

DECISION RENDERED ON JULY 30, 1981  
T.D. 8/81

THE CANADIAN HUMAN RIGHTS ACT  
IN THE MATTER of the complaint of Philip Foucault  
alleging discrimination in employment by Canadian  
National Railways

APPEARANCES:

Y. TARTE, Esq. - for the Complainant  
L. L. BAND, Esq. - for the Respondent

A HEARING BEFORE:

M. WENDY ROBSON, appointed a Board of Inquiry in the above  
matter by The Canadian Human Rights  
Commission pursuant to Section 39 (1) of  
The Canadian Human Rights Act

The hearing in this matter commenced on July 7th, 1981,  
and at the outset counsel for the Canadian National Railway  
indicated that there would be an objection raised concerning the  
ground of discrimination. It was decided to proceed with the  
presentation of the Commission's case and following that to deal  
with any objections.

Subsequent to the presentation of the Commission's case  
the objection resolved itself into a motion made by counsel for the  
CNR as follows:

"... the Defendant moves to have the Complaint dismissed  
on the ground that there is no evidence, or alternatively  
no evidence showing on the balance of probability that  
the Act is applicable, that Mr. Foucault is handicapped  
and that he comes within a class of individual protected  
by the Act."

Counsel for the Commission argued that the Tribunal  
should put Mr. Band to his election and I advised counsel that I  
was not prepared to put Mr. Band to such an election.

Therefore in my view the matter resolved itself into a  
question of whether or not the onus of proof on the Commission to  
establish on the balance of probability that a contravention of the  
Act had occurred had been discharged. Both counsel agreed that if  
a prima facie case of a "discriminatory employment practice based  
on physical handicap" was made out, then the onus would shift to  
the employer to establish "bona fide occupational requirements"  
pursuant to Section 14 of The Canadian Human Rights Act.

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I am not required at this stage of the proceedings to  
deal with the latter onus.

Mr. Foucault's complaint, filed as Exhibit C-4, alleged:  
"I had a back operation in August of 1971. At the time of the operation I was employed by National Steel in Capreol until June, 1979, when the mine closed. I had not missed any time during this period because of my back. I was then hired on the B & B, where I passed my medical in Capreol. I worked going on three weeks when I received a notice in Hornepayne, Ontario, where I was working, that I was medically unfit and was to be removed from service immediately. This notice came from Dr. Hunter in Toronto (CNR doctor) who has never examined me then or since. I feel that I was discriminated against because of a back operation received eight years ago. Included is a copy of back x-ray received in June and notice of layoff. Thank you. Philip Foucault."

Attached to that Exhibit is a letter which reads as follows:

September 10/79  
Mr. Philip Donat Foucault  
Bridgeman  
c/o D. Holmes  
B & B Foreman  
Hornepayne, Ontario

Advised this date from Capreol office that you are medically unfit for duty, from Dr. Hunter's office in Toronto. Employment terminated this date.

V.H. Bauer  
Assistant B & B Master

No objection was taken to the inclusion of that letter in the Exhibit and I conclude that it was a notice received by Mr. Foucault and was sent by an employee of the Canadian National Railway.

The relevant Sections of the Act are as follows:

"Section 2(a):

every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from

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doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap;"

"Section 7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual... on a prohibited ground of discrimination."

"Section 20.... 'Physical handicap' means a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness, and without limiting the generality of the foregoing includes epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a seeing eye dog or on a wheelchair or other remedial appliance or device."

Mr. Foucault is thirty-one years of age and commenced employment at the age of seventeen. His first job was with the CNR working on a section gang. This employment as a manual labourer continued for some five months and he then transferred to the shop as an engine watchman. On and off over the next ten months he was so employed alternating employment with CNR with periods of lay-off.

#### EVIDENCE

In October, 1968, he obtained employment with National Steel at a mine some 15 miles north of Capreol. He was hired as a labourer but also had some periods of working for National Steel as a crusher operator, truck driver and heavy equipment operator.

In 1971, after his shift at National Steel, he slipped on the tile floor of the shower and reported the incident several days later. The pain he was suffering was located in the lower part of his back. He subsequently sought medical advice and was treated with pain killers and relaxants. He went back to work but the pain kept persisting and he was eventually referred to Dr. Sutherland. At that time the pain was down his left leg. He was given a course of therapy but that did not prove successful and he was admitted to hospital. He was given a mylogram and subsequently he was operated on. Mr. Foucault's understanding of the surgery was that it was to remove the ruptured part of a disc in his spine.

Throughout the period of his back difficulties he was on Workmen's compensation. He returned to work in January or February of the following year, 1972, and continued his employment with National Steel reasonably uneventfully until 1979 when the mine was shut down.

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He then applied for a variety of jobs including a position with the CNR. His application form was filed as Exhibit C-3 and is dated August 24, 1979. There is a section on the form dealing with health and a question

"Other serious injuries, or serious illnesses?"  
Mr. Foucault's response to that was  
"ruptured disc. Has been corrected."

Mr. Foucault was subsequently called in for employment by the CNR. Mr. Cappadocia advised him that he would be hired for the Bridge and Building gang and he was referred for a medical examination to Dr. Pinkney in Capreol. Mr. Foucault's recollection of the conversation with the doctor was that he had passed the medical but it would be forwarded to Toronto. However, as far as the doctor was concerned, he couldn't see why he would be refused.

On cross-examination Mr. Band asked:

"Q. ... were you aware before you started working at the Railway that there was a possibility that you wouldn't be accepted because of your back operation, and that therefore you wouldn't be able to continue in your employment. Did he tell you that?"

A. All right, okay, yeah."

Mr. Foucault was given a slip by the doctor and commenced his employment on the 27th of August, 1979, and continued to work until the 10th of September, when he received the notice filed in Exhibit C-4.

#### DECISION

The argument was extensive and I am grateful to counsel for their care in putting their respective positions to me. They advised me and my review of the decided cases confirms that this is the first case in which the actual ground of discrimination has been argued.

The Commission is required in this case to make out a prima facie case that the CNR engaged in a discriminatory employment practice based on physical handicap. I find that a prima facie case has been made.

Mr. Foucault's perception of a physical handicap is irrelevant. It is the CNR's perception of physical handicap and their refusal to employ him that is the ground of discrimination.

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Mr. Foucault's evidence was that he had had an operation on his back, he had been employed as manual labourer for some seven years subsequent to that operation and that following a CNR medical examination he eventually received a notice of termination advising him that "you are medically unfit for duty..".

DATED at Peterborough, Ontario, this 27th day of July, 1981.

M. WENDY ROBSON  
Chairman