

T.D. -1/81
CANADIAN HUMAN RIGHTS TRIBUNAL

CHAIRPERSON: PIERRETTE MOISAN
BETWEEN:
EDNER MITTON,
Complainant
and
FERNAND PARENT,
RICHARD TRUDEL and
PUBLIC SERVICE COMMISSION,

Respondents

Heard at Ottawa on January 29 and 31 and February 1, 1980.
Judgment rendered on January 30, 1981.

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Edner Mitton, fifty-six years old, occupied a position as a French teacher in the Language Bureau from September 5, 1967 to November 15, 1978,
the official date of his release.

Relying on s 7 of the Canadian Human Rights Act, which reads as follows:

7. It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination,

Mr. Mitton filed a complaint on May 30, 1978 with the Canadian Human Rights Commission, which following an investigation appointed this Tribunal pursuant to the discretionary power conferred upon it by ss 39 et seq. 1

1 Canadian Human Rights Act, SC 1976-77, c 33.

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In view of the fact that the four major issues to which argument was directed are sufficient to dispose of the complaint, the Tribunal will concentrate its analysis on them. They are:

I. Parties named as respondents;

II. Could the Tribunal consider acts done prior to the coming into force of the Canadian Human Rights Act?

III. Was this res judicata?

IV. Evidence of discriminatory practices.

I. Parties named as respondents

The complaint filed with the Canadian Human Rights Tribunal named a single respondent, the Public Service Commission.

Section 4 of the Act, 2 which reads as follows:

A discriminatory practice, as described in sections 5 to 13, may be the subject of a complaint under Part III and anyone found to be engaging or

to have engaged in a discriminatory practice may be made subject to an order as provided in sections 41 and 42,

and s 41(2) of the same Act providing for orders that may be made by a Tribunal use the same expression.

2 Canadian Human Rights Act, SC 1976-77, c 33.

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Section 41(2) reads as follows:

If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:*

and section 32(1) also uses the same expression "person". 3

In this Act the legislature did not define the word

"person", although in s 46(3) 4 it is provided that a person should be deemed

to include an employer association or an employee organization. The

respondent in the instant case is not included in these types of associations.

A reading of the complaint filed by Mr. Edner Mitton with the Canadian Human Rights Commission on May 30, 1978 shows that it referred directly to persons:

I, the undersigned, Edner Mitton, ED-LAT-01, a French teacher in the Language Bureau, 800 Carson Rd., Ottawa, Suite A, have reasonable grounds for believing that in about July 1975 Mr. Fernand Parent, LAT-3,

Unit A-5, engaged in a discriminatory practice with respect to my appraisals and my relations with the students.

3 Section 32(1). Subject to subsections (5) and (6), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

* The French version of the Act uses "personne" in both sections; the English version of the Act uses different expressions. - Tr.

4 Section 46(3). A prosecution for an offence under this section may be brought against an employer association or employee organization and in the name of that association or organization and for the purpose of such

a prosecution such an association or organization shall be deemed to be a person and any act or thing done or omitted by an officer or agent of such an association or organization within the scope of that officer's or agents authority to act on behalf of the association or organization shall be deemed to be an act or thing done or omitted by the association or organization.

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However, the Canadian Human Rights Commission could by virtue of its discretionary power name any other party as a respondent in the complaint.

Where the Commission has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, the Commission may initiate a complaint. 5

We feel, nevertheless, that because the legislature used the word "person", prudence dictates that we name individuals as long as the legislature does not define the word "person".

In order to avoid undue delay in the hearing of the complaint, counsel for the respondent agreed that the complaint be amended so that the respondents be the Public Service Commission and Messrs. Fernand Parent and Richard Trudel.

In view of the conclusions of the Tribunal with respect to the disposition of the complaint, it does not consider it worthwhile to consider any further the merits of having the Public Service Commission named as a respondent.

II. Could the Tribunal consider acts done by the respondents prior to the coming into force of the Canadian Human Rights Act? 6

This Act has been in force since March 1, 1978. The evidence showed that several events occurred prior to this date, in particular over a period from early 1976 to November 1978.

5 Canadian Human Rights Act. s 32(3).

6 SC 1976-77, c 33.

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The final event that gave rise to Mr. Mitton's complaint to the Canadian Human Rights Commission was the letter (Exhibit P-10) sent to Mr. Edner Mitton on May 9, 1978 by Mr. Roger Lapointe, a Director General in the Public Service Commission of Canada, informing him that by virtue of the powers delegated to the Director General, he was recommending to the Public Service Commission that Mr. Mitton be released for incompetence under s 31 of the Public Service Employment Act.

This letter followed the recommendation that Mr. Mitton be released for incompetence made by Mr. Fernand Parent, Head, Unit A-5, filed as Exhibit P-6.

The effective date of Mr. Mitton's dismissal appears in Exhibits P-12 and P-15, namely, November 15, 1978, the dismissal of Mr. Mitton planned for October 27, 1978 having been postponed to the later date.

Since the refusal to employ or continue to employ 7 occurred after the Canadian Human Rights Act came into force on March 1, 1978, the Tribunal has jurisdiction to consider not only the complaint but also the logical sequence of events that gave rise to the dismissal. Otherwise, the complainant would be unable to prove the conduct of the respondents that led them to make this recommendation, of which Mr. Mitton could not really complain until it went into effect and was final. Separation of the decision to dismiss from the events giving rise to it would place the complainant in an impossible situation that would run counter to the very purposes of this Act.

7 SC 1976-77, c 33, s 7(a).

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This application of the Act to prior events appears to be in accordance

with the opinion of the Federal Court of Appeal in *Latif v Human Rights Commission and Fairweather*: 8

Such a provision might well be considered necessary because of the volume of complaints that might be anticipated in the initial stage of the Act's operation based on discriminatory practices in which persons were allegedly engaging at the time the Act came into force and during a period of time shortly thereafter. In that limited sense the Act could have a retrospective application - to discriminatory practices begun before the Act came into force but continuing on or after that date.

This Tribunal accordingly has jurisdiction to hear the complaint filed by Mr. Mitton and may consider the chain of events giving rise to the complainant's definitive dismissal on November 15, 1978 and the objection raised by counsel for the respondents be dismissed.

III Was this *res judicata*?

It must be acknowledge that Mr. Mitton has skillfully exercised all his remedies, including grievances through his union and appeals from the decisions rendered prior to the hearing of the complaint he filed under the Canadian Human Rights Act and the Tribunal cannot but acknowledge and approve of the attitude of an individual simply seeking to ensure that his rights are respected, although the Tribunal hopes that this is not a blind obsession that could only confirm the complainant in his conviction that he has suffered an injustice.

8 (1979), 28 NR 494 at 513
Federal Court of Appeal, September 17, 1979, No. A-638-78.

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Mr. Mitton has exercised the following remedies:
On April 15, 1977, he filed a grievance through his union against his appraisal, and a hearing was held in the presence of Mr. Luc Bernier, a union steward, and the said grievance was dismissed.

On February 16, 1978 Mr. Mitton sent to the Appeals Directorate, Public Service Commission, Exhibit P-8:

I hereby wish to appeal from the recommendation for release for incompetence under s 31 of the Public Service Employment Act, of which decision I was informed by Mr. Fernand Parent, Head, Unit A-5, in his memorandum of February 15, 1978.

On February 17, 1978 Mr. Mitton sent to the Anti-Discrimination Directorate of the Public Service Commission Exhibit P-12:

There is a personality conflict between Mr. Fernand Parent and myself that has reached a crisis point. It has led him to write unsatisfactory appraisals of me and finally to request my release. I wish to protest against his attitude, which is contrary to human and civil rights. Hitherto everything has gone well and I am not aware of any deterioration such as he mentioned. Consequently I feel deeply wronged.

On October 19, 1978 the Chairman of the Public Service Commission Appeal Board gave his decision dismissing Mr. Mitton's appeal and confirming his release for incompetence.

The complainant was informed of this decision on October 24, 1978, Exhibit P-12, while the effective date of his dismissal was November 15, 1978, Exhibit P-15. Finally, the Canadian Human Rights Commission began its investigation and appointed this Tribunal.

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An attentive reading of s 33 9 is sufficient to show that the exercise of prior remedies by the complainant and the decisions rendered do not estop him from filing this complaint.

33. Subject to section 32, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) the complaint

(i) is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act. . .

This section was in effect applied by the Canadian Human Rights Commission in the letter (Exhibit P-13) that Pierrette Gosselin, a Human Rights Officer, wrote to Mr. Edgar Gallant, Chairman of the Public Service Commission, on October 25, 1978. She stated:

Our Commission had then agreed to delay the investigation until a decision was rendered in this case (by the Appeals Directorate).

On October 19, 1978, Mr. E. Leclerc concluded that Mr. Mitton's appeal should be dismissed.

It is our duty to proceed at this time. We wish hereby to request that you delay the implementation of the decision and postpone the date of Mr. Mitton's release until we have completed the investigation we are required to conduct.

This letter of November 14, 1978, Exhibit P-15, terminated the postponement of the implementation of the decision which took effect from November 15, 1978.

9 SC 1976-77, c 33.

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Notwithstanding the decision of the Appeals Directorate of the Public Service Commission, the Canadian Human Rights Commission could accordingly hear Mr. E. Mitton's complaint and the objection raised by counsel for the respondents is dismissed.

IV. Evidence of discriminatory practices

This Tribunal does not have to decide whether the complainant was released for incompetence but must analyse the evidence to determine whether the actions of the respondents in their annual appraisals and in the help and support they should have given to the complainant constituted discriminatory practices that led to Mr. E. Mitton's release from the Canadian Public Service.

If we are to find that there was discrimination in Mr. E. Mitton's case,

it is necessary that the actions of the respondents be prohibited grounds of discrimination based on race, religion, national or ethnic origin or colour, 10 since the other forms of discrimination are not relevant to this complaint.

It appears from a brief examination of Mr. Mitton's appraisals (Exhibit P-16, Report from Roger Lapointe to Paul Jodouin, 4/7/69) that he was experiencing difficulties in teaching and transmitting his knowledge as early as 1969.

10 SC 1976-77, c 33, s 3.

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Mr. Mitton has experienced rather serious difficulties in adapting to audio-visual methods and the teaching of adults.

During the year we withdrew him from the classroom and worked very closely with him to improve his training and help him correct the shortcomings we have noted in his teaching. He took the comments we made to him to heart and benefited fully from this week of training. His teaching has improved remarkably and it must be noted that at this time his performance is equal to that of our average teachers.

He has always co-operated very well with management of the school and has shown at all times a fine team spirit. If Mr. Mitton continues to strive to improve his techniques, he will become one of our best teachers. (4/7/69 Roger Lapointe)

However, Mr. Mitton has been a language teacher since September 1967. The appraisal prepared by Mr. Fernand Parent on May 12, 1971, Exhibit P-17, shows once again the difficulties encountered by Mr. Mitton:

Mr. Mitton does not show enough interest in teaching
...

Too frequently there have been requests from single students or groups (through spokespersons) for a different teacher. It is stated that Mr. Mitton is boring, lacking in liveliness and spirit and is poorly prepared and organized in his work; in short, that his class is a waste of time . . .

In the appraisal of April 29, 1976, Exhibit P-18, Mr. Fernand Parent said of Mr. Mitton: "When he takes the trouble, he can give acceptable classes" and added a memorandum to Mr. Mitton that speaks for itself.

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(Extract)

A teacher who is not given the same group of students for successive stages should stop to consider. It appears that this does not upset you. However, this situation must be corrected without delay .

If, on the other hand, neither the students nor the team leaders are

willing to accept you as a regular teacher, appropriate action will have to be taken.

The appraisal signed by Mr. Richard Trudel on April 15, 1977, Exhibit P-19, referred to not only the students' grievances but also the pressure exerted by the teachers to ensure that Mr. E. Mitton would not be a member of their team.

In spite of the unsatisfactory appraisals, Mr. Roger Lapointe made a further effort by giving instructions that Mr. Mitton be reassigned to a class and informed him that a new appraisal would be made in December 1977, Exhibit P-32.

Unfortunately, the appraisal of Mr. Mitton by Mr. Fernand Parent on December 19, 1977, Exhibit P-5, merely confirmed that despite the efforts of everyone, groups of students and teachers in the same team continued to complain and did not want Mr. Mitton.

During his testimony, Mr. Richard Trudel described the closed-minded attitude of Mr. Mitton, who would not accept comments made by him or by the students, thus almost forcing Mr. Trudel to require evidence of the students' dissatisfaction, which he did by asking them to express their grievances in writing and to sign them so that he could show them to Mr. Mitton.

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Moreover, throughout his testimony Mr. Mitton maintained that the actions of Mr. Parent and Mr. Trudel demonstrated a discriminatory attitude on their part.

On the contrary, however, Mr. E. Mitton was given several warnings and several opportunities to teach different classes, and it suffices to read the appraisals to see the difficulties Mr. Mitton experienced in teaching and adapting, although one cannot find there the slightest trace of discriminatory conduct toward him.

A review of the testimony given during the hearing and of the appraisals made by Mr. Parent and Mr. Trudel does not provide evidence at any time of an attitude, conduct, behaviour or a manner of thinking that would lead us to find that they even attempted to engage in any discrimination whatsoever toward the complainant.

The complaint of Mr. Edner Mitton is accordingly dismissed without costs.

RENDERED AT OTTAWA, THIS TWENTY-SIXTH DAY OF JANUARY, ONE THOUSAND NINE HUNDRED AND EIGHTY-ONE.

(signed)
PIERRETTE MOISAN

Chairperson, Human
Rights Tribunal

Original version in French.