HUMAN RIGHTS COMMITTEE

Bhinder v. Canada

Communication No. 208/1986

9 November 1989

VIEWS

Submitted by: Karnel Singh Bhinder

Alleged victim: The author

State party concerned: Canada

Date of communication: 9 June 1986

Date of decision On admissibility: 25 October 1988

The Human Rights Committee established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 9 November 1989,

Having concluded its consideration of communication No. 208/1986, submitted to the Committee by Mr. Karnel Singh Bhinder under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

Views under article 5, paragraph 4, Of the Optional Protocol

1. The author of the communication, dated 9 June 1986, is Karnel Singh Bhinder, a naturalized Canadian citizen who was born in India in 1942 and emigrated to Canada in 1974. He claims to be a victim of a violation by Canada of article 18 of the International Covenant on Civil and Political Rights. A Sikh by religion, he wears a turban in his daily life and refuses to wear safety headgear during his work. This resulted in the termination of his

labour contract.

The facts as submitted

2.1 In April 1974, the author was employed by the Canadian National Railway Company (CNR) as a maintenance electrician on the night shift at the Toronto coach yard.

2.2 CNR is a Crown Corporation; its shares are owned by the Crown and it is accountable to the Canadian Parliament for the conduct of its affairs.

2.3 With effect of 1 December 1978, the company decreed that the Toronto coach yard would be a "hard hat area" in which all employees were required to wear safety headgear.

2.4 At the time, the relevant Canadian legislation in this matter read as follows:

(a) Canada Labour Code, Chapter L-l, Section 81, subsection (2):

Every person operating or carrying on a federal work, undertaking or business shall adopt and carry out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury (...).

(b) Section 82:

Every person employed upon or in connection with the operation of any federal work, undertaking or business shall, in the course of his employment,

(a) take all reasonable and necessary precautions to ensure his own safety and the safety of his fellow employees; and

(b) at all appropriate times use such devices and wear such articles of clothing or equipment as are intended for his protection and furnished to him by his employer, or required pursuant to this Part to be used or worn by him.

(c) Section 83, subsection (1):

The fact that an employer or employee has complied with or failed to comply with any of the provisions of this Part or the regulations shall not be construed to affect any right of an employee to compensation under any statute relating to compensation for employment injury, or to affect any liability or obligation of any employer or employee under any such statute.

(d) Chapter 1007 (Canada Protective Clothing and Equipment Regulations), Section 3:

Where

(a) it is not reasonably practicable to eliminate an employment danger or to control the

danger within safe limits; and

(b) the wearing or use by an employee of personal protective equipment will prevent an injury or significantly lessen the severity of an injury, every employer shall ensure that each employee who is exposed to that danger wears or uses that equipment (...).

(e) Chapter 1007, Section S, subsection (1):

No employee shall commence a work assignment or enter a work area where any kind of personal protective equipment is required by these Regulations to be worn or used unless

(a) he is wearing or using that kind of personal protective equipment in the manner prescribed in these Regulations (...).

(f) Chapter 998 (Canada Electrical Safety Regulations), Section 17:

No employer shall permit an employee to work, and no employee shall work, on an electrical facility

(a) that has not more than 250 volts (...), where there is a possibility of a dangerous electric shock, or

(b) that has more than 250 volts, but not more than 5.200 volts (...), or not more than 3.000 volts (...).

unless that employee uses such insulated protective clothing and equipment as is necessary, in accordance with good electrical safety practice or as required by a safety officer, to protect him from injury during the performance of the work.

(g) Section 18:

No employer shall permit an employee to work, and no employee shall work, on an electrical facility that, in accordance with good electrical safety practice, requires protective headwear to be worn unless he is wearing protective headwear (...).

2.5 During the five years prior to the introduction of the hard hat requirement, 20 head injuries were sustained among the Toronto coach yard's workforce of 487, 52 of whom were employed as electricians.

2.6 The author's work consisted of the nightly inspection of the undercarriage of trains from a pit located between the rails, as well as maintenance work inside and outside the train, i.e. on the engine.

2.7 Since it is a fundamental tenet of Sikh religion that men's headwear should consist exclusively of a turban, the author refused to comply with the new hard hat regulations. He also refused a transfer to any other post. His employment was consequently terminated by

the CNR on 6 December 1978.

2.8 On 7 December 1978, the author filed a complaint with the Canadian Human Rights Commission, alleging that the CNR had discriminated against him on the basis of his religion. In its decision of 31 August 1981, a Human Rights Tribunal appointed pursuant to the Canadian Human Rights Act made inter alia the following findings:

(a) "there is no evidence that other employees or the public will be affected if Mr. Bhinder were to continue working without a hard hat" (paragraph 5167);

(b) "(...) (the author) will be in greater danger if he does not conform with the hard hat policy. There is no doubt that Mr. Bhinder's turban is inferior to a hard hat in its capacity to protect against impact and electrical shock (...) There is a real increase in risk if Mr. Bhinder does not wear his hard hat, even though that increase in risk may be very small (paragraph 5177);

(c) "(...) (CNR) pays compensation directly to its injured employees, and as such, if an employee's risk of injury is increased, the likelihood of receiving compensation correspondingly increases, and as a result the employer's liability to pay compensation consequentially increases" (paragraph 5332 (37)).

2.9 In respect of the application of the hard hat rule to Mr. Bhinder, the Tribunal found a vlolation of the Canadian Human Rights Act on the grounds that the hard hat regulation "has the effect of denying a practising Sikh ... employment with the Respondent because of the Complainant's religion" (paragraph 5332 (3)). This finding was based on the following considerations:

(a) An employment policy may be discriminatory within the terms of the Canadian Human Rights Act, even if the employer has no intention to discriminate (paragraph 5332 (3)).

(b) implicit in the defense of bona fide occupational requirement in the Canadian Human Rights Act is the requirement that employers make such accommodation to the religious beliefs of their employees as will not cause them undue hardship (paragraph 5332 (29-32)).

2.10 The Tribunal acknowledged that the "implications of an exemption made for Mr. Bhinder is that all Sikhs are exempt from hard hat regulations in all industries to which the Human Rights Act applies (...)", and that "the effect may be an increase in the overall accident rate in the affected industries for the purpose of workers' compensation" (paragraph 5332 (36)). It held, however, that such added risk was to be regarded as inherent to the employment and consequently to be borne by the employer (paragraph 5332 (38)).

2.11 The CNR appealed and on 13 April 1983 the Federal Court of Appeal reversed the decision of the Human Rights Tribunal on the grounds that the Canadian Human Rights Charter prohibited only direct and intentional discrimination and that it did not encompass the concept of reasonable accommodation.

2.12 The author's appeal to the Supreme Court of Canada was dismissed on 17 December 1985. Although the Supreme Court held that also unintentional or indirect discrimination was prohibited by the Canadian Human Rights Act, it concluded that the policy of the CNR was reasonable and based on safety considerations, and therefore constituted a bona fide occupational requirement. The Court also denied a duty of the employer to "reasonable accommodation" under the Act.

The complaint

3. The author claims that his right to manifest his religious beliefs under article 18, paragraph 1, of the Covenant has been restricted by virtue of the enforcement of the hard hat regulations, and that this limitation does not meet the requirements of article 18, paragraph 3. In particular, he 'argues that the limitation was not necessary to protect public safety, since any safety risk ensuing from his refusal to wear safety headgear was confined to himself.

The State party's comments and Observation

4.1 The State party submits that the author was not discharged from his employment because of his religion as such hut rather because of his refusal to wear a hard hat, and contends that a neutral legal requirement, imposed for legitimate reasons and applied to all members of the relevant work force without aiming at any religious group, cannot violate the right defined in article 18, paragraph 1, of the Covenant. In this respect, it refers to the Human Rights Committee's decision in communication No. 185/1984 (L.T.K.v. Finland), where the Committee observed, that "(...) (the author) was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service".

4.2 The State party also invokes its obligation under article 7, paragraph (b), of the International Covenant on Economic, Social and Cultural Rights, to ensure "safe and healthy working conditions", and claims that the interpretation of article 18 of the Covenant should not interfere with the implementation of the ICESCR through uniformly applied safety requirements.

4.3 The State party argues that it was open to the author to avoid the operation of the hard hat requirement by seeking other employment, and refers to a decision of the European Commission of Human Rights (Ahmad v. UK, [1982] 4 E.H.R.R. 126, paragraphs 11, 13) which, in assessing the scope of the freedom of religion as guaranteed by article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, had observed that - in addition to the limitations contained in that article - special contractual obligations could influence the exercise of the right to freedom of religion, and that the applicant remained free to resign from his employment if he considered it to be incompatible with his religious duties.

4.4 In the State party's opinion, article 18 of the Covenant has not been violated, since the hard hat regulation represented a reasonable and objective criterion, in no way incompatible with article 26 of the Covenant.

4.5 The State party further considers that article 18 does not impose a duty of "reasonable accommodation", that the concept of freedom of religion only comprises freedom from State interference but no positive obligation for States parties to provide special assistance to grant waivers to members of religious groups which would enable them to practice their religion.

4.6 The State party further submits that if a prima facie infringement of article 18, paragraph 1, of the Covenant were to be found in the circumstances of Mr. Bhinder's case, such limitation was justified under paragraph 3. The State party argues that the scope of this provision comprises also the protection of those persons subject to the limiting regulations.

Proceedings before the Committee

5.1 On the basis of the information before it, the Committee concluded that all conditions for declaring the communication admissible were met, including the requirement of exhaustion of domestic remedies under article 5, paragraph 2, of the Optional Protocol.

5.2 On 25 October 1988, the Human Rights Committee declared the communication admissible.

6.1 The Committee notes that in the case under consideration legislation which, on the face of it, is neutral in that it applies to all persons without distinction, is said to operate in fact in a way which discriminates against persons of the Sikh religion. The author has claimed a violation of article 18 of the Covenant. The Committee has also examined the issue in relation to article 26 of the Covenant.

6.2 Whether one approaches the issue from the perspective of article 18 or article 26, in the view of the Committee the same conclusion must be reached. If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3. If the requirement that a hard hat be worn is seen as a discrimination de facto against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the 0ptional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts which have been placed before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.