T.D. 11/90
Decision rendered on September 24, 1990

THE CANADIAN HUMAN RIGHTS ACT

HUMAN RIGHTS TRIBUNAL

BETWEEN:

RHONDA FITZHERBERT

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

STERLING UNDERHILL

Respondent

TRIBUNAL

J. Grant Sinclair, Q.C. - Chairman
Edward H. Fox - Member
Joanne Cowan-McGuigan - Member

DECISION OF TRIBUNAL

APPEARANCES:

Anne Trotier	Counsel for the Commission
DATE AND LOCATION OF HEARING:	May 16, 1990 Fredericton, New Brunswick

Complainant alleged that:

DECISION

The Complainant, Rhonda Fitzherbert of Stickney, New Brunswick, filed a complaint with the Canadian Human Rights Commission ("Commission") dated

August 25, 1986, alleging that the Respondent, Sterling Underhill, engaged in a discriminatory practice on the grounds of sex and family status. More particularly, the

"On August 10, 1986, Sterling Underhill, my employer, informed me that my employment as a truck driver was terminated. He advised me that my position was to be given to his brother. I allege that I have been discriminated against on the grounds of sex and family status, contrary to section 7 of the Canadian Human Rights Act."

This Human Rights Tribunal ("Tribunal") was appointed on August 23, 1989 to enquire into the complaint. At the commencement of the hearing on May 16, 1990 in Fredericton, the Respondent did not appear nor was he represented by counsel. The Commission was represented by Anne Trotier, Commission counsel. A number of documents were filed as exhibits with the Tribunal which show conclusively that the Respondent had notice in writing of the time, date and place of the hearing. In addition, Tribunal officials spoke to Gertrude Underhill, spouse of the Respondent, on May 14, 1990 by telephone. She confirmed that the Respondent had received the notice of hearing and that he was well aware that the hearing was to commence on May 16, 1990 at Fredericton.

On the commencement of the hearing on May 16, 1990, Commission counsel requested a short adjournment to allow a further opportunity for the Respondent or his representative to appear, but no one appeared.

When the Respondent first received notice of the complaint, he retained legal counsel who advised him of the obligations and authority vested in the Tribunal and, that as a minimum, it would be in his interest to appear and tell the Tribunal his version of the events surrounding the complaint. For whatever reason, the Respondent chose not to appear or be represented by counsel. The Tribunal proceeded to hear the complaint, and in these circumstances, is satisfied that it properly did so.

The Complainant received a Class 3F driving license in 1986 which qualified her to drive a "straight truck" equipped with air brakes.

The Respondent had a contract with the Irving nursery to haul tree seedlings from the nursery to various destinations within New Brunswick and Maine.

In early August 1986, upon hearing that the Respondent might need a driver, she called and met with him to discuss the possibility. When they met, he

was somewhat surprised to see that it was the

Complainant and not her husband who wanted the job and he indicated to her at that time that he was not sure if he needed anybody.

On the following Tuesday night which appears to be August 6, 1986, Clarke Underhill, the Respondent's son who worked in the business, called the Complainant and said that he wanted her to drive a load to Port Elgin, New Brunswick. She asked him if she had a job and he replied, "I guess so", and told her that the Respondent had said that she could take the load to Port Elgin. Clarke also told her that the job usually lasts 3 to 4 weeks depending on the season.

The Respondent used two straight trucks for hauling the seedlings, a red one and a blue one. The red truck was in better condition and the Complainant was to drive it, and Clarke was to drive the blue truck if it had to go out.

The Complainant drove the load to Port Elgin where it was unloaded and she returned home Wednesday evening. She called the Respondent who asked her if she would drive the truck to the nursery and pick up another load of seedlings to be taken to Port Elgin. She did this and the load was driven to Port Elgin by Clarke.

On Friday, August 8, 1986, the Complainant picked up another load from the nursery and drove it to Sussex, New Brunswick.

She returned home that afternoon, delivered the empty truck to Clarke and at that time, asked him how much she was to be paid. He said that was up to the Respondent and she should speak to him.

The next day, she again spoke to Clarke about the pay rate, and he expressed the view that the Complainant should get paid less than he did because she was a woman.

On Sunday, August 10, 1986, the Complainant went to see the Respondent to discuss the matter of pay. At that time, he gave her a cheque for $125.00, and also told her that he didn't need her to drive anymore. The reason was that his brother, Ervine Underhill wanted to drive. She went home very

upset. The Respondent had never expressed any dissatisfaction or had any complaints concerning the Complainant's work performance.

She understood that the $125.00 was calculated on the basis of $75.00 for the trip to Port Elgin and $50.00 for the trip to Sussex. None of the usual deductions, such as income tax or unemployment insurance premiums were deducted from the payment of $125.00.

Maurice Dionne, manager of the Irving nursery also gave evidence. The most relevant part of his evidence dealt with the dates and destinations of the loads taken by the Respondent over the period April 29, 1986 to September 3, 1986 which were set out in Exhibit

HR-2. This exhibit did not identify the drivers of the trucks or the distances from the nursery to the various destinations. In oral testimony, Mr. Dionne was able to identify some of the drivers of the trucks, being the Complainant on August 6, and August 8, 1986; Clarke on August 12 and 14, 1986 to Fort Kent; Sterling Underhill on August 22, 1986 to Fredericton and Ervine Underhill on September 3, 1986 to Blackbrook. Mr. Dionne also gave evidence as to the distances from the nursery to the various destinations.

The first question that the Tribunal must decide is whether the Complainant was an employee. The courts have developed a number of factors to determine whether an employer/employee relationship exists. Without reviewing the cases in detail, they indicate that the most important factors are whether the employer has the right to control what work is to be done, how it is to be done and the payment of wages or other renumeration.

The courts have also held that the fact that a person who is paid by the job, and the fact that none of the normal deductions are made, does not disqualify that person from being characterized as an employee (Zinkovic and John Botelho Construction Co. Ltd., [1986] Man. R. (2d) 123. Yellow Cab Limited and Board of Industrial Relations et al, (1980) 108 D.L.R.(3rd) 479)

Applying the case law as it has developed, it is the Tribunal's opinion, that on the facts of this case, the Complainant was an employee of the Respondent.

The Tribunal is supported in this conclusion by a number of recent decisions in which the Supreme Court of Canada has held that "the Canadian Human Rights Act must be interpreted so as to advance the broad policy considerations underlying it and that task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation": (see Winnipeg School Division No.1 v. Craton, [1985] 2 S.C.R. 150; Ontario Human Rights Commission, and O'Malley v. Simpsons/Sears Limited, [1985] S.C.R. 536; Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145; Action Travail des Femmes v. C.N.R., [1987] 1 S.C.R. 1114.

The next question is, did the Respondent engage in a discriminatory practise under the Act in preferring his brother to the Complainant. The Complainant is a woman. She was engaged by the Respondent to work as a truck driver. Clarke made the comment that she should receive less pay because she was a woman. There is no evidence that the Respondent shared this view. She was dismissed because the Respondent wanted his brother to drive. The Tribunal does not accept the conclusion that the Complainant was dismissed on the grounds of sexual discrimination.

On the question of "family status", Commission counsel pointed out that there are few decisions dealing with family status in this fact context. She referred the Tribunal to two recent decisions Commission des droits de la personne du Quebec v. Brossard, [1988] 2 S.C.R. 279 (S.C.C.) and Schaap & Lagace v. Canadian Armed Forces (1988) 95 N.R. 132 (F.C.A). The Brossard case involved a municipal hiring policy which disqualified members of the immediate families of full-time employees and town councillors from being employed by the town and raised the question of whether this policy, based on family relationship, constituted discrimination in employment based on "civil status" contrary to section 10 of the Quebec Charter of Human Rights and Freedoms.

Schaap & Lagace dealt with the issue of whether the Armed Forces' policy that denied married quarters to persons having a common law relationship was discrimination based on marital status contrary to the provisions of the Canadian Human Rights Act ("Act").

In addition to these two cases, the Tribunal considered A.G. Can v. Mossop (29 June, 1990, A-199-89, Toronto) (Fed. C.A., unreported) and Ina Lang V. C.E.I.C., unreported decision C.H.R.T., T.D. 8/90, dated June 18, 1990. (Both cases are under appeal)

Although the words "family status" are not defined in the Act, this Tribunal agrees with and adopts the conclusion of the Tribunal in Schaap (1988) C.H.R.R. D/4890, D/4910 that:

"... The natural and ordinary meaning of the word "family status" I believe would include the inter-relationship that arise from bonds of marriage, consanguinity, legal adoption and including to use the words of Professor Tarnopolsky, the ancestral relationship whether legitimate, illegitimate or by adoption as well as the relationships between spouses, siblings, in-laws, uncles or aunts and nephews or nieces, cousins, etc."

As similar meaning was given to family status by the Federal Court of Appeal in Mossop per Marceau J. A. at p. 15:

"I do not see how it can be said that the word "family" has a meaning so uncertain and equivocal that, in a legal context, it must in every instance be subjected to interpretation by the courts. Is it not to be acknowledged that the basic concept signified by the word has always been a group of individuals with common genes, common blood, common ancestors."

The Complainant performed her job as a driver without complaint or criticism from the Respondent. The sole reason her employment was not continued is that the Respondent favoured his brother for the job. Unlike Brossard where employment was denied because of family relationship, here it was denied because of the absence or lack of family relationship. Nonetheless, in the Tribunals's view, the actions of the Respondent constitute family status discrimination contrary to section 7 of the Act. In reaching this conclusion, the

Tribunal is guided by the reasons of the Federal Court of Appeal in Schaap & Lagace where Hugessen J.A. said at p. 135:

"... I think the legislation [human rights legislation], by including marital status as a prohibited ground of discrimination along with such factors as race, ethnic origin, colour, disability, and the like, is clearly saying that these are all things which are irrelevant to any of the types of decisions envisaged in ss. 5 to 10 inclusive. Those decisions are to be made on the basis of individual worth or qualities and not of group stereotypes."

Similarly, Marceau, J. said at p. 138:

" ... Indeed, is not this in perfect keeping with the purpose of all human rights enactments, which is, of course, to prevent the victimization of individuals on the grounds of irrelevant characteristics over which they have no control (sex, colour, disability), or with respect to which their freedom of choice is so vital that it should in no way be constrained by the fear of eventual discriminatory consequences (religion, marital status)."

The Complainant was dismissed from her job for reasons, in effect, of nepotism; a family member was preferred. The Complainant was denied employment on the basis of an irrelevant characteristic over which she had no control.

In the absence of any evidence or justification from the Respondent as to why the he took this action, the Tribunal is bound to decide in favour of the Complainant and finds that the complaint is substantiated. Counsel for the Commission argued that the Complainant should be compensated for loss of income for the period August 11, 1986 to September 3, 1986. Counsel also argued for damages for hurt feelings and for a letter of apology.

With respect to loss of income, Exhibit HR-2 showed that there were 23 loads delivered between August 11, 1986 and September 3, 1986. Clarke was shown as the driver f or two of these loads. It was argued that, if the Complainant had not been dismissed, she would have made at least half of the remainder, or 10 1/2 trips. At an average rate of $50.00 per trip, she would have earned $525.00. Accordingly, her compensation should be this amount plus interest.

The Tribunal has difficulty in accepting this argument. Although we have concluded that the Complainant was an employee, the terms of her employment were very vague to say the least. There was evidence that she was to drive the one of the trucks - the red truck - and Clarke the blue truck, but it would be stretching the evidence to conclude that the Complainant was guaranteed to make 50% of the trips during the relevant period. The evidence is not sufficiently developed to allow the Tribunal to conclude, without a large amount of guessing that the Complainant would have made half of the 21 trips taken over the relevant period, or, for that matter, to determine what number of trips the Complainant would have made.

Ervine Underhill, the brother, drove the load on September 3, 1986 to Blackbrook. But for the dismissal, a reasonable inference is that the Complainant would have made that trip. Accordingly, the Tribunal orders that the Respondent pay to the Complainant the amount of $50.00 for lost wages.

The Tribunal also orders that the Respondent compensate the Complainant the further amount of $100.00 for hurt feelings and $25.00 for expenses incurred as a result of the discriminatory practise.

Dated this 13th day of August, 1990.

J. Grant Sinclair