TD 10/ 87

TRANSLATION FROM FRENCH

Decision rendered on October 16, 1987

DECISION OF THE TRIBUNAL THE CANADIAN HUMAN RIGHTS ACT

In the Matter of a Hearing before a Human Rights Tribunal Appointed under Section 39 of the Canadian Human Rights Act.

BETWEEN:

JEAN CINQ- MARS Complainant

- AND

LES TRANSPORTS PROVOST INC Respondent

DECISION OF THE TRIBUNAL

BEFORE: MAURICE BERNATCHEZ, Chairperson

APPEARANCES: For the Complainant and the Canadian Human Rights Commission ANNE TROTTIER AND RÉNÉ DUVAL

For the Respondent, Les Transports Provost Inc CLAUDE CAMIRAND

HEARD IN QUEBEC CITY ON JANUARY 19 AND 20, 1987 AND MAY 14 AND 15, 1987.

1 - APPOINTMENT OF THE TRIBUNAL

On August 7, 1986, the President of the Human Rights Tribunal Panel appointed the present Tribunal to inquire into the complaint lodged by Mr Jean Cinq- Mars on February 22, 1985.

The complaint as filed concerns an allegation of discrimination on the ground of physical disability, contrary to the provisions of the Canadian Human Rights Act (SC 1976- 77, c 33, as amended) and, in particular, section 7(a) of the Act.

The Complainant alleges that:

[translation] The Respondent dismissed me from my job as a truck driver on March 23, 1984, on the pretext that I had a congenital deformation of the spine. I contest the validity of this dismissal, as I am fully capable of carrying out my duties as a truck driver. I thus have reason to believe that in dismissing me on March 23, 1984, the Respondent was guilty of a discriminatory practice under section 7(a) of the Canadian Human Rights Act.

The hearing of the complaint took place in Quebec City on January 19 and 20, 1987 and on May 14 and 15, 1987. The notice of appointment of the Tribunal was entered as exhibit T- 1.

2 - FACTS

At the time of the hearing, the Complainant, Jean Cinq- Mars, was twenty- eight years old (date of birth: September 21, 1958) and had begun to work for the Respondent, Les Transports Provost Inc, on February 22, 1984, as a truck driver. Some time after he began work (there is conflicting evidence on this point), he was given a physical examination, although the Respondent's normal policy is to have employees take the physical before they begin work. Following this examination, the examining physician, Dr Louis Robert, gave the Complainant a medical certificate dated February 23, 1984, as shown in Exhibits C- 8 and C- 9. The medical certificate (Exhibit C- 9) stated that the Complainant was fit to drive a truck, with no restrictions, as the conditions of the American Motor Carrier Safety Regulations (Exhibit R- 11) had been met. However, this certificate, which was signed by both Mr Cinq- Mars and Dr Robert, was given to Mr Cinq- Mars without the company's knowledge, since such certificates are not normally given to employees until the results of medical tests are known. The testimony of Mr Marcel Caron, health and safety coordinator at Les Transports Provost Inc, to that effect appears at pages 336 through 340 of the transcript.

In any case, one month later, on March 23, 1984, the Complainant, Mr Cinq- Mars, was called to the office of Mr Michel Tremblay, the Respondent's personnel manager, at the Quebec depot in St- Jean- Chrysostôme. During that meeting, Mr Tremblay informed Mr Cinq- Mars that he was being dismissed because of a medical report indicating that he had back problems, more specifically, bilateral spondylolysis. According to Mr Marcel Caron, who testified for the Respondent, this decision was made as a result of a discussion he had with Dr Robert, during which the doctor told him that the Complainant suffered from bilateral spondylolysis and did not, therefore, satisfy the Respondent's medical occupational requirements. The Respondent, Les Transports Provost Inc, did not deem it necessary to have Dr Robert testify before the Tribunal on this matter.

The evidence also showed that, following his dismissal, Jean Cinq- Mars consulted an orthopedist, Dr Montminy, on April 2, 1984. Dr Montminy also diagnosed bilateral spondylolysis, as shown in Document 00045 of Exhibit C- 2, the Complainant's medical file. It is interesting to note the following entry in this document:

[translation]

no limitation whatsoever on activity or employment. The document also shows that Dr Montminy was aware that Mr Cinq- Mars worked as a truck driver.

On March 5, 1984, Mr Cinq- Mars filed a complaint with the Commission Québécoise des droits de la personne alleging that he had been the victim of discrimination. As Les Transports Provost Inc proved to the Quebec Commission that it was under federal jurisdiction, the complaint was dropped or dismissed. A new complaint (Exhibit C- 1) was filed on February 22, 1985 with the Canadian Human Rights Commission. After filing this new complaint, Mr Cinq- Mars was

rehired as a truck driver by the Respondent, on or about June 25, 1985. The Respondent rehired Mr Cinq- Mars without prejudice, as indicated in the letter (Exhibit R- 8) sent to Mr Reggie Newkirk of the Canadian Human Rights Commission. This was obviously done to reduce the amount of damages that the Respondent might be called upon to pay in the event that the Complainant succeeded in proving discrimination in relation to his disability. Mr Robert Feliciello, industrial relations manager for the Respondent, testified to that effect, at page 83 of the transcript. One thing should be noted immediately: the Respondent, when it rehired Mr Cinq-Mars, in no way restricted him or limited the extent of his duties.

The evidence also showed that between the time he was dismissed, on March 23, 1984, and rehired, on June 25, 1985, Mr Cinq- Mars held various jobs and collected unemployment insurance benefits, as shown in Exhibit C- 4.

The Complainant, Mr Cinq- Mars, gave his evidence simply and directly. The impression he gave was of a man in good health who was able to carry out his work without worrying about his back, especially since, according to his testimony, he only learned of his condition on March 23, 1984. Moreover, he began working for the Respondent again in June 1985, doing exactly the same kind of work as he had been doing when he was dismissed in March 1984. Since that time, his disability has not troubled him in any way.

As regards his disability, Mr Cinq- Mars testified under oath that he had never experienced problems with his back. However, we should note that his medical file (Exhibit C- 2) shows that in 1977 he consulted a doctor who sent him for radiographs of his back. The medical file also shows that on April 2, 1984, shortly after he was dismissed, the Complainant consulted Dr Montminy, whose diagnosis (Document 00045 of Exhibit C- 2) was that Jean Cinq- Mars suffered from bilateral spondylolysis, although he added that there were no limitations whatsoever on the Complainant's activity or employment.

Mr Marcel Caron, testifying for the Respondent, described the duties of a truck driver at Les Transports Provost Inc. His testimony, and Exhibits R- 13 and R- 15, show that a truck driver's work involves a great deal of sometimes dangerous travel and physical exertion. Furthermore, Mr Caron carried out a study in 1982 (Exhibit R- 15) which describes the physical demands and potential risks associated with a truck driver's duties. Mr Caron also compiled statistics in 1986 showing the number and type of accidents which had occurred at Les Transports Provost Inc.

Mr Robert Feliciello, industrial relations manager at Les Transports Provost Inc, testified that the Respondent transported dangerous substances such as petroleum products and acids - a list of these substances was entered as Exhibit R- 5 - throughout Canada and the United States, particularly in Quebec. He also testified that these substances were almost always transported through industrial regions and, thus, through major population centres.

Dr André Gilbert, testifying on behalf of the Respondent, Les Transports Provost Inc, explained the company's position and rationale for dismissing Mr Cinq- Mars because of his bilateral spondylolysis. The Tribunal was greatly impressed by Dr Gilbert's testimony, which took up most of a day. Not only does Dr Gilbert's curriculum vitae speak for itself, but his testimony,

which clarified matters for the non- experts among us and was sprinkled with both anecdotes and excerpts from scientific studies, convinced the Tribunal of Dr Gilbert's expertise.

Dr Gilbert testified that the Complainant, Jean Cinq- Mars, suffered from bilateral spondylolysis of the fifth lumbar vertebra and added, at page 167 of the transcript:

[translation] Spondylolysis is a defect of the dorsal arch of a vertebra in which the posterior portion is not connected to the anterior portion.

He added that spondylolysis was the least advanced state of spondylolisthesis. Dr Gilbert's testimony to that effect, at pages 207 and 208 of the transcript, makes interesting reading. He also admitted that Mr Cinq- Mars's spondylolysis was still in the least developed stage. Indeed, Dr Gilbert, commenting on the radiological reports, particularly those from 1977 and 1985, noted that there had been no change in Mr Cinq- Mars's condition (see pages 222 through 224 and 273 of the transcript.

As regards the duties and working conditions of a truck driver, the position sought by Mr Cinq-Mars, which were described more fully by Mr Caron and discussed by Dr Gilbert, the latter declared, at page 189 of the transcript:

[translation] I think that it is from this perspective, given that, in my opinion, it is difficult to offer people with spondylolysis an alternative. These are people who can be encouraged to undergo very aggressive therapy, and I think that when we are asked to prevent such cases, it is from this perspective. It isn't that we want to deprive anyone of a job, but we want to encourage them to work in an environment in which they will be able to function without risking permanent disability in a job which, like it or not, involves heavy strains and biomechanical and physiological modifications.

Further on, at page 232 of the transcript, he adds: [translation] There was one thing I was sure of, with spondylolysis, when one is required to lift heavy objects or exert oneself in a way that puts strain on the lumbosacral joint, it can be very harmful, and that is my personal experience in the light of the documents which I have presented to you.

3 - ISSUES

(1) Was the Respondent's decision to dismiss Mr Cinq- Mars because of his disability a discriminatory practice in contravention of sections 3(1) and 7 of the Canadian Human Rights Act (SC 1976- 77 c 33, as amended), which read:

Section 3(1) : For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Section 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. The term "disability" used in section 3(1) is defined in section 20 of the Act.

In argument, counsel for the Canadian Human Rights Commission rightly claimed that Ontario Human Rights Commission et al v Borough of Etobicoke [1982] 1 SCR 202, which was followed by O'Malley and Bhinder in the Supreme Court, establishes that the burden lies with the Commission to establish a prima facie case of discrimination. Once such prima facie evidence is established, the onus shifts to the employer to justify its decision regarding a bona fide occupational requirement (bfor).

In the present case, the Tribunal is satisfied that the Complainant has established a prima facie case of discrimination against him. The evidence on this point is convincing. It is sufficient to refer to the testimony of Messrs Caron and Feliciello, both managers for the Respondent, to the effect that Mr Cinq- Mars was fully qualified for the position of truck driver at Les Transports Provost Inc, except that he had bilateral spondylolysis. Since this is a disability as defined in sections 3 and 20 of the Canadian Human Rights Act, it constitutes a prohibited ground of discrimination under section 7 of the Act. What is more, in argument, counsel for the Respondent clearly admitted that Les Transports Provost Inc had discriminated on the basis of a disability, but specified that such discrimination was permitted under section 14(a) of the Act.

The Tribunal thus has no hesitation in finding that the Complainant has established a prima facie case of discrimination in relation to a disability.

(2) Can it be affirmed that Mr Cinq- Mars's dismissal was not discriminatory because it was based on a bona fide occupational requirement as defined in section 14(a) of the Canadian Human Rights Act?

As previously mentioned, counsel for the Respondent has argued that the alleged discriminatory practice was not discriminatory because it was based on a bona fide professional requirement as defined in section 14(a) of the Act.

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

The other subsections of section 14 list the other acts that are not considered discriminatory practices prohibited by the Act.

In Etobicoke, supra, McIntyre J wrote, at page 208: Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer.

The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification

and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is, upon a balance of probabilities.

This principle was reconfirmed in Ontario Human Rights Commission and Therese O'Malley (Vincent) v Simpson Sears Ltd [1985] 2 SCR 536, and in K S Bhinder and Canadian Human Rights Commission v Canadian National Railway Company, Attorney General of Canada et al [1985] 2 SCR 561.

In the present case, there is obviously prima facie evidence of discrimination against the Complainant. Therefore, the burden of proof now lies with the employer. The latter, engaged in a practice considered discriminatory under section 7 of the Canadian Human Rights Act, may invoke section 14(a) of the Act to show that there was in fact no discriminatory practice since there was a bona fide occupational requirement.

4 - DEFENCE PROVIDED FOR IN SECTION 14 OF THE ACT

A) CRITERIA FOR A BONA FIDE OCCUPATIONAL REQUIREMENT

As it is almost always appropriate, cases of this type usually begin with some mention of the criteria for a bona fide occupational requirement established in Etobicoke, at page 208:

To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering. the employee, his fellow employees and the general public.

Therefore, according to Etobicoke, a bona fide occupational requirement has two aspects which the employer must take into account. The first is subjective and the second is objective.

Regarding the subjective element in the present case, there are some points which must be cleared up. Indeed, as to Mr Cinq- Mars's medical condition, there seem to be several conflicting opinions about his ability to drive a truck.

Les Transports Provost Inc refers potential employees to Dr Robert for a physical examination. In this case, Mr Cinq- Mars was examined after he had been hired, although the examination is normally given before the person begins work. The employer explained that this was due to an administrative error. Furthermore, since there are no regulations or legislation governing the transportation of dangerous substances in Canada, the company has had to create its own safety regulations and measures. To that end, it uses the hiring principles entered as Exhibit R- 6 and the American regulations entered as Exhibit R- 11, which include the requirement for a physical examination.

Following the physical examination, Dr Robert gave Mr Cinq- Mars a medical certificate dated February 23, 1984 (Exhibits C- 8 and C- 9). This certificate stated that there were no restrictions on Mr Cinq- Mars's ability to work as a truck driver, because the conditions in 391.41 to 391.43 of the American regulations (Exhibit R- 11) had been met.

However, in March 1984, the Respondent decided to dismiss Mr Cinq- Mars because he suffered from bilateral spondylolysis. This decision was apparently made after Dr Robert informed the Respondent that the Complainant had the condition. The decision to dismiss Mr Cinq- Mars was made by Mr Feliciello, as his testimony, at page 77 of the transcript, shows:

[translation] Mr Marcel Caron, our health and safety specialist, came to me, as the industrial relations specialist, with this information; I was forced to conclude that Mr Cinq- Mars had a condition which contravened our policy and our occupational requirements and T had to order his dismissal.

There was no evidence in the file to show that Dr Robert had communicated with the Respondent. It is true that the Respondent was somewhat surprised by the medical certificate (Exhibits C- 8 and C- 9), but that is no reason for not having Dr Robert appear to explain his actions and, in particular, why a month passed between the physical examination, on February 23, 1984, and the dismissal, on March 23, 1984.

Because of the lack of evidence on this matter, we must turn to section 391.41(a) of the American regulations, which reads as follows:

Sec 391.41 (a) A person shall not drive a motor vehicle unless he is physically qualified to do so and, except as provided in Sec 391.67, has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle.

This is followed by a list of the physical and mental conditions which mean automatic exclusion.

Further on, Section 391.43 of the American regulations reads: INSTRUCTIONS FOR PERFORMING AND RECORDING PHYSICAL EXAMINATIONS The examining physician should review these instructions before performing the physical examination. Answer each question yes or no where appropriate.

The examining physician should be aware of the rigorous physical demands and mental and emotional responsibilities placed on the driver of a commercial motor vehicle. In the interest of public safety the examining physician is required to certify that the driver does not have any physical, mental, or organic defect of such a nature as to affect the driver's ability to operate safely a commercial motor vehicle.

Later in the same section, under the heading "spine", it says "Or spondilolisthesis and scoliasis"; this is, in fact, the only place it is mentioned.

Judging from that last paragraph, it seems that a doctor must take note of spondylolysis and must decide if, for the individual concerned, it constitutes an impediment to the safe driving of a truck.

Dr Robert exercised that discretion in giving Mr Cinq- Mars the medical certificate. Once again, Dr Robert was not called to explain the conversations he allegedly had with the Respondent or to explain why Mr Cinq- Mars could not safely drive a truck.

Another, more important, subjective element came into play on April 2, 1984 - some time after Mr Cinq- Mars was dismissed - when he was examined by Dr Montminy. The first thing to note is that Dr Montminy is a specialist in orthopedics, unlike Dr Robert, who is a general practitioner. Dr Montminy diagnosed spondylolysis and at the end of his diagnosis noted:

[translation] no limitation whatsoever on activity or employment.

(Exhibit C- 2 and Document 00045). This confirms Dr Robert's certificate, which was apparently given to Mr Cinq- Mars as a result of an administrative error.

This document also shows that Dr Montminy was aware that Mr Cinq- Mars was a truck driver by profession.

Despite these few anomalies, the Tribunal would be inclined to conclude that the Respondent satisfied the subjective element established in Etobicoke: in other words, the decision to dismiss the Complainant was made honestly and in good faith to ensure the adequate performance of the work. Mr Camirand stated in his argument, at page 461 of the transcript:

[translation] The employer has no complaints regarding Mr Cinq- Mars. He is an excellent driver and a good worker; he has all the qualities a good driver needs. He has one problem, however: he has spondylolysis.

This brings the Tribunal to the second element in Etobicoke: the objective element.

This objective element mentioned in the Etobicoke decision is the most important element for showing a bona fide occupational requirement "is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." In McCreary vs Greyhound Line of Canada Ltd and Eastern Canadian Greyhound* Lines Ltd (October 16, 1984), TD 11/ 84, at page 24, it was decided that the objective branch had two elements. [* French reads "Coreyhound" - Tr]

This involves two sub- issues in the circumstances of this case. First, does the evidence support the Respondents' rationale for this policy on a factual basis? Secondly, does the rationale, if factually supported, lead to the legal conclusion that the requirement "is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public"?

As to the first question, the rationale for this policy, the employer's justification for requiring a truck driver to be in good physical condition is quite clear. Indeed, it is a demanding job and requires good physical condition. The evidence and exhibits confirm this. Furthermore, a vehicle inspection form entered as Exhibit R- 4 shows that the driver must open the hood, climb up onto the vehicle and check the power take- off and all the equipment on the truck- tractor.

It seems less clear, given the evidence, that the Respondent has legally established that the requirement (not having spondylolysis) is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." As Rodger VS Canadian National Railways (July 24, 1985), TD 4/ 85 indicates in its conclusion, at page 40:

Although society cannot permit any substantial threat to public safety, it cannot condone hasty assumptions about the capabilities of the handicapped. Employers must ensure that in imposing BFORs, they are relying upon the most authoritative and up to date medical and statistical information available and adapted to the circumstances of each individual case.

This brings us to an examination of the risk factor.

B) RISK FACTOR

In Carson vs Air Canada (1985), FCA, CHRR, paragraphs 23262ff, Mahoney J considered the necessary degree of risk, in paragraph 23298:

An examination of the cases cited by McIntyre J. thus makes it clear that he did not intend by his reference to give approval to a particular measure of risk. Nevertheless, his own posing of the issue in terms of whether there is "sufficient risk of employee failure" indicates a recognition of a certain degree of risk that sits better with the notion of "acceptable" than with that of "minimal".

Sufficient risk was also considered in Mahon vs Canadian Pacific Ltd (November 6, 1986), TD 8/ 85, at page 42:

The cases have not established how significant a risk must exist before it amounts to a b. f. o. r. Must the risk posed by handicapped people to themselves or others be substantially greater than that posed by a non- handicapped person or is only some greater degree of risk necessary? The vague standards of risk used in the cases may result in the protections in the Act tending to be only empty phrases. Risk to others is a valid factor in denying employment but as the Ward case pointed out, any employee can present a risk to fellow employees. Before denying a handicapped person a job on this basis, a real and significantly greater risk to other employees or the general public than that posed by the non- handicapped should have to be established by the employer. The future is difficult to predict, but we must not deny equality of opportunity on some very remote, or fanciful possibility. (emphasis added)

On this question of necessary risk, Rodger unquestionably establishes that, when public safety is involved, as is the case here, the onus on the employer is less, heavy than it would be under more ordinary circumstances.

It was decided in Carson that the words "reasonably necessary to assure the efficient and economical performance of the job" used by the Supreme Court at page 208 of Etobicoke signify that the employer must demonstrate that the essence of its business would be undermined if it were not permitted to apply its discriminatory policy. Carson vs Air Canada (March 18, 1982), TD 5/ 82 states, at page 44:

As to the objective element of the defence, the Supreme Court of Canada by using the phrase "reasonably necessary" requires the application of a "business necessity" test and not a business convenience test. Thus, the employer has the onus of demonstrating that the essence of its business would be undermined (as opposed to merely being inconvenienced) if it was not permitted to apply its discriminatory policy.

Thus when an employer invokes safety considerations to justify its action, the test consists of determining whether the evidence submitted confirms the conclusion that the risks presented by an employee with bilateral spondylolysis are sufficiently high to make the discriminatory practice a bona fide operational requirement. According to Nowell vs Canadian National Railway Ltd (November 27, 1986), TD 8/ 86, the employer must establish the validity of the occupational requirement by establishing the degree of risk presented by each employee, because it is not, as in Bhinder v Canadian National Railway Co [1985] 2 SCR 561, a working condition that applies to all employees. Thus in Nowell, at page 9, it states:

The bona fides of the occupational requirement in the Bhinder case can be established objectively by considering the validity of the job requirement or "working condition" itself. The bona fides of the occupational requirement in this case or in any case which excludes a whole group or class of so- called "disabled" persons cannot be assessed or established without assessing or establishing that each individual member of that group or class presents a "sufficient risk" to justify the exclusion.

Although the case of Mr X serves as an example in terms of work experience, the Tribunal cannot accord it any greater importance than that, since the cross- examination of witnesses in this case was not possible and, furthermore, certain facts may be different from the present case. Each situation is unique.

To establish that Mr Cinq- Mars could constitute a danger to the general public, the Respondent cited an excerpt from pages 587 and 588 of Bhinder:

It is, however, clear from the reasons and the references made by the Tribunal to the evidence that it was of the view that, as far as the rule applied to non- Sikhs, it was a bona fide occupational requirement. It was agreed that CN adopted the rule for genuine business reasons with no intent to offend the principles of the Act. The Tribunal found that the rule was useful, that it was reasonable in that it promoted safety by reducing the risk of injury and, specifically, that the risk faced by Bhinder in wearing a turban rather than a hard hat was increased, though by a very small amount.

There is no doubt that when the safety of the public or the individual is affected by a person’s condition or behaviour, it may constitute reasonable grounds for not hiring that person. The Tribunal is not inclined to apply the principle used in Bhinder, because there is an important difference between the two cases.

We should note that in Bhinder it was a regulation, or rather a working condition, which applied to all the employees, while in our case it is a matter of a general directive applied by the Respondent giving the doctor a great deal of discretionary power. However, the decisions made

on the basis of this discretionary power must be justified by recognized scientific data that establish the probability of a risk. Given this difference, the present case is not as clear- cut.

The Respondent, as part of its defence based on section 14(a) of the Act, cited Forseille vs United Grain Growers Ltd (September 20, 1985), TD 7/ 87.

First of all, in Forseille, the complaint was based on section 10 of the Act, which is not the case here. Secondly, the principle of individual evaluation was recognized in that case and it was concluded that the dismissal was not the result of prejudice against diabetics on the part of the company but rather was based on uncontradicted physical examinations which indicated that Mr Forseille suffered from brittle diabetes, which meant he could be excluded under section 14(a) of the Act.

The difficulty lies in determining to what degree we can be reasonably sure about allowing someone like Mr Cinq- Mars to return to his old job without undue risk. It seems that it must be left to the doctor to establish that limit.

According to Dr Gilbert's medical evidence, Mr Cinq- Mars has bilateral spondylolysis of the fifth vertebra. Spondylolysis is a condition of the dorsal arch in which the anterior portion of a vertebra is not connected to the posterior portion.

At page 224 of the transcript, Dr Gilbert admitted that the radiological reports on the Complainant, Jean Cinq- Mars, from 1977, 1994 and 1985, showed no signs of change in or aggravation of the condition. According to the medical evidence given, when spondylolysis becomes symptomatic, it is called spondylolisthesis. Dr Gilbert explained that spondylolisthesis is an aggravated state of simple spondylolysis. Barring what is known as a degenerative hypertrophic phenomenon, one cannot contract spondylolisthesis without having spondylolysis (Dr Gilbert's testimony at page 208 of the transcript).

Dr Gilbert's testimony established that any number of things can cause a person with spondylolysis to experience pain. Some feel pain simply in bending over; with others, it is a result of repeated traumas, or one major trauma.

Dr Gilbert believes that driving a truck for a period of several hours constitutes a certain risk because the seated position and the vibration are conditions which are detrimental to Mr Cinq- Mars. They could produce such great pain that Mr Cinq- Mars would be unable to control his truck or to act quickly in an emergency situation.

How then do we reconcile Dr Gilbert's "certain risk" with the fact that there had been no change in or deterioration of the Complainant's condition although he had been driving trucks for over a year for the Respondent and for several months before that for other companies? How can it objectively be claimed that Mr Cinq- Mars presents "a real and significantly greater risk" than that posed by a non- handicapped person? As put in Mahon: "The future is difficult to predict, but we must not deny equality of opportunity on some very remote, or fanciful possibility." Furthermore, the Tribunal should note that Dr Gilbert talked in terms of possibilities rather than probabilities.

At page 277 of his testimony, Dr Gilbert had this to say: [translation] I would say that it is possible that he may live his entire life without any problem, it's possible. If I wanted to reduce the risks involved, I would try to put restrictions on him so that we could remain in the realm of possibilities rather than probabilities.

That is preventive medicine, and that is as far as I can go. Dr Gilbert quoted from a work called Occupational Low Back Pain written by Malcolm H Pope, John W Frymoyer and Gunnar Anderson. Excerpts from this document were entered as Exhibits R- 22 and R- 23. These excerpts indicate that spinal degeneration can occur in individuals in certain occupations, including vehicle operators. Dr Gilbert quoted a passage from page 131 of this document (Exhibit R- 22):

The implication of these observations is: vehicle operators are being exposed to vibration at the resonating frequencies of their spines. It remains to be firmly established that this relationship can be responsible for spinal degeneration.

It obviously cannot be concluded that driving a truck is clearly responsible for what may happen to vertebrae and even less so that Mr Cinq- Mars's spondylolysis would be aggravated by driving a truck, because no real or significant statistical relationship has been demonstrated between, the two elements. However, the Tribunal notes that, at page 131 of the work cited, it says:

It is a convenient explanation for the greater prevalence of degenerative lesions in industrialized societies.

Dr Gilbert even wrote to Dr Ian MacNab to ask him some questions about the consequences of having spondylolysis. Dr MacNab responded in a letter that is entered as Exhibit R- 24.

His answers to the questions were all in terms of possibilities. For example, Dr McNab said:

spondylolysis occasionally may progress to spondylolisthesis.

Continuing his testimony, Dr Gilbert concluded that Mr Cinq- Mars should not continue to work as a truck driver because simply leaning over might be enough to make his spondylolysis symptomatic. Furthermore, he claimed that a fall could create slippage or abnormal mobility of the epispinal space or articular facet and that the resulting pain could be severe enough that the patient would literally seize up and be unable to move. We might note that Dr Gilbert's prime concern was with the possible danger of aggravation and potential complications and he was interested mainly in prevention. But there is no medical evidence or statistics to show the probability of deterioration in the Complainant, Jean Cinq- Mars.

The Tribunal also heard Mr Caron's testimony concerning the responsibilities and physical demands of a job like the one Mr Cinq- Mars occupied, and has occupied since June 1985. A truck driver's duties, such as inspecting the vehicle (an inspection report has been entered as Exhibit R- 14 to show the procedures and actions involved), hooking up the vehicle, climbing onto the tank and lifting the trailer support, carry a high risk of injury. At page 135 of his testimony, Mr Caron describes these actions as very hazardous given the poor layout, the

weather, possible distractions and the surrounding conditions. Mr Caron is in a position to know, since he carried out a study in 1982 (Exhibit R- 15) on trailer pre- coupling. The purpose of this study was to determine the effort required to carry out the necessary operations before leaving the yard.

Mr Caron also prepared a statistical report (Exhibit R- 17) on January 16, 1987, concerning injuries to drivers of semitrailers that involved loss of time at work beyond the day of the accident. These statistics involved accidents occurring between January 1, 1986 and June 30, 1986. Although Mr Caron's testimony showed some risk from injury or falls, he was unable to say if any of those accidents were caused by the sudden incapacity of the driver or, more importantly, to show that Mr Cinq- Mars, because of his spondylolysis, would pose a greater threat than someone without it. There is no tangible evidence on the probability of an accident or the existence of a link between Mr Cinq- Mars's condition and the presumed risk, as was mentioned in Dejager vs Department of National Defence (July 15, 1986), TD 36, at page 38 in particular.

It should be mentioned that Dr Robert Gilbert, an ergonomist, also carried out a study on the suitability of certain physical activities at Les Transports Provost Inc for employees with lower back pain. This document is dated December 16, 1985 and is entered as Exhibit R- 13. Different tasks were analysed, including connecting the hose when delivering products to clients, lifting the trailer support and opening the hood. Can this study be used to justify the decision concerning Mr Cinq- Mars made in March 1984? The Tribunal is of the opinion that it is the data available in 1984 which must prevail in deciding whether, in fact, Mr Cinq- Mars constituted a public danger by driving a truck. This is in view of the conclusion in Rodger, supra, where it is expressly stated:

Although society cannot permit any substantial threat to public safety, it cannot condone hasty assumptions about the capabilities of the handicapped. Employers must ensure that in imposing BFORs, they are relying upon the most authoritative and up to date medical and statistical information available and adapted to the circumstances of each individual case.

Furthermore, Exhibit R- 13 gives no indication that someone with spondylolysis is incapable of the physical efforts required to work as a truck driver. This study focusses on serious conditions, such as a herniated disk, and concludes that the efforts required in the activities studied cannot be "[translation] borne without risk by those with healthy spines or, at least, with no symptoms of microscopic lesions."

On the one hand, it is obvious that any kind of work involves a certain amount of risk for all; on the other hand, the evidence available indicates that Mr Cinq- Mars's spondylolysis is asymptomatic.

Mr Feliciello, the industrial relations manager, testified that the Respondent transported dangerous products, as shown by the list in Exhibit R- 5, and that these products were transported across Canada and the United States, primarily to factories located in cities or major population centres.

5 - CONCLUSIONS

In the light of the testimony given here, respecting the analytical framework established by the Supreme Court of Canada in Etobicoke and upholding the objective spirit of equal opportunity that was invoked in Mahon, the Tribunal judges the occupational requirement claimed by the Respondent not to be a bona fide requirement, although it does consider some of the evidence given by witnesses for the company concerning operational aspects to be important. The Tribunal finds, pursuant to section 14 of the Canadian Human Rights Act, that the employer has failed to establish the existence of a bona fide occupational requirement to justify what is a prima facie discriminatory practice. Mr Cinq- Mars's complaint of discrimination is thus substantiated and must be allowed. This is not a case of malicious intent or of deep- rooted prejudice on the part of the employer. However, the discretionary power given to the doctor and its application in Mr Cinq- Mars's case were based more on subjective fears, in that the medical evidence indicated only that there was a possibility of danger for persons with spondylolysis.

This position is summed up very well in Rodger [quoting Etobicoke], at page 31:

In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a bona fide occupational qualification and requirement has been shown the board of inquiry and the Court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interest of safety of the employee, his fellow employees and the public at large.

Although allowing Mr Cinq- Mars to retain his job may constitute an additional risk, the Tribunal considers that it represents an acceptable risk for society. Reiterating the principle expressed in Mahon, the simple fact that there is a possible safety risk is not grounds for refusing an individual a job. Moreover, if Mr Cinq- Mars constituted a greater risk than other employees in terms of safety, why was he rehired under the same conditions, with no restrictions, in June 1985, after the complaint was filed with the Canadian Human Rights Commission? If the employer truly believed in the bona fide occupational requirement, surely Mr Cinq- Mars would have been given a different job or would have had conditions or restrictions placed upon him.

6 - COMPENSATION

The Tribunal, having concluded that the complaint is substantiated and that the Complainant was the victim of discrimination on a prohibited ground, must now consider the question of damages.

The Complainant has entered as Exhibit C- 6 a document entitled "claim for lost wages" in which he claims $4,882.44 for lost wages, as well as $2,500.00 for emotional injury and $100.00 for travel expenses, for a total of $7,482.44.

According to this document, the Complainant earned $23,709.36 from March 25, 1984 to June 23, 1985, a period of sixty- five weeks. Moreover, he estimates the amount he would have earned working for the Respondent, had he not been dismissed on March 23, 1984, to be $33,157.80.

However, when asked by counsel for the Respondent and by the Tribunal to explain items on his tax returns for 1984 and 1985 (Exhibits C- 4 and C- 7), the Complainant could not provide clear and precise explanations. On the contrary, many questions were left unanswered.

Both his testimony and Exhibit C- 6 show that he estimated that from March 23, 1984 to June 23, 1985, a period of sixty- five weeks, he would have worked for the Respondent for forty- five hours a week at an average salary of $10.90/ hr. However, on this point, he admitted during cross- examination that the work he would have done for the Respondent was seasonal (page 303 of the transcript).

Furthermore, Mr Robert Feliciello, industrial relations manager for the Respondent, testified that the work at Les Transports Provost Inc was handed out on the basis of seniority, as shown in Exhibit R- 10 and the collective agreement (Exhibit R- 9). He also testified that the Respondent's drivers did not all work forty- five hours a week and that their salaries differed, depending upon whether they worked close to the depot or had to make long trips.

If we refer to the Complainant's federal income tax return for 1984 (C- 4), we see he earned:

Employment Income $15,978.12 Unemployment Insurance Benefits $ 3,391.00 TOTAL $19,369.12

In 1985, according to his federal income tax return for that year (Exhibit C- 7), Mr Cinq- Mars earned:

Employment Income $16,814.74 Unemployment Insurance Benefits $ 3,470.00 TOTAL $20,284.74

As regards the loss of $3,692.57 from running a business, which appeared on his 1985 return, it cannot be taken into account, because there is no real evidence that the amount is correct, particularly since the Complainant's explanations on this point were vague and imprecise. What is more, the losses involved the Complainant's own company, Cinq- Mars Moteur Diesel Inc, of which he is the sole shareholder and which has not operated since June 1985. The company had apparently acquired $1,500.00 in equipment, which the Complainant has kept for personal use.

From the amount of $20,284.74 earned in 1985, we can deduct the sum of $11,319.00 that the Complainant earned after he was rehired by the Respondent; this was confirmed by Mr Feliciello and there is nothing to contradict it.

Thus, the Complainant earned $8,963.74 in 1985 while not employed by the Respondent.

The income earned by the Respondent in 1984 and 1985 is thus: 1984 $19,369.12 1985 $ 8,963.74 TOTAL $28,332.36

The best way of computing the salary that Mr Cinq- Mars would have earned had he not been dismissed is to compare his earnings with those of the person who replaced him and whose seniority was comparable to the Complainant's. Contrary to the submission made by counsel for

the Commission, the Tribunal is considering only the employee, Yvon Roussin, who replaced the Complainant in [June] 1984, even though the Complainant was dismissed in March 1984, for the simple reason that, according to the evidence, the work at Les Transports Provost Inc is seasonal and is distributed according to seniority. This would suggest that between March 1984 and June 1984 either there was a lack of work at the company or the work was given to more senior employees.

According to Mr Feliciello's testimony, at page 316 of the transcript, Yvon Roussin earned $14,788.54 from June 20, 1984 to December 31, 1984. Between January 1985 and June 1985, the point at which the Complainant was rehired, Yvon Roussin earned $11,300.31.

Thus, during the period in question, Mr Roussin earned a total of $26,088.00 dollars compared to the $28,332.86 earned by the Complainant during the same period, which means that the latter earned $2,244.86* [* French text reads "$ 2,244.82 - TR.] more than he would have if he had worked for the Respondent.

Consequently, nothing in the evidence justifies awarding the Complainant compensation for lost wages. What remains to be decided is whether there should be an award for emotional injury as set out in section 41(3) of the Act, which reads as follows:

Section 41 (3) In addition to any order that the Tribunal may 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.

As has already been pointed out, the Tribunal considers that the Respondent acted in good faith and without negligence when it dismissed the Complainant in March 1984; it honestly believed itself to be justified under section 14(a) of the Act. However, it has failed to demonstrate the existence of a bona fide occupational requirement. Consequently, there are no grounds for awarding damages under section 41(3)(a).

As for the damages provided for in section 41(3)(b), the Complainant, in Exhibit C- 6, estimated them at $2,500.00. The Complainant's evidence on this question is virtually non-existent. Furthermore, counsel for the Commission did not suggest any amount to the Tribunal, leaving it to the Tribunal's own discretion.

In this matter, section 41(3) of the Act clearly gives the Tribunal a great deal of discretion.

The Complainant's explanations and hesitation in his testimony concerning his income during the period for which he is claiming lost wages, the fact that he informed Dr Gilbert (page 231 of the transcript) during his examination in November 1985 that he had never had backaches, although he admitted at this hearing that he suffered from backaches when he was as young as

thirteen, and the fact that he did not mention to Dr Gilbert that he had visited Dr Montminy in April 1984 for intermittent backaches must all be taken into account.

The Respondent's rehiring of the Complainant in June 1985, with the obvious intention of minimizing possible damages, also reduced the complainant's suffering in respect of feelings and self- respect.

Taking all these factors, as well as the Respondent's good faith, into consideration, the Tribunal in its discretion considers that compensation for suffering in respect of feelings or self- respect is unjustified.

7 - ORDER

IT IS DECLARED that the decision of the Respondent not to hire the Complainant because he suffered from bilateral spondylolysis, without any real risk of danger, is a discriminatory practice contrary to section 7 of the Canadian Human Rights Act.

IT IS ORDERED that the Respondent allow the Complainant to retain his position as truck driver, without any restriction.

Dated at Quebec City this 30th day of September 1987.

[sgd] MAURICE BERNATCHEZ, Chairman