HRC File No. 1352-05

PRINCE EDWARD ISLAND HUMAN RIGHTS PANEL

BETWEEN:

THOMY NILSSON

COMPLAINANT

AND:

THE UNIVERSITY OF PRINCE EDWARD ISLAND

RESPONDENT

DECISION

Hearing Dates: May 15 and May 17, 2013

Panel: Commissioner Lou Ann Thomson

Prince Edward Island Human Rights Commission
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CASES REFERRED TO:
UPEI v. Thomson & Ors., 2012 PESC 7
Bartmann et al v. University of Prince Edward Island, [2011] P.E.I.H.R.B.I.D No. 2 (CanLII)
Ayangma v. PEI Eastern School Board, [2008] PEIJ No. 31 (PESCAD)
Red Deer College v. Michaels [1976] 2 S.C.R. 324

STATUTES REFERRED TO:
Human Rights Act, R.S.P.E.I. 1988, Cap. H-12
Judicial Review Act, R.S.P.E.I. 1988, Cap. C-35

TEXT REFERRED TO:
Robert w. MacAulay & James L.H. Sprague, ***Practice and Procedure Before Administrative Tribunals***, loose-leaf (Toronto: Carswell) at 27A-55

HISTORY OF PROCEEDINGS

1. On October 14, 2005 the Complainant Professor Thomy Nilsson filed a complaint with the Prince Edward Island Human Rights Commission. He alleged that the mandatory retirement policy of the Respondent (the University) discriminated against him on the basis of age, in contravention of s. 6(1)(a) of the ***Human Rights Act,*** **R.S.P.E.I.** 1988, Cap. H-12.

2. Fellow University employees Professor Richard Wills and Yogi Fell filed similar complaints in 2005 and 2006. Their complaints were consolidated with the Nilsson complaint.

3. In 2006 and 2007, Professors Barry Bartmann, J. Ronald Collins and Robert O'Rourke filed complaints with respect to the University's mandatory retirement policy. Their complaints were held in abeyance pending the outcome of the complaints filed by Nilsson, Wills and Fell.

4. In the fall of 2009, the Human Rights Panel heard the complaints of Nilsson, Wills and Fell. In its decision issued on February 18, 2010, the Panel found that the University's mandatory retirement policy contravened the ***Human Rights Act*** *supra*, and that Nilsson, Wills and Fell had been wrongfully terminated.

5. The University applied for judicial review of the Panel's finding of discrimination.

6. On June 4, 2010 the Panel issued a decision addressing remedies for Nilsson, Wills and Fell.

7. The University sought judicial review of the damages awarded by the Panel.

8. A separate Panel was appointed to address damages for Bartmann, Collins and O'Rourke. It issued a decision on September 1, 2011.

9. The University sought judicial review of the orders respecting Bartmann, Collins and O'Rourke.

10. On November 16, 2011, the Honourable Justice Taylor heard the judicial review with respect to Nilsson, Wills and Fell in the Supreme Court of Prince Edward Island. Before the hearing, the University dropped the assertion that the Panel had erred in it's finding of discrimination, and the Court considered only damages on review.

11. The Supreme Court decision **UPEI v. Thomson & Ors.,** PESC 7 was released on February 3, 2012. Taylor J. held that the Panel had made two errors in the findings it made with respect to remedies for Nilsson, Wills and Fell. Both errors were made in the Panel's findings on the duty to mitigate. He referred the matter of mitigation back to the Panel for consideration pursuant to section 3(e) of the ***Judicial Review Act,*** R.S.P.E.I. 1988, Cap. C-35.

12. Following the release of Justice Taylor's decision, Wills, Fell, Collins, Bartmann and O'Rourke entered into settlement agreements with the University.

13. The only outstanding issue before this Panel relates to the consideration of mitigation of Thomy Nilsson's loss of income.

CONSIDERATION OF MITIGATION

A. PRELIMINARY MOTION TO ADMIT NEW EVIDENCE

New Evidence:

14. The University made a motion to introduce new evidence at the hearing before the Panel. It asked the Panel to admit the settlement agreements reached between the University and Wills, Fell, Collins, Bartmann and O'Rourke. Section 28.5 of the ***Human Rights Act*** gives the Panel statutory authority to consider new evidence. It states:

> (1) If there is new evidence available that was not available or that for good reason was not presented before the Human Rights Panel in the first instance, the Panel may, on the application of any party or on its own motion, reconsider any matter considered by it.
>
> (2) For the purposes of a reconsideration pursuant to subsection (1), the Human Rights Panel has all of the same powers and duties as it had on the initial hearing.
>
> (3) Reconsideration of a matter pursuant to subsection (1) shall be commenced not later than 30 days after the Panel's decision in the first instance. 1997(2nd),c.65,s.4.

15. Additionally, the University submitted that paragraphs [44] to [46] of **UPEI v. Thomson & Ors.** *supra* contemplate the introduction of new evidence. Further, the guidance provided to the Panel by Justice Taylor in paragraph [46] does not restrict the Panel to considering only evidence contained on the record. Paragraphs[44] to [46] read as follows:

> [44] The Panel should reconsider the issue of mitigation based on there having been a duty on the Complainants to attempt to mitigate damages by searching inside and outside their present communities, including opportunities at UPEI and throughout the Maritimes. The Panel should consider whether there is evidence that establishes on a balance of probabilities the Complainants or any of them could likely have found employment, whether full time, permanent, part time or temporary, had they searched. As to Professors Nilsson and Wills, the Panel should consider the availability of the sessional lecturer positions and determine how many, if any, of those positions each of the Professors might have been able to get.

[45] Unlike wrongful dismissal cases, the Complainants are not seeking new permanent employment. Rather, they are looking for interim employment to tide them over while they fight their cases. This necessarily means that part time or temporary assignments, and related but not identical work, should all be considered. It would make no sense to restrict the search to full time positions matching their previous work in qualifications, duties and pay.

[46] Pursuant to section 3(e) of the ***Judicial Review Act***, I refer the matter of mitigation back to the Panel for further consideration in accordance with the finding in this decision of errors by the Panel, together with the following guidelines:

> a. The Panel should consider whether there is evidence the Complainants could have gotten jobs off-Island, whether temporary, part time or fulltime. In doing so, the Panel should consider the Complainants individually.
>
> b. The Panel should consider whether there is evidence the Complainants could have gotten jobs in Prince Edward Island. In that regard, the Panel should consider the sessional lecturer positions at the University and the fact Professors Nilsson and Wills, as retirees, had preferred status under the agreement. I respect the Panel's assessment that the assertion the Professors could have earned $22,000 annually is speculative, but the question is whether the University has proven the likelihood of any amount of annual earnings.
>
> c. The Panel should consider whether Dr. Wills' continued work on the study which he did as part of his University employment, for which he may have gotten a grant had he applied, has satisfied his duty to mitigate.

16. The University proposed that a panel reconsidering an issue at the direction of a court on judicial review is acting at the direction of the court. Reference was made to MacAulay and Sprague ***Practice and Procedure Before Administrative Tribunals***, loose-leaf (Toronto: Carswell) 27A.5 at 27A- 55] for comment on the reconsideration authority of an agency at the direction of a court on judicial review. The commentary as cited in **UPEI v. Thomson & Ors.** *supra,* reads in part:

> .... the court will have quashed the original decision and the agency is not technically exercising it's own authority to reconsider. There appears to be no prohibition on an agency exercising its reconsideration authority to reconsider a decision which itself has been arrived at as a result of a matter of a matter being referred back to the agency as a result of a judicial review.

17. Thus, asserted the University, the powers of a tribunal reconsidering an issue as a result of direction from a court on judicial review, combined with section 28.5 of the ***Human Rights Act,*** would permit the Panel to allow introduction of the five settlements as new evidence in this hearing.

18. Counsel for the Complainant Thomy Nilsson asserted that in **UPEI v. Thomson & Ors.,** Justice Taylor found errors only with respect to mitigation. The errors were on the face of the hearing record before him on review. His referral of the matter back to the Panel for further consideration had a very narrow focus. To admit new evidence would fly in the face of the directions provided in paragraph [46] of Justice Taylor's decision.

19. Furthermore, it was submitted that subsection (3) of section 28.5 of the ***Human Rights Act*** is a limiting section. It would not allow the introduction of the above-noted new evidence in the present hearing. Although the Panel may reconsider a matter if new evidence meeting the criteria in subsection 28.5 (1) becomes available, such reconsideration shall be requested not later than 30 days after the initial decision was made.

Relevance of the new evidence:

20. The University argued that the new evidence it sought to introduce was relevant to the issue before the Panel. The complaints of Wills, Fell, Bartmann, Collins and O'Rourke had all been resolved prior to the present hearing. In its motion to admit the new evidence, the University asserted that the settlements agreed to by these five Complainants would be the best evidence to assist the Panel. The five Complainants who settled would be in the best position to address what was a

reasonable deduction for failure to mitigate from damages awarded to Thomy Nilsson. The settlements would provide guidance as to how similarly-situated complainants agreed to apply the principles of mitigation. If the settlements were admitted as new evidence, they would provide a context for the evidence on record from the original hearing.

21. The relevance of evidence had been considered in **Bartmann et al v. University of Prince Edward Island**, *supra*, at paragraph [40] as follows:

> This issue before the Panel . . . is whether the information sought by the University bears any relevance to a fact or issue to be determined by the Panel. Evidence is relevant if it pertains to a fact or issue to be determined during the course of the proceeding, and if it serves the purpose of moving the proceeding forward. The evidence must assist in some way the process of proving or disproving a certain fact or situation.

22. The University also noted that the Panel is not strictly bound by the rules respecting evidence in civil proceedings, as stated in **Bartmann** *supra* at paragraph [41]. The University urged the Panel to admit the new evidence, and then determine weight.

23. Counsel for Thomy Nilsson noted that the guidelines provided in paragraph 46 (a) and (b) of **UPEI v. Thomson & Ors.** *supra* required the Panel to consider the Complainants individually as to whether there "is evidence" the Complainants could have obtained employment off-Island, and on Prince Edward Island. Subsequent settlements reached by the other Complainants were not relevant in determining whether Thomy Nilsson could have gotten jobs off-Island, or on Prince Edward Island, including sessional lecturer positions at the University. To admit the settlements would be a mischief. It was argued that the Panel was bound to look only at evidence contained in the record of the original proceeding.

24. Thomy Nilsson's complaint was filed in 2005. The remaining complaints were filed in 2005, 2006 and 2007. The settlement agreements were entered into after February 3, 2012. Counsel for Nilsson suggested that litigation fatigue and other unknown factors could have had an impact on the choices of the Complainants who

settled. The agreements would not assist in an individual consideration of Thomy Nilsson as directed by the court on judicial review. The Panel should not admit the settlements.

Decision on the Preliminary Issue:

25. The Panel has carefully considered the rules of evidence as generally applied to tribunals. It is also cognizant of the need for tribunals to proceed according to the rules of natural justice and procedural fairness.

26. The Panel finds that the direction and guidelines provided by Justice Taylor in paragraphs [44] to [46] of his decision refer the Panel to reconsider mitigation by examination of the record. The Panel has also considered ***Ayangma v. PEI Eastern School Board***, [2008] PEIJ No. 31 (PESCAD) at paragraph [31]. Pursuant to the ***Judicial Review Act,*** the applications judge at judicial review is required to review the decision of a panel based on the record that was before it. The Court of Appeal in paragraph [87] referred the Ayangma matter back to the Panel:

> We refer this issue back to the Panel with the direction to assess ..... on the evidence that the appellant has placed before the Panel.

The Panel finds the ***Ayangma*** case lends support to the Panel's decision to be bound by the record that was before Justice Taylor during its consideration of the case at hand.

27. It is settled law that the Panel is not bound by the formal rules of evidence. Additionally, the pertinent section 28.2(2) of the ***Human Rights Act*** reads:

> (2) Evidence may be given before a Human Rights Panel in any manner that the Panel considers appropriate, and the Panel is not bound by the rules of law respecting evidence in civil proceedings.

28. That being said, a panel must be acutely aware that rules of evidence exist for a reason. Evidence must be relevant. It must logically establish some fact the tribunal needs in order to make a decision. Unless the evidence would be crucial to the decision, it could possibly be unfair to

admit it. New evidence in the form of the five settlements would not be relevant to making a determination as to whether Thomy Nilsson as an individual could have gotten jobs off-Island. The same reasoning applies to consideration of the question whether he could have gotten jobs in Prince Edward Island. The University has failed to satisfy the Panel that the settlements would be relevant to any determination made within the parameters of para. [46] of the decision on judicial review.

29. While section 28.5(1) of the ***Human Rights Act*** states that the Panel "*may*" reconsider any matter considered by it, the new evidence must first meet the threshold requirements of the subsection. Subsection (3) notes that any reconsideration of a matter pursuant to subsection (1) "*shall*" be commenced not later than 30 days after the Panel's decision in the first instance. In statutory interpretation, the word "*may*" is generally deemed to be permissive, while the word "*shall*" is deemed to be mandatory. Accordingly the Panel finds that the new evidence the University seeks to introduce is barred by section 28.5(3).

30. In summary, the Panel denies the University's motion to admit the new evidence. The Panel finds that Justice Taylor's referral to the Panel for further consideration pursuant to the ***Judicial Review Act*** *supra* directs the Panel to consider the matter based on the original record of proceedings. In any event, section 28.5 (3) of the ***Human Rights Act*** *supra* dictates that the application to admit new evidence is out of time.

B. REVIEW OF EVIDENCE ON THE RECORD

31. In giving further consideration to the matter of mitigation with respect to Thomy Nilsson, the Panel is bound by the directions in paragraphs [44] to [46] of **UPEI v. Thomson & Ors.** *supra*. The Panel is also attentive to the decision as contained in paragraphs [17] to [41], and in particular to the Panel's errors as identified in paragraph [30].

The Law on Mitigation

32. The leading case on a plaintiff's duty to mitigate is ***Red Deer College v. Michaels*** [1976] 2 S.C.R. 324. The court held that a plaintiff ought to

be put in as good a position as he or she would have been if there had been proper performance of the contract by the defendant. However, there is no obligation on the defendant to compensate a plaintiff for avoidable losses. The case states at page 331:

> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.
>
> He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

33. Further, at pages 331 and 332, the court cites from *Williston on Contracts,* with respect to avoidable consequences, and the burden of proof, as follows:

> The rule of avoidable consequences here finds frequent application. The consequence of this injury is the failure of the employee to receive the pay which he was promised but, on the other hand, his time is left at his own disposal. If the employee unavoidably remains idle the loss of his pay is actually suffered without deduction. If, however, the employee can obtain other employment, he can avoid part at least of these damages.
>
> It seems to be the generally accepted rule that the burden of proof is on the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities, and that in the absence of such proof the plaintiff is entitled to recover the salary fixed by the contract.

34. The court went on to note that *Cheshire and Fifoot on Contracts* had expressed the position more tersely, and quoted from the text as follows:

> But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

35. In ***Ayangma*** *supra,* the Court of Appeal looked at mitigation in the context of human rights decisions. Paragraph [74]states:

> [74] As the authors point out in **The Law Of Human Rights In Canada** at p 16-34.1, many human rights tribunals have held that complainants are obliged to mitigate their damages for loss of income by seeking other employment. As Belzil J. stated in **Fort McMurray Catholic Board of Education v. Alberta Human Rights and Citizenship Commission, supra** at para. 31: "The existence of discrimination does not trump the legal obligation to mitigate damages"(emphasis added). He goes on to state at para. 32 that the decision of the Supreme Court of Canada in **Red Deer College v. Michaels**, [1976] 2 S.C.R. 324 is the authority for the general principle of law that the onus is on the paying party to prove the victim of the discrimination did not mitigate his or her loss.

Evidence on the Record of Off-Island Jobs

36. At paragraph [23] of **PEI v. Thomson & Ors.**, Justice Taylor describes the job Thomy Nilsson applied for off-Island as follows:

> . . . a job he could do online or by mail – a part time job reviewing research grants that would require no relocation. He was not successful in his application, he made no other applications, and did no other work.

37. Thomy Nilsson's testimony on the record, at pages 58 and 59 of the Transcript (October 13, 2009), indicates that in December of 2008 he did apply for a job with the National Institute of Health of the United States in Bethesda, Maryland. There was no evidence on the record to provide any particulars about the position. His application passed the initial review, but he was not offered the position. Counsel for Thomy Nilsson commented, in response to a request for clarification from the Panel, that in fact the position in Maryland was a full time one which, had he been successful, would have required Thomy Nilsson to relocate. The University did not dispute the comment.

Evidence on the Record of Jobs in Prince Edward Island

38. When Thomy Nilsson was asked on cross examination at the initial hearing why he made no other application for alternate employment,

other than for the position in Bethesda Maryland, he responded at page 59 of the Transcript in part as follows:

> There were certainly no other opportunities for jobs on Prince Edward Island that would be suitable, so I waited for a while.

39. On page 86 of the Transcript Thomy Nilsson was asked in cross examination by the University if he had applied for any sessional teaching contracts at the University since his retirement. He answered:

> No.

At page 101 of the Transcript when he was asked in redirect examination if there was a reason he had not applied, he testified:

> . . . . why should I go back and teach for them for a fraction of what they had been paying for me to teach those same courses. I mean, it's a matter of principle, in a sense, that if your employer's going to mistreat you, do you turn around and do them, you know, a favour.

40. The Transcript indicates at page 39 that in October of 2005 Thomy Nilsson was applying for a National Science and Engineering Research Council grant to continue some of his research. At the time he was 64 years of age, but would be turning 65 on October 26, 2005. His department Chair advised him that he would not approve the grant application. Since Thomy Nilsson would have to retire at the end of that academic year, he would no longer have access to the laboratories he needed to carry on with his research. The refusal to approve his grant application because he would be mandatorily retired was the initial basis for Thomy Nilsson filing his complaint with the Human Rights Commission on October 14, 2005.

41. Thomy Nilsson was born on October 26, 1940. The University's mandatory retirement policy as stated in Article (b) 7.2 of the Collective Agreement in force held that the retirement date for a person whose birth date then *"falls between January 1 and June 30, shall be July 1, following his or her 65th birthday"* and the retirement date for a person whose birthdate *"falls between July 1 and December 31, shall be January 1, following his or her 65th birthday"* (transcript pages 88-89, and page

113). The Panel notes that the official date for Thomy Nilsson's mandatory retirement was therefore January 1, 2006.

42. The mandatory retirement date for Richard Wills was January 1, 2006 as well, since his 65th birthday fell between July 1 and December 31, 2005. Not all professors subject to mandatory retirement were barred from continuing to teach ongoing courses after their mandatory retirement dates. Some were allowed to teach until the end of the academic year, and others were not. Richard Wills was not allowed to continue to teach his course for the ongoing 2006 academic year, even though the Chair of his department requested that he be allowed to do so. As Richard Wills testified on the record at page 113 of the Transcript:

> *"....it was a very capricious kind of thing, you know".*

43. The University did offer to have Thomy Nilsson continue to teach his courses after his mandatory retirement date. He taught until the end of June 2006, at which time his work at the University concluded. He earned $48,574 for the half year. The income was reported in his income tax return for the year 2006.

44. The Collective Agreement was entered as documentary evidence at the initial hearing, thus forming a part of the record. The agreement at page 110 contains the heading **G-1 SESSIONAL INSTRUCTORS.** Page 110 and subsequent pages to page 116 give detailed information on the terms and conditions of employment applicable to sessional instructors. The agreement describes a process with many steps. The Panel notes that if jobs were to become available in particular areas, seniority of equally qualified persons on the sessional roster would be considered in assigning instructors.

Analysis and Findings

45. After his mandatory retirement date on January 1, 2005, the University allowed Thomy Nilsson an opportunity to continue to teach his courses until June 30, 2006. He took advantage of the opportunity, and earned$48,574. In determining damages for its original decision on remedies, the Panel reduced his lost income for the year by that amount.

Had the Panel considered mitigation in the original decision, the earnings would not have been deducted from lost income, but would have been viewed as mitigation. The earnings would have equaled 12.78% of his total lost income between January 2, 2006 and June 4, 2010.

46. The evidence on the record shows that not all professors subject to mandatory retirement were given an opportunity to teach for an additional six months. The work was offered to Thomy Nilsson, and he took it. Although it cannot be said that he was actively seeking to mitigate his losses, he effectively did so. The Panel finds that when he agreed to continue to teach his courses for six months beyond his mandatory retirement date, he mitigated damages for the year 2006.

47. The University asserted that a retired professor could have earned $22,000 annually had he instructed up to five sessional courses. The Court on judicial review respected the Panel's finding that a determination of assured annual earnings of $22,000 would be speculative. In an effort to quantify the impact of mitigation on damages in the case at hand, the Panel herein considered the availability of sessional lecturer positions and how many, if any, of those positions Thomy Nilsson might have been able to get. There was no direct evidence on the record of any sessional lecturer positions available to Nilsson. The University did not offer any sessional lecturer positions to him, nor was there direct evidence of any available positions for which he could have applied.

48. On the other hand, the Panel finds that there was a duty on Thomy Nilsson to attempt to mitigate damages by searching for employment opportunities at UPEI and throughout the Maritimes. There is nothing on the record to show any attempt by him to do so. There is no evidence to show that any amount of damages was unavoidable. In fact, his testimony was clear that as a matter of principle, he would have refused to teach as a sessional lecturer at the University. Had he asked to be placed on the roster for sessional lecturers, he may or may not have obtained work, but his effort would have satisfied to some extent the duty to try.

49. The Panel finds that by refusing to consider sessional lecturer positions at the University, Thomy Nilsson did not take reasonable steps to avoid some measure of loss of income. Although the University bore the burden of proving a failure to mitigate damages, Thomy Nilsson's admission that he would not teach sessional courses at the University indicates a failure to mitigate. The quantum of the losses suffered by him is thus impacted.

50. Once a failure to mitigate has been shown, the University would need to show that had he made an effort to obtain work as a sessional lecturer, Thomy Nilsson would on a balance of probabilities have enjoyed some measure of success. There is evidence on the record to support that sessional lecturers could have taught up to five courses each year. It can be inferred from the evidence that there was a reasonable probability that Thomy Nilsson would have been able, at least in part, to lecture as a sessional instructor between July 1, 2006 and June 4, 2010. He was an experienced and highly qualified professor, and would have been afforded some support by the Collective Agreement in place had a suitable opening become available for him.

51. There is no direct or inferential evidence on the record to establish on the balance of probabilities that Thomy Nilsson could have found related though not identical employment elsewhere throughout the Maritimes, whether full time, permanent, part time or temporary, had he searched.

52. When Thomy Nilsson applied for a position with the National institute of Health of the United States in Bethesda, Maryland he showed an effort to mitigate damages. He was not successful, but he tried.

Conclusion

53. Thomy Nilsson partially mitigated damages by working at the University in 2006 beyond his mandatory retirement date. He also applied in 2008 for one position in the United States, but was not successful. However, he did not take all reasonable steps to avoid some unreasonable accumulation of lost income.

54. Accordingly the Panel finds that damages awarded for Thomy Nilsson are to be reduced by 10%, or $33,148.70. The amended amount to be awarded for total lost income is $298,338.30.

ORDER:

1. Pursuant to section 28.4(1)(b)(iv) of the ***Human Rights Act***, the Panel orders that the University pay to the Complainant Thomy Nilsson $298,338.30 for loss of income.

2. Pursuant to section 28.4(1)(b)(v) of the ***Act,*** the Panel orders the University to pay prejudgment interest on the loss of income award accruing from the Complainant's date of termination to the date of this judgment, and post-judgment interest on the award until paid.

Dated at Charlottetown, in the Province of Prince Edward Island,
this 25th day of June 2013.

Signed: Lou Ann Thomson
Lou Ann Thomson, Commissioner