

T.D. 12/93  
Decision rendered on July 27, 1993

CANADIAN HUMAN RIGHTS ACT  
(R.S.C., 1985, c. H-6 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

ERIC SCHULTZ

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL: Stanley Sadinsky Q.C.  
Chairman

APPEARANCES: Odette Lalumiere, Counsel for the Commission  
and assisting the Complainant

Chris Wartman, Counsel for the Respondent

DATES AND LOCATION

OF HEARING: May 4 and 5, 1993,  
Toronto, Ontario

THE APPOINTMENT

Pursuant to subsection 49.(1.1) of the Canadian Human Rights Act, by Appointment dated July 29, 1992, I was appointed to inquire into the complaint of Eric Schultz dated February 5, 1988, against Canada Post Corporation to determine whether the action complained of constituted a discriminatory practice on the ground of national or ethnic origin in a matter related to employment under section 7 of the Canadian Human Rights Act.

## THE COMPLAINT

By written complaint dated February 5, 1988, (Exhibit HR -1) the Complainant alleged that he had been discriminated against by the Respondent in refusing to pass him on a Class D driver's examination on the basis of his national or ethnic origin (German) in contravention of the Act. He also alleged that the Respondent had engaged in a discriminatory practice in passing a disproportionate number of driver candidates with British names and backgrounds as opposed to others.

## THE FACTS

Eric Schultz was born and grew up in Alberta. His ancestry is German. During most of his working life, Mr. Schultz has been employed in positions that have involved driving a variety of vehicles including firetrucks, buses, automobiles and commercial trucks of various sizes and descriptions.

Mr. Schultz was first employed by the Respondent from September, 1979, to January, 1981, as a driver of 5 ton shuttle trucks. He was employed again by the Respondent from December, 1986, until April, 1990, driving primarily light vehicles. In January, 1987, he took a driving test which would qualify him to drive heavier equipment notably 5 ton shuttle trucks, the type of vehicle that he had previously driven from 1979 to 1981. Mr. Schultz failed his test and his complaint is with respect to this test taken on January 5, 1987.

Employees of the Respondent who perform driving duties in Ontario must be licensed to drive by the Ministry of Transportation of Ontario. In addition, however, they must also pass an internal driving test administered by other full time employees. These internal tests may be more stringent than the Ministry's tests because the Respondent is self-insured and must be satisfied that its drivers are competent to operate its various vehicles. On January 5, 1987, Mr. Schultz was attempting to acquire what is known as a Class D licence. With this licence, he would have been able to drive heavier equipment and because of the needs of the

Respondent at the time, Mr. Schultz alleges that he would have been able to earn more money.

On January 5, 1987, Mr. Schultz went for his driving test at the Respondent's facilities at 393 Front Street in the City of Toronto. He was to be tested by Bill Weatherup, a driver training examiner employed by the Respondent in that capacity since 1975. When Mr. Schultz met Mr. Weatherup, Mr. Weatherup was with one Don Ward, who was also a driver training examiner with the Respondent. Mr. Schultz had never met Mr. Weatherup before but he did know Mr. Ward. During his earlier employment with the Respondent, Mr. Ward had been one of Mr. Schultz's supervisors and the two had worked together on a day to day basis. Mr. Schultz gave

2

evidence that he got along well with Mr. Ward and Mr. Ward gave evidence to the same effect indicating that he never had any problems with Mr. Schultz. In fact, Mr. Ward had tested Mr. Schultz for his Class "G" licence in 1979 and Mr. Schultz had passed that test. However, Mr. Schultz also said that Mr. Ward and some other employees of the Respondent at the time referred to him as "Eric the Hun". Mr. Ward has denied in evidence ever using that term and indicated that he never heard it used.

Immediately after Mr. Schultz arrived for his driving test, Mr. Ward left and Mr. Weatherup proceeded to obtain information from Mr. Schultz prior to proceeding with the road test. The information included Mr. Schultz's S.I.N. number. The information was recorded by Mr. Weatherup on a form headed Record of Driver Examination (Exhibit HR-3). Mr. Schultz gave evidence that during this time, Mr. Weatherup commented on Mr. Schultz's western Canadian background having deduced this fact from the S.I.N. number. Mr. Schultz also indicated that after he signed the form, Mr. Weatherup made the following comment: "Schultz, boy, that's a good name".

Mr. Schultz then proceeded to take the driving test with Mr. Weatherup. Mr. Schultz described Mr. Weatherup's demeanour as being hostile. At one point, Mr. Weatherup said that Mr. Schultz "had a heavy foot", apparently meaning that he drove too fast. At the end of the test when they returned to the Respondent's yard, Mr. Schultz was asked to back the vehicle into a narrow parking spot. Mr. Schultz said that he objected but Mr. Weatherup told him to do it anyway. After backing the vehicle into the spot successfully, Mr. Schultz said that Mr. Weatherup had to get out of the vehicle on the driver's side because the passenger door was too close to the nearest parked vehicle.

Mr. Weatherup then advised Mr. Schultz that he had failed the test. Exhibit HR-3 indicates that Mr. Schultz had failed to properly check the vehicle's air system before commencing to drive, that in backing up the vehicle he demonstrated "uncertain steering", that he had erred in choice of driving lanes and, finally, that he had driven too fast. Mr. Schultz felt that he had passed the test.

Finally, Mr. Schultz gave evidence that as he left the Respondent's premises following the test, he saw Mr. Weatherup with Mr. Ward from a distance. He said that both were laughing and waved good-bye to him with grins on their faces.

Mr. Weatherup gave evidence that he had no recollection whatsoever of the test on January 5, 1987. He said that he performed approximately 8 road tests a day for a period of some 12 years as part of his job and he could not remember this one at all. He described his normal practices during road tests and some of these "normal practices" appeared to differ from what Mr. Schultz had described. Mr. Ward also gave evidence that he had no recollection of the day or circumstances in question. Mr. Weatherup described Mr. Ward as a close friend while Mr. Ward referred to their relationship in more distant terms.

On the basis of the above, Mr. Schultz alleges that Mr. Ward influenced Mr. Weatherup to fail him on his driving test. He reasoned that Mr. Ward had shown previous hostility towards him by calling him "Eric the Hun" and this, together with the way in which he says he was treated by Mr. Weatherup prior to and during the driving test, constituted acts of hostility which led to discrimination against him. Most notably, he

3

suggests that the statement by Mr. Weatherup regarding his name ("Schultz, boy, that's a good name") taken together with Mr. Ward's prior conduct demonstrate that a conspiracy existed between the two men to fail Mr. Schultz because of his German background.

Mr. Schultz also alleges that the Respondent made a discriminatory practice of passing a disproportionate number of driver candidates who had British names and backgrounds and that such practice constituted discrimination. He submitted in evidence seniority lists of employees of the Respondent as of 1989 (Exhibit HR-4) which, he says, substantiate this allegation. In spite of efforts to secure similar lists as of 1987, Mr. Schultz was unable to do so.

Mr. Schultz did not apply to take a second driving test although such an opportunity was available to him. A subsequent driving test would have been administered by a different examiner. In addition, he did not raise this matter with anyone in a senior position at Canada Post nor did he grieve under the collective agreement that existed between the Respondent and the union. Rather, he raised the matter with the Human Rights Commission in September, 1987, some 8 months after the alleged incident occurred. He said that he did not do so earlier because as a casual employee, he feared that he would get less work and that it would prejudice his chances of eventually securing full time/part time employment, an explanation that I found to be reasonable.

## CONCLUSIONS ON THE FACTS

I am prepared to accept Mr. Schultz's evidence as to what actually happened on January 5, 1987. Mr. Schultz has a clear recollection of the events in question while both Mr. Weatherup and Mr. Ward have no recollection whatsoever. Where Mr. Schultz's evidence conflicts with that of Mr. Ward as to whether the name "Eric the Hun" was ever used in reference to Mr. Schultz, I accept the evidence of Mr. Schultz. However, that does not settle this matter because the issue remains as to whether these incidents taken in context, constitute acts of discrimination and particularly, whether Mr. Schultz failed his driving test due to such acts. Mr. Schultz interprets the conduct of Messrs. Weatherup and Ward as constituting acts of discrimination. He also asks this Tribunal to find that the Respondent is guilty of systemic discrimination in its hiring practices. It remains for me to determine whether his interpretation is correct.

## THE LAW AND ITS APPLICATION TO THE FACTS

There is no dispute between the parties as to the relevant law that applies in this case. The onus rests with the Complainant to establish a prima facie case of discrimination on a balance of probabilities. If the Complainant satisfies this onus, then the onus shifts to the Respondent to justify its conduct. Ontario Human Rights Commission et al. v. Borough of Etobicoke, [1982] S.C.R. S.C.R. 202; Holden et al. v. C.N.R., 14 C.H.R.R. D/12 This case turns entirely on whether the Complainant has satisfied the onus that rests with him. In order to decide whether the Complainant has satisfied the onus, one must look at all of the circumstances of the case. This is especially so in a case such as this where, if there was discrimination, it was covert in nature. This matter turns on issues of credibility and

interpretation of facts and not on an interpretation of the law. I am not satisfied on a balance of probabilities that Mr. Schultz failed his driving test as a result of acts of discrimination. I find it impossible to conclude that a conspiracy existed between Mr. Weatherup and Mr. Ward to fail Mr. Schultz because of his German background. Mr. Ward had a good relationship with Mr. Schultz when they worked together from 1979 to 1981. While Mr. Schultz may have been referred to as "Eric the Hun" from time to time, this did not seem to interfere with the working relationship between them. There was no evidence of the context or circumstances in which such comments were made from which I can conclude that the use of that name indicates derision and hostility rather than friendly and affectionate teasing. There was also no evidence that the use of this term resulted in any acts of discrimination against Mr. Schultz at that time.

After leaving his employment with Canada Post in January, 1981, there was no evidence that Mr. Schultz saw Mr. Ward again until the day of the driving test in January, 1987, some 6 years later. On the evidence adduced before me, I cannot conclude that Mr. Ward harboured ill will for Mr. Schultz for that period of time which prompted him to conspire with Mr. Weatherup to see that Mr. Schultz did not pass his driving test. Mr. Ward was an impressive witness who has risen in the ranks of Canada Post. He did not strike me as a person who would act maliciously and dishonestly in the discharge of his duties and his career pattern does not bear that out.

John Oldroyd, an officer in the National Control Centre of Canada Post in Ottawa, gave evidence with respect to his prior contacts with Mr. Schultz and Mr. Weatherup when he worked as a supervisor in the transportation centre of Canada Post in Toronto in 1987. He described Mr. Schultz as a good employee with a good level of work performance. He described Mr. Weatherup as the most professional and knowledgeable driver trainer and examiner in the employment of Canada Post at the relevant Toronto location. Based on this evidence, I cannot conclude that Mr. Weatherup conspired with Mr. Ward to fail a driver who he, Weatherup had never met simply because Mr. Ward suggested that he do so. Such conduct could place the careers of both Mr. Weatherup and Mr. Ward in jeopardy and their long and successful careers with Canada Post do not suggest that they are men who would likely engage in such conduct.

Mr. Schultz was obviously disappointed that he failed his driving test. He was an experienced driver who had driven similar vehicles before. In my view, he justified his failure by piecing together a few isolated acts which he interpreted as acts of discrimination against him. Instead

of repeating the driving test with a different examiner, he chose to complain to the Human Rights Commission.

While I accept Mr. Schultz's evidence that he was referred to as "Eric the Hun" during his first period of employment with Canada Post and that Mr. Weatherup did comment on his name during his driving test in 1987, I am not satisfied on the evidence that these acts constitute acts of discrimination and there is no causal connection between them and the failure of the driving test by Mr. Schultz. While Mr. Schultz's interpretation is possibly correct, it is not probably correct and accordingly he has failed to satisfy the onus that rests with him in this case. What this case does illustrate, however, is how easy it is for people to take offence with casual and potentially sensitive remarks.

5

However, the making of such remarks does not in itself constitute acts of discrimination. The context and relationship between the remarks and any conduct must be examined.

Counsel for the Respondent referred to two decisions which bear some similarities to this case, viz. *Gaba v. Lincoln County Humane Society*, (1992), 15 C.H.R.R. D/311 and *Nimako v. C.N. Hotels*, (1987), 8 C.H.R.R. D/3985. Both cases involved allegations of discrimination in employment based, in part, on name calling, racial humour and slurs. In the *Gaba* case, there was evidence that a supervisor had referred to Mr. Gaba as "a Filipino" and "a little nip". In the *Nimako* case, the complainant alleged that a supervisor had called him "a nigger" and another supervisor had referred to him as "a fucking black bastard". In both cases, the tribunal in question indicated that the name calling alone was not sufficient to support a finding of discrimination. In *Gaba*, the Board of Inquiry said this at page D/316:

The Commission, quite properly, emphasised the racial comments which had been heard by several witnesses. While I prefer the evidence of the witnesses, and discount Mr. Hampson's denial, I cannot, on the facts before me impose a causal link between such thoughtless, insensitive, inappropriate and hurtful expressions and the choice of an inspector/assistant manager.

The pieces of the jigsaw puzzle must be arranged in such a manner that the picture is complete. The evidence, when circumstantial, in cases such as this

one, in order to succeed must go further than producing several equally consistent results; the second test, above referred to, which is more favourable to the position of the Commission, still requires that the inference of discrimination be "more probable than the other inferences or hypotheses."

The name calling (Eric the Hun) and the reference to the name Schultz ("Schultz, boy, that's a good name") are not nearly as thoughtless, insensitive and hurtful as was the case in both the Gaba and Nimako cases.

More important, however, I do not conclude that in this case, discrimination is "more probable" than any other reasonable inference.

Counsel for the Commission referred me to the case of *Basi v. C.N.R.* (1988), 9 C.H.R.R. D/5029 which dealt with an instance of covert discrimination. The decision emphasized the importance of examining all of the circumstances of a case in order to determine whether acts of discrimination existed. It posited a useful test in vernacular terms, viz. is there a "subtle scent of discrimination" in the circumstances? In this case on the evidence that I have heard, I do not detect a "subtle scent of discrimination".

Finally, the Complainant alleges systemic discrimination in the passing of a disproportionate number of driver candidates who had British names and backgrounds. The only evidence adduced in support of this allegation was the seniority list of employees (Exhibit HR-4). In my view, this evidence falls far short of establishing such discrimination. There was no evidence adduced to indicate the national or ethnic origins of those

6

on the lists nor the percentage of applicant/candidates with British names as opposed to others.

In the result, the complaints herein are dismissed. There will be no order as to costs.

At the opening of the hearing, the parties in a joint submission asked me to deal only with the issue of discrimination and not with remedies. Reluctantly, I agreed and so no evidence was led as to remedies. As it turns out, it will not be necessary for me to hear evidence in this respect.



I wish to thank counsel for their assistance in presenting this matter. I also wish to thank the Complainant for his submissions.

Dated this day of June, 1993.

Stanley Sadinsky, Q.C.