TD 6/ 87

Decision rendered on April 14, 1987

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

DARLENE CORLIS Complainant

- and

CANADA EMPLOYMENT AND IMMIGRATION COMMISSION Respondent

TRIBUNAL: ANDRIY J. SEMOTIUK

DECISION OF THE TRIBUNAL

APPEARANCES:

JAMES HENDRY Counsel for the Complainant and the Canadian Human Rights Commission

IAN DONAHOE Counsel for the Respondent

The following is a Transcript of the Decision rendered from the Bench by the Tribunal in Edmonton, Alberta on April 14, 1987:

This case concerns a complaint filed by the complainant with the Canadian Human Rights Commission on September 18th, 1985. The complaint reads, as follows:

"My claim for unemployment insurance benefits was established effective March 20, 1983. After a review and the presentation of an appeal to the Board of Referees, I was held not entitled to benefits from October 10 to November 11, 1983 because I refused to work on Saturday. I refuse to work on Saturdays because I am a Seventh- Day Adventist. I allege that this disentitlement to unemployment insurance benefits is discriminatory on the ground of religion, contrary to section 5 of the Canadian Human Rights Act."

The following matters have been agreed upon by both counsel for the Canadian Human Rights Commission, who is also acting for the complainant, as well as counsel for the respondent, the Canada Employment and Immigration Commission.

1. That the benefit period for this complainant started on March 20th, 1983.

2. That this complainant received benefits of $188.00 per week, and that the total amount of benefits that she lost was the sum of $940.00, being five weeks of benefits.

3. That the expenses which were incurred by the claimant in reference to attending at a Board of Referees hearing and preparing her case with a Mr. Fowler, were based on a mileage charge of 244 per kilometer, and I guess that's the extent of the agreement there.

4. There is no dispute between the parties as to the genuineness of the belief of the complainant in regard to Saturday being a holy day and regards to her being a Seventh- Day Adventist.

That is the extent of the agreement between the parties going into the hearing.

I now propose to make the following further findings of fact.

I find that the claimant, in her initial application for unemployment insurance benefits listed her type of work sought as that of being a store clerk. I also find that there was no other reference to any other type of work being sought on her initial application.

Sometime in September, approximately September 20th, 1983, I find that the Complainant was the subject of a random review undertaken by Employment and Immigration Canada, which was done in the normal course of work by the Commission. A Mr. Isnor called the Complainant in for an interview on September 20th, 1983, and he summarized his findings from that interview as follows:

"She attended at local office and identified herself by producing her social insurance card. She is looking for work in the offices but does not have qualified secretarial skills. She will work in the hospitals (kitchen staff). She will work in the stores.

She has applied at Alberta Power Credit Union, AGT and at the hospitals. Her last application was with the hospital approximately one and a half to two months ago. She will not work for less than $5.00 per hour. She has refused no jobs. She has had no part- time work and earnings. She will work shift work but will not work on Saturdays. She is married, no children. She has her own means of transportation and driver's license..."

I find that subsequent to this interview Mr. Sladek made a note on October 7th, 1983 to the effect that she was looking for work in an occupation which requires Saturday work, and that this was a restriction to the hours of work that she was available for. This memo was placed on the Corlis' file at Employment and Immigration Canada.

Thereafter on October 10th, 1983, I find that Mr. Sladek, who was an Insurance Officer with Employment and Immigration Canada, made a decision in reference to the Complainant which stated,

"... you are available for work and unable to obtain suitable employment. You have not met these requirements in that after being unemployed for a reasonable period, you are imposing restrictive

conditions on your acceptance of suitable employment in respect of the days you are prepared to accept work. Payment of benefit is suspended as long as this condition exists."

On October 25th, 1983, I find that the complainant filed a further clarification in writing with the Employment and Immigration Commission, indicating that the reason that she was not prepared to work on Saturdays was because of religious belief. Namely, that she was a Seventh- Day Adventist, and I also find that from that day forward the Employment and Immigration Commission knew about the fact that she was not prepared to work because of a religious reason.

I find further that on November 9th, 1983, Mr. Reynolds, an Insurance Officer with Employment and Immigration Canada, upheld the earlier decision reached by Mr. Sladek, based on a review of the documents that have been mentioned so far and the decision of Mr. Sladek specifically.

I find that on November 14th, 1983, a telephone conversation took place between an Officer of Employment and Immigration Canada and either the complainant or her husband, in which the Commission, that is to say the Employment and Immigration Commission, was further informed as to the fact that the complainant was seeking work in various fields unrestricted to simple salesclerk work.

I find that on November 18th, 1983, Miss O'Kane, an Insurance Officer with Employment and Immigration Canada, reversed the earlier decision of the Commission to terminate benefits, and reinstated benefits to the complainant as at November 11th, 1983.

I find that the complainant thereafter initiated an appeal to the Board of Referees of the Employment and Immigration Commission, and that a decision of that Board on January 10th, 1984 upheld the earlier decisions of the Employment and Immigration Officers, and in particular stated,

"The Board agrees unanimously with the decision of the Insurance Officer, and basically for the same reasons. The claimant has been on benefits now for about seven months and unemployed almost ten months. It is certainly a reasonable period of unemployment to find a suitable job. The second reason is that jobs requiring work on the Sabbath are more numerous than jobs that do not. It is a restricting affecting [sic] availability for work."

I find that thereafter a further appeal was taken to an Umpire, and that Mr. Justice Dubinsky, who acted as the Umpire in this case, upheld the earlier decisions of the parties with the Canada Employment and Immigration Commission.

Turning now to some of the viva voce evidence that was presented to the Tribunal, I find that the complainant lives and is seeking work in the city of Grande Prairie in the province of Alberta, and that the population of that city is approximately 22,000 people. I find that the complainant was surprised and shocked at the time that she was notified that her benefits were terminated by the Canada Employment and Immigration Commission, and I further find that notwithstanding what was contained in the documents put forward to the Commission from the initial period when the complainant applied for benefits through 'til today, the complainant had not necessarily

restricted her search for work to the area of store clerk, but was indeed working, or looking for work in a broader area.

I find that as between Mr. Isnor and the complainant in regard to the question of Mr. Isnor's review and note to the effect that the Complainant was not prepared to work on Saturdays, that both Mr. Isnor and the complainant are equally at fault for not including in the notes from the interview that the complainant was not prepared to work on Saturdays for religious reasons.

I find that the initial review of Mr. Isnor's notes and decision to terminate benefits by the Canada Employment and Immigration Commission was based on the absence of any reference to religious holidays, and that the issue of a religious holiday was introduced only on the review of the initial decision by Mr. Reynolds, and it was from that time forward that the issue of a religious holiday was within the knowledge of the Canada Employment and Immigration Commission.

I find that the distance between Grande Prairie and Edmonton is 471 kilometers one way, and that if the claimant is entitled to expenses her expenses would be calculated at 24¢ per kilometer, as agreed to between the parties, times 471 kilometers, times two for travel expenses; and $25.00 per person per day while being in Edmonton for the purposes of the hearings and preparation for the hearings.

In this respect, I also find that on each occasion, there being two such occasions, the claimant and her husband travelled to Edmonton and stayed in Edmonton for two days, and I calculate that the total that would be payable if this claim were recognized to be $652.16.

Turning to the evidence of Mr. Sladek, who was the first officer involved in making a decision to terminate the complainant's benefits and who has worked with Canada Employment and Immigration for 22 years, I find that the reason that he terminated benefits in regard to the complainant was that she was seeking a job as a salesclerk which required weekend and off hours work and that the restriction pertaining to not working on Saturday was a barrier to her finding work. It was important to Mr. Sladek's decision that the complainant was in a final phase of her claim in regard to unemployment insurance benefits, insofar as she had been on unemployment for some time.

Turning to Mr. Reynolds, I find that he upheld Mr. Sladek's decision on the basis that the availability of an individual for work, including work on Saturdays, was an important consideration for entitlement to benefits.

Turning to Miss O'Kane, I find that the Digest of Benefit Entitlement Principles, which was used by her, is the policy manual used by Canada Employment and Immigration in reference to cases such as the one before this Tribunal, and that she used that manual, as did the other parties who considered the complainant's claim in this case.

I am impressed by Miss O'Kane's comment to the effect that many of the problems which arose in this case could have been corrected by a simple call, namely a telephone call, to the client and a discussion over the phone about the problems involved. I also take note of Miss O'Kane's

evidence to the effect that Mr. Corlis was abusive over the phone in discussing the problem that arose after insurance benefits were terminated, and I take note of Mrs. Hill's evidence confirming this fact. I appreciate that Mrs. Hill had to largely rely on Miss O'Kane's comments as to what Mr. Corlis said on the phone and what he didn't say on the phone, but I none the less feel that Mrs. Hill's evidence is corroborative of what happened with Miss O'Kane in her telephone conversations with Mr. Corlis.

Turning to the policy manual that I have referred to, I feel that there are certain sections in the manual that should be incorporated into my decision, and I therefore wish to quote from the manual at page 78, paragraph 10.10.6 "religious convictions". That paragraph reads,

"A claimant may be precluded from working on certain days of the week because of religious convictions, particularly Friday night, Saturday or Sunday. It should be borne in mind that the legislation requires that availability be proven only for working days, that is from Monday to Friday. Nevertheless, depending on the claimant's usual occupation, a refusal to work on Friday nights or during weekends could considerably reduce chances of obtaining employment. That would certainly be the case for a salesclerk, for example.

Even where the genuineness of ones convictions is not in doubt, it would be of no assistance to consider that the restriction is well founded. Entitlement to benefits is based on availability for work, and not on good cause for not being available. It is incumbent upon claimants in this situation to extend their availability to include other occupations for which there are good employment opportunities in spite of the restriction. If their convictions are strong enough to preclude them from meeting the normally accepted requirements of the labour market, and if their prospects of employment are significantly reduced as a result, a reasonable period of time might then be granted to allow them to explore the possibilities.

As for the religious holidays which fall on a weekday, they should not by themselves give rise to a disentitlement provided they occur in a period during which the claimant has otherwise been available for work, regardless of whether the claimant was in fact available on that particular day."

I note in reading that paragraph that it appears to be the Commission's policy that if a religious holiday falls on a weekday there should be some element of accommodation involved, and notwithstanding the fact that a salesclerk is used as an example in this passage in reference to the problems of working on weekends, I believe that it is the policy of the Commission, or it should be the policy of the Commission to accommodate individuals who may have religious holidays that do fall on weekdays or weekends, as best as reasonably possible.

This can be further amplified by reference to the cases which I'm about to come to.

In reference to section 9.10.3 on page 50 of the policy manual, which is titled "moral or religious convictions",

"A claimant may have good cause in refusing employment because of religious convictions unless they can be put in doubt. Good cause was shown when a person refused to work on the religious day of rest or to work in a school of another religious denomination."

Having read those passages, it is my conclusion that the policy of the Commission at the time that the decisions in this case were made, were not discriminatory as far as intention is concerned, and were not problematic as policy per se is concerned.

I now want to turn to the law. In the course of this hearing numerous cases and statutes were cited. I would like to just list all the cases that were considered and cited at this point in this decision.

The Unemployment Insurance Act of 1971, section 25, and the regulations under that Act found in the Consolidated Regulations of Canada 1978, chapter 1576, as amended. Specifically, section 45 was cited. Obviously the Canadian Human Rights Act was cited and I'll be dealing with that in more detail in a moment.

Other cases that were cited and considered were: - CUB- 384. (20 September, 1948); - Ontario Human Rights Commission and O'Malley v. Simpson- Sears Ltd. (1985) 2 S. C. R. 536; - Bhinder and the Canadian Human Rights Commission v. Canadian National Railway Company (1985) 2 S. C. R. 561; - Morrell v. C. E. I. C. (1985) 6 C. H. R. R. D/ 479; - Re Funk v. Manitoba Labour Board (1976) 66 D. L. R. (3d) 35; - Ontario Human Rights Commission and Dunlop v. The Borough of Etobicoke (1982) 3 C. H. R. R. D/ 781; - Insurance Corporation of British Columbia v. Heerspink (1982) 2 S. C. R. 145; - Regina v. Bushnell Communications Ltd. 4 O. R. (2d) 288 (Court of Appeal); - Regina v. Bushnell Communications Ltd. 1. O. R (2d) 442 (High Court of Justice); Sheehan v. Upper Lakes Shipping Ltd. (1978) 1 C. F. 836; - Newport v. Manitoba (1982) 2 W. W. R. 254; - Winnipeg School Division No. 1 v. Craton 6 C. H. R. R. D/ 3014; - Attorney General of Canada v. Von Findenigg (1983) 46. N. R. 549. Before touching on these cases, in the case law, I would like to express certain observations in regard to the evidence that was presented.

Firstly, I am very impressed with Exhibit C- 4, being the notes of Mr. Isnor prepared on September 20th, 1983, which initiated the review that ended in the termination of benefits of the complainant. What strikes me about these notes is that Mr. Isnor mentions that the complainant is seeking work in a variety of areas and not solely in the area of store clerk. This document and these notes were considered by each one of the Officers who made decisions in regard to the complainant's case, and for some reason the question of her search for work outside the area of store clerk was totally overlooked by these following decision makers.

It seems to me that Counsel for the Commission, that is to say the Canada Employment and Immigration Commission, quite properly categorized the subsequent decisions as in error insofar as they appear to have overlooked this fact about her looking for work outside of the area of work as a store clerk. And what I want to point out is that the evidence of the decision makers is all to the effect that the reason why the complainant was denied benefits was because her scope of searching for work was too narrow. Yet they had evidence before them that the scope of search was quite broad.

I'm also impressed by the fact that there was a breakdown in communications between the complainant and the Canada Employment and Immigration Commission. As between the two parties, I fault the Canada Employment and Immigration Commission more for the fact that the complainant was obviously not informed as well as perhaps she could have been, and for this breakdown in communication in general.

I'm mindful of how long it takes for anybody to bring a case before a body like this and how much effort it takes to get to the day when a hearing is held, and how many things can get in the way between the day one files a complaint or suspects that a problem has developed, and the day that a hearing takes place. In a sense, the frustration of dealing with a bureaucracy can be amplified by the long process that it takes to get a decision changed or corrected through hearings such as this one.

But on the other hand, I would say that we are very fortunate to live in a country where issues of discrimination generally are more in the realm of adverse impact and indirect effect, rather than direct, blatant, open discrimination that one might find in other countries in the world. We are dealing here at best with a case on the margin, where if there was a discriminatory aspect to it, it was certainly an unintentional one and one that indirectly affected the claimant in a manner that might be found discriminatory.

So far, as the Canada Employment and Immigration Commission is concerned, I have already mentioned that I do not regard their policy per se as discriminatory, nor do I feel that their intention in this case was to discriminate. I do not accept their Counsel's argument to the effect that knowledge of discrimination is a prerequisite to discrimination, because it seems to me in almost every case, or most cases of discrimination in Canada, the party who is accused of discrimination does not know at the time that the process starts out that he has discriminated against another party. That is something that one learns as you get through the hearing process.

It would be a contradiction in terms for someone to know that he's discriminating and to discriminate, almost, in the context of Canadian society and the discrimination cases that now come before tribunals such as this one. Mind you, in other parts of the world that may be true, there may be countries where knowledge is openly displayed and where government officials may discriminate openly, knowing they are discriminating; but this is rare in Canada, I would suggest.

I find that the Morrell case is an authority for the proposition that section 5 of the Human Rights Act applies in this case, and that unemployment insurance benefits are services, as envisioned in section 5 of the Act; and I would just cite a few sections out of the Canadian Human Rights Act which I think are relevant in these proceedings. The first is section 3(1):

"For all purposes of this Act, race, national or ethnic origin, colour, religion... are prohibited grounds of discrimination."

Emphasis is on religion. Section 5, "It is a discriminatory practice in the provision of ... services (a) to deny... any such... service... (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."

Section 14 reads, "It is not a discriminatory practice if (a) any refusal ... or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement..."

And section 14(g), "... in the circumstances described in section 5 or 6, an individual is denied any goods, services... or is a victim of an adverse differentiation and there is bona fide justification for that denial or differentiation."

I'm just citing this section as a qualification on the overall import of section 14.

"41.(1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

41.(2) If, at the conclusion of its inquiry, a Tribunal find that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and 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:

(a) that such person cease such discriminatory practice and, in order to prevent the same or a similar practice in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 15(1), or

(ii) the making of an application for approval and the implementing of a plan pursuant to section 15.1, in consultation with the Commission on the general purposes of those measures;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

41.(3) In addition to any order that the Tribunal ma make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self- respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine."

It's obvious that this section circumscribes the powers that this Tribunal has in dealing with the complaint before it.

The O'Malley and Bhinder case deal with the question of bona fide occupational requirement. As I understand these cases, in the O'Malley case the Supreme Court of Canada decided that:

"In a case of adverse effect discrimination, the employer has a duty to take reasonable steps to accommodate short of undue hardship in the operation of the employer's business. There is no question of justification because the rule, if rationally connected to the employment, needs none. If such reasonable steps do not fully reach the desired end, the Complainant in the absence of some accommodating steps on his own part, must sacrifice either his religious principles or his employment."

The O'Malley is authority for the proposition that the onus to prove discrimination first rests on the complainant who must establish a prima facie case,

"The onus then shifts to the employer to show that he has taken such reasonable steps to accommodate the employee as are open to him without undue hardship."

The case also, I believe, stands for the proposition that intention is irrelevant.

I find the O'Malley case to be a binding authority on this Tribunal, and I propose to t in reference to much of what is to come.

Just in passing, the Bhinder case also deals with the same issue, that is to say bona fide occupational requirement, but in that case the Supreme Court of Canada held that a hard hat is not -- the requirement that employees wear a hard hat on the job site is not a violation of or discriminatory towards an employee who, being a Sikh, refused to wear a hard hat.

I understand this decision to be effectively that the wearing of a hard hat was found to be a bona fide occupational requirement in that case.

Turning to the case we are dealing with, the issue might be posed as whether working on Saturday is a bona fide occupational requirement in regard to people who wish to find a job as a store clerk. This question, however, in my view is academic since the evidence is, and I'm compelled to find this, that the complainant from the beginning was seeking work not only as a store clerk but elsewhere.

So looking at the case before us we see that a complainant has later complained regarding what she feels to be discrimination based on not recognizing her rights to her Sabbath. During the course of arguments, section 25 of the Unemployment Insurance Act was cited, and it reads,

"A claimant is not entitled to be paid initial benefit for any working day in a benefit period for which he fails to prove that he was either

(a) capable of and available for work and unable to obtain suitable employment on that day, or..."

Counsel then pointed out section 45 of the regulations under the Act, which state that,

"For the purposes of section 25 of the Act, a "working day" is any day of the week except Saturday and Sunday."

An argument was put forward to the effect that since the regulation does not touch on other sections of the Act, it must be restricted to the initial benefit period, and that delay in cutting off the complainant from unemployment insurance benefits was effectively accommodating her particular situation and recognizing her religious difference. I am not totally convinced on that argument.

In the end I must therefore find that there was an adverse impact, a discriminatory adverse impact by the decision of the Canada Employment and Immigration Commission to terminate benefits to the claimant, unintentional as it may have been. And, therefore I find that there was a violation of section 5 of the Canadian Human Rights Act in this case.

I therefore find that the claimant is entitled to $940.00 in benefits that were improperly withheld from her by the Canada Employment and Immigration Commission. Had a right decision been reached by the Canada Employment and Immigration Commission and had there not been the possible factual error in reference to the question of the wide scope of seeking work by the complainant, the complainant would have received these benefits and it seems to me this is another reason why the Canada Employment and Immigration Commission should pay this $940.00 in benefits.

Turning to the question of expenses, I am persuaded by Counsel for the Canada Employment and Immigration Commission that the Morrell case is an authority for the proposition that the expenses which are being claimed in this case are inappropriate. In particular, I was persuaded by paragraph 2438 of that case:

"Counsel for the Commission also requested payment of the wages lost by the complainant while attending the hearing. Section 41(2)(d) allows for an award for expenses incurred as a result of the discriminatory practice. However, in my view, this is intended to cover expenses directly related to the discriminatory conduct, and not expenses related to legal proceedings under the Human Rights Act. The latter are more a question 67 costs, and there is no provision in the Act for recovery of costs. Consequently, I do not believe I have any authority to make an award for expenses related to the hearing. I would note that evidence respecting lost wages was not led before me .so that, even if I had the authority to include them in my award, I would not be able to determine the amount."

Turning to the issue of feelings, I would in the normal course perhaps have considered giving some compensation for the injured feelings and blow to the self- respect of the claimant by virtue of the decision that was reached, but I was impressed by the fact that the claimant's husband acknowledged that heated discussions took place at the very least, and the evidence of the other witnesses who dealt with the claimant's husband was to the effect that foul language was used. I don't mean to say that I reject all the evidence given by the claimant's husband as to what he did, nor do I feel that it was inappropriate for him to do whatever possible to correct a wrong that was

done to his wife. However, I do feel that one can be civil even with the most impossible circumstances, and I am inclined not to give any damages for injured feelings as a result of that conduct.

In regard to any order that I might issue to the Canada Employment and Immigration Commission, in view of my finding to the effect that no policy violation was made and that there is a marginal discriminatory effect that resulted from a decision made by the Commission, I will not make any order in regard to future cases, as I presume this case has already taught the Commission a lesson in regard to being flexible with people who might have religious holidays other than what normally comes to mind, namely Sunday.

One of the most persuasive cases that was presented to me was the case CUB- 384. I found that to be very persuasive in coming to my conclusion as to the discrimination involved here.