

DECISION RENDERED ON APRIL 15, 1981
TD-3-81

THE CANADIAN HUMAN RIGHTS ACT

BETWEEN:
Nancy Bain
Complainant,
- and -
Air Canada
Respondent.

Before: F. D. Jones, Q.C., appointed a Human Rights Tribunal pursuant to Section 39 of the Act.

Appearances: R. J. Juriansz, representing Canadian Human Rights Commission and Nancy Bain.

R. Patrick Saul, representing Air Canada.
Heard in Vancouver, Canada, on December 3, 1980.

>-

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
- and -
AND IN THE MATTER OF A COMPLAINT BY NANCY BAIN
AGAINST AIR CANADA

INQUIRY TRIBUNAL: F.D. Jones, Esq., Q.C., representing the parties
R. Patrick Saul, Esq., representing Air Canada
Russell Juriansz, Esq., representing the
Human Rights Commission and Nancy Bain

Ms. Nancy Bain's complaint relates to the Family Fare Rate of Air Canada which allows a family (as defined) a reduction in fare of 17% divided between two adult individuals. Ms. Bain alleges that the Family Fare structure as set up by Air Canada contravenes the Canadian Human Rights Act as the reduced fares are available only to the family (as defined) and are not available to two single adults travelling together and, as a result, contravenes Section 3 of the Canadian Human Rights Act in that the differentiation is based on marital status.

The Canadian Human Rights Act reads as follows:

"3. For all purpose of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters relating to employment, physical handicap, are prohibited grounds of discrimination."

Section 5 reads as follows:

"5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

- (a) to deny or to deny access to, any such good, service, facility or accommodation to any individual, or
- (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."

Ms. Bain's complaint centres on her allegation that the Family Fare Plan discriminates against non-married adult individuals and, as such, differentiates adversely to single adults travelling together.

An Agreed Statement of Facts was filed with the Tribunal which was as follows:

1. Air Canada is a company incorporated by Special Act of Parliament for the principal purpose of carrying on business as an international and domestic air carrier.

2. Air Canada has since October, 1953, offered a group fare known as the "Family Fare".

3. In April, 1978 the Family Fare was offered to a group which defined as follows:

- (i) a husband and wife, or
- (ii) a husband and wife and one or more accompanying son(s) or daughter(s), 2 through 21 years of age, or

(iii) either a husband or wife and one or more accompanying son(s) or daughter(s), 2 through 21 years of age.

4. In May, 1979 this group was amended by changing (iii) above to read: (iii) one parent and one or more accompanying (son)s or daughter (s), 2 through 21 years of age.

5. The following definitions apply to this group:

-
- (a) husband or wife means of legal or common law status,
 - (b) a parent includes: step parents, adoptive parents and legal guardians,

(c) son(s) or daughter(s) includes: step-children, legally adopted children, and legally assigned wards.

6. To this group travelling together between points wholly within Canada

Air Canada will charge the following percentage of the applicable one way adult fare.

Head of Family 100%

First accompanying member of family 83%

Additional accompanying member(s) 83%

Additional minor accompanying member(s) 66-2/3%

7. The following definitions apply to this fare:

(1) Head of Family: may mean husband, wife or parent.

(2) First accompanying member: shall be a spouse or if a second spouse is not accompanying the group a son or daughter, 2 through 21 years of age.

(3) Additional accompanying members: shall be a son or daughter, 2 through 21 years of age, when there is a First Accompanying Family member.

8. The Family Fare would not apply to two or more adult persons travelling

together who are not related in the manner set forth above.

9. On April 21, 1978 Nancy Bain filed a complaint with the Canadian Human

Rights Commission alleging that the Family Fare is discriminatory.

10. It is agreed that the applicable section of the Human Rights Act, if

that Act applies to Air Canada, is Section 5(b).

It was also common ground between the parties that Section 5(b) applies to Air Canada in that Air Canada was providing goods, services, facilities or accommodation customarily available to the general public.

Ms. Bain's testimony established that upon learning that Air Canada did not offer a discount fare to two single adults travelling together, she did

not fly Air Canada but used another airline and, in fact, her testimony indicates that she has been avoiding the use of Air Canada when at all possible.

There was a preliminary motion raised by Mr. Saul at the end of Ms. Bain's testimony to the effect that Ms. Bain was not adversely affected because she in fact did not fly Air Canada and therefore Section 5(b) of the

Canadian Human Rights Act does not apply. In my opinion, this objection is

ill-founded. Nowhere in the Canadian Human Rights Act is there a requirement

that the individual complainant must complain about some personal experience

or personal treatment. Under Section 32, an individual may file a complaint where they have reasonable grounds to believe that a person is engaging or has engaged in a discriminatory practice. The complainant does not have to be the victim. This is further substantiated by Section 32(b) which expressly contemplates a complaint being laid by someone other than the individual who is alleged to be the victim of the discriminatory practice.

Mr. Saul's argument was summarized by myself at page 47 of the transcript as follows:

"The Chairman: So you are arguing as to the evidence before this board, in this particular instance, as to no proof of adversity, is that what your argument is?

Mr. Saul: Yes, that is right."

The evidence clearly disclosed that members outside of the family group as defined by Air Canada, do not qualify for the fare reduction. This, in my opinion, clearly establishes an adverse effect, if as a result of its definition of family group, Air Canada is engaging in a discriminatory practice. A careful reading of Section 5(b) clearly contemplates that it is a discriminatory practice to differentiate adversely in relation to any individual if such discrimination is based on one of the prohibitives mentioned in Section 3 of the Canadian Human Rights Act.

In order to capsulize how air fares are set, it is necessary to refer to certain statutory bodies. Section 3 of The National Transportation Act sets out a national transportation policy, The Canadian Transport Commission has broad powers to oversee the operation of the Canadian transportation system, The Canadian Transport Commission has the power to delegate its responsibilities to various committees.

Its responsibilities respecting to aeronautic matters is delegated to the Air Transport Committee. Section 22 of The National Transportation Act sets out the powers and duties and functions of the Canadian Transport Commission. One of the Canadian Transport Commission's powers relates to the Aeronautics Act. The specific duties of the Canadian Transport Commission, as they apply to the Aeronautics Act, are set out in Sections 4 and 24 of The Canadian Transport Act. The Air Transport Committee of the Canadian Transport Commission has authority to regulate Air Canada and in the course of this they supervise the fares and tariffs set by Air Canada. Therefore, in

order
for Air Canada to set a fare or tariff, it submits its proposal to The
Air
Transport Committee which then recommends to The Canadian Transport
Commission the acceptance or rejection or modification of the proposal.
The
Canadian Transport Commission then makes the final decision.

Mr. Saul raised a jurisdictional question. As I understand the essence
of his argument, it was that this Tribunal has no jurisdiction in this
instance in that the only order that the Tribunal could make would be
against
Air Canada and Air Canada does not have the power to comply with such
an

order insofar as it relates to fares, due to the fact that ultimately
it is
The Canadian Transport Commission that sets the fares. Therefore any
order
given by this Tribunal against Air Canada would be ineffectual and
therefore
this Tribunal lacks jurisdiction.

The word "jurisdiction" is a slippery one. In *Anisminic v. Foreign
Comp.*
Comm. [1969] 2 A.C., Lord Reid at page 171 states as follows:

"It has sometimes been said that it is only where a tribunal acts
without jurisdiction that its decision is a nullity. But in such cases
the word 'jurisdiction' has been used in a very wide sense, and I have
come to the conclusion that it is better not to use the term except in
the narrow and original sense of the tribunal being entitled to enter
on
the inquiry in question. But there are many cases where, although the
tribunal had jurisdiction to enter on the inquiry, it has done or
failed
to do something in the course of the inquiry which is of such a nature
that its decision is a nullity. It may have given its decision in bad
faith. It may have made a decision which it had no power to make. It
may
have failed in the course of the inquiry to comply with the
requirements
of natural justice. It may in perfect good faith have misconstrued the
provisions giving it power to act so that it failed to deal with the
question remitted to it and decided some question which was not
remitted
to it. It may have refused to take into account something which it was
required to take into account. Or it may have based its decision on
some
matter which, under the provisions setting it up, it had no right to
take into account. I do not intend this list to be exhaustive. But if
it
decides a question remitted to it for decision without committing any
of
these errors it is as much entitled to decide that question wrongly as

it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg. v. Governor of Brixton Prison, Ex parte Armah* [1968] A.C. 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error in law. I think that, if these views are correct, the only case cited which was plainly wrongly decided is *Davies v. Price* [1958] 1 W.L.R. 434. But in a number of other cases some of the grounds of judgment are questionable."

In my opinion, this Tribunal has "jurisdiction" in the sense that Lord Reid defined the word in the aforementioned case.

That, however, is not the end of it. *Stroud's Judicial Dictionary* 4th edition, page 1452 defines jurisdiction in the following manner:

"2. In its narrow and strict sense the 'jurisdiction' of a validly constituted Court, connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves

of its process by reference

(1) to the subject matter of the issue or

(2) to the persons between whom the issue was joined, or

(3) to the kind of relief sought or to any combination of these factors.

In its wider sense it embraces also the subtle practice of the Court as to the way in which it will exercise its power to hear and determine issues which fall within its 'jurisdiction' (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has 'jurisdiction' (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances."

It is seen, therefore, that part of the term "jurisdiction" relates to the kind of relief sought.

"Words and Phrases Legally Defined", volume 3, 2nd. edition, page 114 cites "*Oscroft v. Benabo* [1967] 2 All E.R. 548 C.A. per Diplock L.J. at page 557"

"Courts (even Inferior Courts) have 'jurisdiction' to be wrong in law; that is why we hear appeals on questions of law and not merely applications for certiorari. A Court may lack 'jurisdiction' to hear and determine a particular action or application because

(i) of the composition of the Court (for example, the bias of the Judge), or
(ii) the subject matter of the proceedings (for example, title to foreign land), or
(iii) the parties to the proceedings (for example diplomatic immunity);
or

although having jurisdiction to hear and determine the proceedings, it may lack jurisdiction to make the kind of order made ...".

Lord Diplock therefore says that there are two types of jurisdiction, one, a jurisdiction to hear and determine the proceedings, two, a jurisdiction to make the kind of order made.

In *McCarthy & Menin & United States Security and Exchange Commission* [1973] 2 O.R. 154, the Ontario Court of Appeal in referring to a tribunal of "competent jurisdiction", states that this does not mean merely a tribunal competent to adjudicate upon the matter before it, but rather a tribunal with all the well known sanctions possessed by a Court of Law or equity with which it is enabled to enforce its duly authorized orders.

Therefore, enforcement again seems to go to the root of one branch of the word "jurisdiction".

Finally, referring again to *Anisminic v Foreign Comp. Comm.* [1967] 2 All E.R. 986, in the Court of Appeal, Diplock L.J. at 994 states:

"'Jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context. In the present appeal we are concerned only with statutory jurisdiction in the sense of an authority conferred by statute on a person to determine, after inquiry into a case of a kind described in the statute conferring that authority and submitted to him for decision, whether or not there exists a situation, of a kind described in the statute, the existence of which is a condition precedent to a right or

liability of an individual who is party to the inquiry, to which effect will or may be given by the executive branch of government."

In my opinion, there is a common thread running through the above definitions. It is that "jurisdiction" has at least two recognized

components. The first relates to the power to hear and determine, the second relates to the power to grant the relief sought.

Adopting Lord Diplock's and Lord Reid's definition of "jurisdiction" in *Anisminic v. Foreign Comp. Comm.* (supra), in my opinion, this Tribunal has the jurisdiction to hear and determine the proceedings. On reading the Canadian Human Rights Act, the sense of authority conferred upon this Tribunal by this statute, is such as to determine whether or not given the set of circumstances before this Tribunal, these offend Section 5(b) of the Canadian Human Rights Act. In my opinion, the family fare plan as promulgated by Air Canada does "differentiate adversely in relation to any individual" on the basis of marital status.

It could be argued that Ms. Bain is not married, therefore does not have any marital status, therefore there could not be any differentiation based on marital status. In my opinion, this is a circuitous and fallacious argument.

Viewed from the point of view of individuals who are members of the general public, there is a differentiation as defined in "family", one of the criteria being husband and wife, that being defined as legal or common law status. The legal status of husband and wife, of course, differentiates between legally married and unmarried individuals. "Common law" status, in my opinion, relates to relationships of some length of time, although not necessarily of permanent duration. "Common law relationship" has been defined in various family law related statutes and workers compensation statutes in various provinces in Canada, as a relationship varying from two to five years in duration. Nowhere have I been able to find any definition of "common law relationship" which doesn't entail a degree of time applicable thereto. Therefore, when "husband" and "wife" are defined in "family" in relation to family fares, as including common law relationship, this, in my opinion, connotes a relationship of some duration and excludes a casual or immediate relationship of two adult individuals. This is strengthened by the evidence of Ms. Bain at page 10 of the transcript in which she states, in connection with the quotation as to fare prices from Air Canada,

"and they quoted the full fare and then told me that if I was married, that I could qualify for this other fare. And I said well, I am not married but I am travelling with a male. And they said 'well, if you can prove that you have been living together for a certain length of time, then you will qualify, but otherwise you will have to pay full fare'."

I am cognizant of the evidence of Mr. Tripp at page 108 and 109 of the transcript. I interpret this evidence to mean that Air Canada does not look too closely into the time of relationship, however, this does not detract from what I consider to be the essence of a "common law relationship" and

that is that there must be a time period of some permanency to the relationship in order to fall under the rubric. The fact that Air Canada does not rigorously enforce the time requirements in no way changes the meaning of the words. Therefore, in my opinion, there is a differentiation which would adversely affect an individual who does not come within the "family group" and I further find that the definitions applicable to "family group" are, in part, based on marital status. The adversity in relation to this differentiation would be the difference between the full fare and the family fare.

Having found that I have jurisdiction to hear and determine and having made that determination, I then must consider the remedies asked. Bearing in mind my findings with respect to the word "jurisdiction", this question arises again with respect to the remedies, The Canadian Human Rights Commission asked that if I found there was a discriminatory practice, the order be given requesting Air Canada to cease the discriminatory practice or at least to make an application to have the discriminatory practice cease. It also asked that I award damages to Ms. Bain pursuant to Section 41(3)(b).

With respect to the first of these remedies, based on the definitions quoted previously, in my opinion, this Tribunal lacks the jurisdiction to require Air Canada to cease the discriminatory practice or force it to make an application to the Air Transport Committee. Mr. Juriansz argued vigorously that such an order could be enforced by the Federal Court. However, in my opinion, this begs the question as to the fundamental jurisdiction of this

Tribunal. The definitions quoted above clearly state that in order to have "jurisdiction" as it relates to remedies asked, it is the Tribunal itself which must be able to effect a remedy in order for it to have jurisdiction to give that remedy rather than rely on an appeal to an independent body (The Federal Court) to enforce the remedy. In a highly regulated industry such as the airline industry, the remedy urged upon this Tribunal by the Human Rights Commission, insofar as requiring an airline to cease a discriminatory fare, is unavailable to the Tribunal. This, in my opinion, does not mean that the Human Rights Commission could not lay a complaint against the Canadian Transport Commission if it feels that the fares are discriminatory and thus offend the Canadian Human Rights Act. The effect of this decision in declining to give an order requiring Air Canada to make an application to the Air Transport Committee (which may or may not recommend to the Canadian Transport Commission the change in fares proposed in the application and which the Canadian Transport Commission in turn may or may not accept the recommendation of the Air Transport Committee) is consistent with the case which was often quoted during the proceedings, namely, *Roberta Bailey, William Carson, Real J. Pellerin, Michael McCaffery and The Canadian Human Rights Commission v. Her Majesty the Queen in Right of Canada* as represented by the Minister of National Revenue.

Insofar as Section 41(3)(b) is concerned, the Tribunal may order Air Canada to pay compensation if, in its opinion, Ms. Bain was the victim of the discriminatory practice and suffered in respect of her feelings or

self-respect as a result of the practice. Having observed the demeanour of

Ms. Bain on the witness stand and having been made aware of certain articles which she has written, and the publicity resulting therefrom, it is my opinion that Ms. Bain did not suffer any loss

of self respect or any feelings of a nature to warrant damages being given.

Indeed it is my opinion that Ms. Bain has a very healthy self respect and her

feelings may be characterized as aggressive insofar as asserting what she

feels to be her rights.

DATED at the City of Edmonton, in the Province of Alberta this 7th day
of
April, A.D. 1981.

F.D. Jones, Q.C.
Chairman