *Renaud v. Central Okanagan School District No. 23* [1992] 2 S.C.R. 970, stated that both unions and employers may be held equally liable for a discriminatory provision in a Collective Agreement. The *Renaud* case comprised of a complaint alleging discrimination in employment on the basis of religion against the School Board. The discriminatory provision was included in the collective agreement and because of this, the Board of Inquiry (of the British Columbia Council of Human Rights) amended the complaint against the School Board to add the union as a party Respondent. The Board of Inquiry stated as follows:

Since the union is equally responsible with the school board for the terms and conditions of the collective agreement (which contains the discriminatory requirement), it would be unjust to so limit the complainant's relief and to order only the school board to bear all the consequences of such discriminatory requirement according to sections 17 of the Act. ... It would be a travesty of justice to order only one of the two persons contravening the Act to cease doing so...

The Supreme Court of Canada upheld the decision of the Board of Inquiry.

In this case, the provision in question is included in the collective agreement between U.P.E.I. and the Faculty Association. For that reason, we find that the Faculty Association is equally responsible with U.P.E.I. for all the terms and provisions in the collective agreement and consequently, the Faculty Association is to be added as a party Respondent.

C.U.P.E., of which Complainant Yogi Fell is a member, confirmed to U.P.E.I. its approval of the mandatory retirement policy by letter dated January 8, 1996. As a result, U.P.E.I. is requesting that C.U.P.E. be added on as a party to these proceedings. However, a review of the collective agreement between U.P.E.I. and Local Union No. 1870 C.U.P.E. indicated that no provisions on mandatory retirement were included. Therefore, C.U.P.E. did not formally approve the provision in question and consequently, we do not order that C.U.P.E. be added as a party Respondent. We also acknowledge that C.U.P.E. did not request an intervener status in these proceedings. Should C.U.P.E. change its mind, we have no objections.

c) Yogi Fell's request to amend complaint

Complainant Yogi Fell had amended her complaint to add allegations of discrimination on the basis of sex as well as on the basis of age. When it was decided that the complaints of Yogi Fell and Richard Willis would be heard at the same time as the complaint of Thomy Nilsson, it was because all three complaints were similar in nature with a common set of facts. Ms. Fell voiced no objection at the hearing to the severance of her complaint of sexual discrimination. It will be

held in abeyance until the allegations of discrimination on the basis of age have been dealt with.

d) **The status of the Executive Director's carriage of the complaint of Richard Wills**

The Faculty Association had indicated that it would be inappropriate for the Executive Director to have carriage of Richard Wills' complaint, in the light of his initial dismissal of Thomy Nilsson's complaint on the same issue. As Gregory Howard, who was Executive Director at the time, is no longer with the Prince Edward Island Human Rights Commission, the question is now moot and we will not be making a finding on the issue.

e) **Adjournment pending Supreme Court of Canada Decision**

The Respondent, U.P.E.I., requested that the hearing be adjourned pending a decision of the Supreme Court of Canada in *Potash Corp. of Saskatchewan v. New Brunswick Human Rights Commission*. After hearing arguments on the issue, we do not feel it is appropriate to adjourn this matter until the Supreme Court of Canada decision. The New Brunswick *Act* is different in that it has a pension plan exception that explicitly allows for a mandatory retirement policy in certain cases. The appeal at the Supreme Court of Canada is in relation to the standard that should be applied to the exception. That exception is not included in the Prince Edward Island *Act*. Therefore, the adjournment is not necessary.

f) **The Record**

One set of documents will be prepared for all parties involved. The Clerk will circulate a list of the Commission's documents to each party. Should any party have any additional documents to be included in the record, they are to forward them to the Clerk within ten days of having received the list of documents.

Summary of Decisions

a) The Panel will resume at the earliest possible dates in December 2007, to be set by the Clerk.

b) The Faculty Association will be added on as a party Respondent. C.U.P.E. will not be added on as a Respondent, but may join as an intervener, should it decide to do so.

c) Yogi Fell's complaint based on sex will be held in abeyance until the allegations on the basis of age have been dealt with.

d) Gregory Howard is no longer the Executive Director of the Human Rights Commission, therefore the question of his involvement is now moot.

e) This matter will not be adjourned pending the Supreme Court of Canada decision.

f) There will be one set of documents. The Clerk will circulate a list among all parties.

Dated this 1st day of August, 2007.

Signed: Lou Ann Thomson
Commissioner Lou Ann Thomson, Panel Chair

Signed: Ann Sherman
Commissioner Ann Sherman

Signed: Maurice Rio
Commissioner Maurice Rio

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