T. D. 7/ 87 Decision rendered on July 21, 1987

Canadian Human Tribunal Decision Under the Canadian Human Rights Act.

BETWEEN: Carla Druken Hilda Isbitsky, Myrna McMillan and Jeanne Bérubé complainants, and Canada Employment and immigration Commission respondent,

TRIBUNAL DECISION

Heard in Ottawa, Ontario on November 3, 4, 5, 6, 20, 21, 1986

Before: Hugh L. Fraser

Appearances: James Hendry, counsel for the complainants Carla Druken, Hilda Isbitsky, Marna McMillan, Jeanne Bérubé and the Canadian Human Rights Commission.
Grant Sinclair, counsel for Canada Employment and Immigration Commission.

>THE FACTS:

All of the complainants have filed complaints under section 5 of the Canadian Human Rights Act alleging that the respondent, the Canada Employment and Immigration Commission, has engaged in a discriminatory practice on the ground of marital status and family status in the provision of services. The Canadian Human Rights Commission was satisfied that the complaints involved substantially the same issue of fact and law and therefore all of the complaints were dealt with together pursuant to sub section 32 (4) of the Act.

The complainant Marna McMillan completed grade 10 in 1965 or 1964. She was engaged in a variety of occupations and spent several years at home looking after her infant child until December 1977 when she commenced employment at Sims Custom Cartage. Initially, her employment was on a part- time basis doing month- end accounts receivable. She received most of her training from the accountant who was employed with the company. She was taught how to do the payroll, and acquired other related bookkeeping skills during this period. The full- time employment with Sims Custom Cartage began in March of 1978. The complainant's husband had formed a company called

Icarus Enterprises Limited along with two other individuals. The complainant's husband owned 50% of Icarus, with his partners each owning 25%. Icarus Enterprises Limited purchased Sims Custom Cartage in April 1977. The complainant was initially hired by her husband who needed some help in the office. Her husband set her salary and initially directed her work. As the company grew, a full time general manager was hired and the general manager assumed much of the direction over the complainant work. The complainant, Marna McMillan, stated that she did not receive any unusual or favorable treatment as a result of marriage to the majority shareholder in the company. All the usual deductions were taken from her salary including Canada Pension, Income Tax and Unemployment Insurance.

In 1983, the company had approximately 163 employees. As a result of an economic downturn, a number of employees of Sims Custom Cartage were laid off. In January 1984, the partners of Sims Custom Cartage decided to close their doors. In February 1984, the company declared bankruptcy with approximately 160 employees losing their jobs as a result. The complainant prepared the T- 4 and separation slips for the departing employees. She indicated to the Unemployment Office that she would not be available to work for a two week period in order to finish up the separation papers. Mrs. McMillan received a notice of disentitlement for the period during which she was completing the company's T4 and financial records. The disentitlement was later terminated by Employment and Immigration Canada. The termination of the disentitlement occurred on February 10th, 1984. Mrs. McMillan then received Unemployment Insurance benefits retroactive to February 10th of 1984.

- 1 > The complainant Marna McMillan received the sum of $ 236.00 gross payment per week for 14 weeks from Unemployment Insurance. Mrs. McMillan indicated in her testimony that she was advised by the Revenue Canada tax auditor who attended her premises to go through the records and complete the payroll audit, that she was not eligible for Unemployment Insurance benefits, in view of the fact that her husband was an owner of the company, by virtue of his 50% ownership of the shares of Icarus corporation, which owned all the shares of Sims Customs Cartage. Mrs McMillan then pursued a series of letter and appeals in an attempt to reverse the final decision to disentitle her from Unemployment Insurance benefits. Mrs. McMillan was unsuccessful in her appeals. She was eventually repaid approximately 4 years worth of unemployment insurance premiums that had been paid by her employer.

The second complainant, Mrs. Hilda Isbitsky, has been employed as a bookkeeper throughout most of her working career. She completed commercial high school and then embarked on a 4 year training course on all commercial subjects. She also took a course at McGill University in accounting. Mrs. Isbitsky has had a lengthy working career beginning in 1940. Between 1940 and 1977, Mrs. Isbitsky worked in a variety of jobs primarily as a bookkeeper. In 1977, during a period in which she was unemployed, Mrs. Isbitsky was offered a position as a bookkeeper by a company called Avenue Advertising Art. This company had three partners, one of whom was Mrs. Isbitsky's husband. Each had a 1/ 3 ownership interest in the company. The complainant, Mrs. Isbitsky, stated that in January of 1980, the companies that had been managed by her husband and his two business partners were rolled over into one company named Centrave Graphiques. One of the partners left the company and the two remaining partners, of which Mrs. Isbitsky husband was one, each owned 50% of the new company. The complainant continued her bookkeeping duties during this period. The complainant's

salary in 1977 was approximately $ 225.00 a week. That salary was increased to $ 380.00 a week by January of 1983. The complainant, Hilda Isbitsky, maintained she did not have any say in the management decisions; nor did she receive benefits as a result of her marriage to one of the co-owners.

The complainant was laid off in January of 1983, in a decision made by the two partners. During a subsequent discussion with an official of Revenue Canada she was advised that she should not have been paying Unemployment Premiums because her husband owned more than 40% of the shares of the company that employed her. This meeting occurred sometime in January of 1983.

The complainant Isbitsky received unemployment benefits of approximately $ 1,436.00 before she was advised that she was not entitled to those benefits because of her marital status. Hilda Isbitsky attempted to find other employment but was unsuccessful in her attempts.

- 2 > In July 1985, she applied for a vacant bookkeeping position at Centrave Graphiques, her previous employer. Mrs. Isbitsky was also ill for part of the period of her unemployment and had an operation in August of 1983. She indicated that the only period in which she was not available for work was July 1983 to August 1983. This complainant pursued a series of letter and appeals beginning with the application for determination of a question regarding Insurable employment, an appeal to the tax court of Canada, and an attempt to appeal to the Federal Court of Canada. She also appeared before the board of referees for Unemployment Insurance. After exercising all avenues of appeal, the complainant Hilda Isbitsky filed a complaint with the Canadian Human Rights Commission.

The tribunal also heard from Carla Druken, the third complainant. Carla Druken completed her grade 10 education in Nova Scotia and then took a two year business course which involved secretarial and bookkeeping training. She completed the final year of her training in 1974, and was employed in a series of positions, including jobs with Acadia University and a job as a teller with the Atlantic Trust Company. This latter position also involved bookkeeping. Carla Druken then took some time out of the work force to have a child and in March of 1982, she assisted her husband in setting up a business known as Mike's Plumbing and Heating, a sole proprietorship. Mrs. Druken helped to set up the initial bookkeeping system and insured that the business was registered with the proper agencies. The complainant also stated that she called the Unemployment Insurance office in Digby, Nova Scotia, and explained to them that her husband had just started a business which was solely owned by him, and that she, as his wife, would be working for him. She stated that she was advised that she would have to pay premiums for Unemployment Insurance.

The business was conducted out of the complainant's home; one half of the basement was partitioned off for an office. The complainant's husband did all the actual plumbing work while the complainant handled the office work. In December 1982, the complainant was laid off as a result of a slow down in the business. The complainant received full Unemployment Insurance benefits from December 1982 until April 1983. During this period the complainant was employed on a part time basis as an Avon Sales Lady and her Avon earnings were deducted from Unemployment Insurance payments. The complainant also received partial Unemployment Insurance benefits through to May 10th, 1984. She alleged that she was continuing to look for work but she resided in a very small community in which there were few jobs available.

On May 17th, 1984 the complainant received a notice of ruling on her insurability advising her that her earnings were not insurable as a result of paragraph 3(2)(C) of the Unemployment Insurance Act of 1971.

- 3 > She did not understand the initial meaning of this ruling but was later advised that the ruling was made because she was the spouse of her employer. This complainant then decided to complete an application for determination of the question regarding insurable employment. The complainant also appealed to the board of referees. Her appeal was unsuccessful. A number of

letters and request for reconsideration were sent to Revenue Canada by the complainant and by a solicitor retained by the complainant. When these attempts proved unsuccessful the complainant filed a complaint with the Canadian Human Rights Commission.

By consent of counsel these three complaints were heard together, the argument in respect of each applying to all. The fourth complainant, Jeanne Berube did not attend the hearing and no evidence was introduced regarding her complaint. The three complainants who appeared before the tribunal all alleged that the respondent Canada Employment and Immigration Commission, engaged in a discriminatory practice on the grounds of marital status and family status in the provision of services. The complaints before this tribunal each alleged a discriminatory practice and contravention of section 5 of the Canadian Human Rights Act which reads as follow:

It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public;

a) To deny, or to deny access to, any such good, service, facility or accommodation to any individual.

b) To differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

Section 3(1)(g) of The Act reads as follows: 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.

The complainants maintained they were discriminated against on the basis of their marital status and family status in that they were required to repay the Unemployment Insurance Benefits received by them on the basis of their relationship with their spouse.

The respondent maintains that the Employment of the three complainants appearing at the tribunal was uninsurable employment as a result of the provisions of the Unemployment Insurance Act, 1971.

- 4 > Section 3(1)(a) of The Unemployment Insurance Act reads as follows:

Insurable Employment is employment which is not included in excepted employment and is;

(a) Employment in Canada by one or more employers, under any express or Implied contract of service or apprentiship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the peace, or otherwise.

The respondent further maintained that the employment of the three complainants was accepted employment by virtue of Section 3(2)(c) of The Unemployment Insurance Act which reads;

Excepted employment is (c): Employment of a person by his spouse; The other provision. of the Unemployment Insurance Act relied upon by the respondent to classify the complainants employment as excepted employment was found in section 4, Sub- section (3)(d) which provides that the Commission may with the approval of the governor in council make regulations for excepting, from insurable employment

d) The employment of a person by a corporation if he or his spouse, individually or in combination, controls more than 40% of the voting shares of that corporation.

The regulation relied upon by the respondent in accordance with section 4(3)(d) of the Unemployment Insurance Act is a regulation found in Section 14 A of the Unemployment Insurance Regulations which reads as follows;

The following employment are excepted from Insurable employment, a) Employment of a person by a corporation if he or his spouse, individually or in combination, controls more than 40% of that corporation.

I am guided by the case of Christine Morrell v. Canada Employment and Immigration Commission (1985) G. C. H. R. R. 3021 in which the tribunal found that Christine Morrell was discriminated against when she was denied the continuation of regular unemployment insurance benefits because she was pregnant. I agree with the finding of the Tribunal in the Morrell case that unemployment insurance is not only a service provided by the Respondent and generally available to the public, but it is also a

- 5 > service which most employed members of the public are required by law to participate in. Thus, in the case before me I also find that the Complainants were denied a service customarily available to the public on a prohibited ground of discrimination.

Counsel for the Complainants stated that the terms "Marital Status" and "Family Status" are not defined in the Canadian Human Rights Act, and the existing case law does not provide any clear or consistent interpretation of these terms. I am satisfied that the term "Marital Status" as contemplated by this Act refers not only to the fact of the complainants marriage, but also to the identity of the spouse, as well as the attributes and Interests of the spouse. With regards to the matter of "family status" my review of

the case law leads me to support the broader interpretation of relationship to another particular family member including one’s spouse.

CONFLICT WITH UNEMPLOYMENT INSURANCE ACT. As was the situation in the Morrell case, this Tribunal is faced with the task of considering a practice that is prima facie discriminatory but which is mandated by the Unemployment Insurance Act, and in particular sections 3(2)(c) and 4(3)(d) and regulation 14(a).

There is no express provision in either the Unemployment Insurance Act or the Human Rights Act indicating that one statute is to be given precedence over the other counsel for the complaints

submitted section 63(1) of the Canadian Human Rights Act binds the crown. This section provides that:

This Act is binding on Her Majesty in right of Canada, except in matters respecting the Government of the Yukon Territory or the Northwest Territories.

Section 63(2) of the Canadian Human Rights Act states: Nothing in this Act affects any provision of The Indian Act or any provision made under or pursuant to that Act.

Sub Section 48(1) of The Canadian Rights Act exempts pension funds or plans established by an Act of Parliament.

- 6 > Sub Section 48(2) of the same statute states that:

The Commission shall keep under review those Acts of Parliament enacted before the coming into force of this section by which any superannuation or pension fund or plan is established and, where the Commission deems it to be appropriate, it may include in a report mentioned in section 47 reference to and comment on any provision of any such Act that in its opinion is inconsistent with the principles described in section 2.

The tribunal in the case of Bailey v. Carson (1981), 1 C. H. R. R. D/ 193 maintained that these excepting provisions suggest that the Canadian Human Rights Act otherwise applies to federal statutory provisions. Professor Cumming added however, that because there is no primacy clause in the Canadian Human Rights Act such as is found in several provincial human rights acts "which would be the clearest approval in dealing with the matter of the relationships between two inconsistent statutes; perhaps... The government did not intend the Act simply to prevail over all other (at least existing) legislation which did not specifically exclude its application".

Although the tribunal in Bailey found that the Canadian Human Rights Act can have application in respect of provisions of the federal statutes, it went on to conclude that the provisions of the Income Tax Act which discriminated against Bailey and the other complainants were unreasonable violations of the Canadian Human Rights Act. Notwithstanding this finding the tribunal held that the particular provisions of the Income Tax Acts although in conflict with the Canadian Human Rights Act remained operative as long as the otherwise offending provisions were "based upon considerations perceived by Parliament as relevant to the fundamental purpose of the Income

Tax Legislation, being Revenue collection". This Tribunal also considered the case of Insurance Corporation of British Columbia v. Heerspink (1982) 2 S. C. R. 145. In the Heerspink case the Supreme Court of Canada was asked to consider whether the termination of an insurance policy without stated reasons amounted to denial of a service customarily available to the public contrary to the Human Rights Code of British Columbia. In arriving at his decision Mr. Justice Ritchie considered whether there was a conflict between the two aforementioned statutes and said:

I agree with Mr. Justice Hinkson that in the present case the two statutory enactments under review can stand together as there is no direct conflict between them.

> The position is that the insurer's right to terminate its contract is unaffected by the provision of Section 3 of The Human Rights Code wherever reasonable cause exists for such termination. This might be termed a modification of The Statutory Condition but it certainly does not in my view constitute repugnancy so as to alter the fact that reasonable cause' is the touchstone in the construction of the two provisions here at issue.

Mr. Justice Lamer delivering reasons for himself and for Mr. Justice Estey and Mr. Justice McIntyre added at p. 157 of the decision:

When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavors to buttress and protect are, save their constitution laws, more important than all other. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises. As a result, the legal proposition generalis specialibus non derogant cannot be applied to such a code. Indeed the Human Right Code, when in conflict with "particular and specific legislation" is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.

Counsel for the Complainant also relied on Winnipeg School Division no. 1 v. Craton (1985) 2. S. C. R. 150. In the Craton case the respondent a teacher was required by the collective agreement to retire at a fixed date following her sixty- fifth birthday. The Manitoba Human Rights Act prohibited discrimination in employment on account of age while the Public Schools Act of Manitoba allowed the fixing of a compulsory retirement age for teachers. At issue in the Supreme Court appeal was the conflict between the provisions of the Public Schools Act.

Mr. Justice McIntyre in delivering the decision states at page 156; " In any event I am in agreement with Monnin C. J. M. where he said:"

Human rights legislation is public and fundamental law of general application, if there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.

This Tribunal finds it Inconceivable that the government did not anticipate a possible conflict between the Canadian Human Rights Act and other federal legislation. The fact that the Canadian Human Rights Act refers to several exceptions in its application suggests otherwise. This Tribunal supports the view expressed by Mr. Justice Ritchie, and Mr. Justice Lamer that in the absence of words contained in the Canadian Human Rights Act which expressly limits its application, such a public and fundamental law must govern over other legislation.

Nevertheless this Tribunal finds that the Canadian Human Rights Act contains provisions that are designed to deal with the potential areas of conflict between the former statute and the Unemployment Insurance Act or other federal legislation.

In the Heerspink case the Supreme Court of Canada found that the provisions in section 3 of the Human Rights Code of British Columbia which reads as follows:

3(1) No person shall (a) deny to any person or class of persons any accommodation, service or facility customarily available to the public, or.

(b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public.

unless reasonable cause exists for such denial or discrimination. Provided a means whereby two apparently conflicting statutes could stand together.

Section 14 of the Canadian Human Rights Act provides in subsection (g) that it is not a discriminatory practice if;

(g) In the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there a bona fide justification for that denial or differentiation.

- 9 > In other words the Respondent will not be engaged in a discriminatory practice in denying unemployment insurance benefits to the complainants where there is an bona fide justification for such denial.

The Tribunal therefore finds that the Canadian Human Rights Act and the Unemployment Insurance Act can stand together.

BONA FIDE JUSTIFICATION Counsel for the complainant suggested that Respondent counsel would have

to prove a bona fide justification for each of the three complainants. The Tribunal concurs with that assertion.

The Respondent's witnesses did not provide any evidence regarding significant abuse of unemployment benefits by claimants employed by their spouses or corporations partly owned by their spouses. There appears from the evidence to be a very small number of claimants that fall into this category. The tribunal took note of the fact that the application form completed by those seeking unemployment insurance benefits makes no reference to employment by a spouse, or by a corporation controlled by one's spouse.

The Respondent's witnesses testified that although there were often non- arms length relationships which did not fall into the excepted employment category, the husband and wife

relationship may have been excepted because it was the most pronounced non- arms length relationship. The Respondent's evidence also suggested that one of the other principles supporting this category of excepted employment was that of anti- selection in that one should not have too much control over one's eligibility for benefits. Additional evidence before the Tribunal suggested that there were other categories of claimants who exercised control over their eligibility for benefits. The Respondent also obtained an admission from one of the complainants that her mother had received benefits as a result of employment with the complainant's husband's business.

Counsel for the Respondent argued that bona fide justification under section 14(g) has not been the subject of any case, that the test should be neither that found in Bhinder v. C. N. R. (1985) 2 S. C. R - 561 nor Ontario Human Rights Commission v. Etobicoke (1982) 1 S. C. R. 202 which dealt with bona fide occupational requirement and bona fide occupational qualification respectively. It was argued that the test should be the Bill of Rights test or the Charter of Rights test.

The Tribunal is not convinced that the valid federal purpose that Respondent's counsel maintained was the objective of Section 3(2) (c) of the Unemployment Insurance Act justifies an otherwise discriminatory practice.

- 10 > The Tribunal acknowledges the potential for a spouse in a non- arms length employment situation to manipulate or milk the system, but the Respondent did not introduce any evidence to demonstrate that these abuses were rampant or that there was any historical problem with this particular relationship. Nor was the Tribunal satisfied that any attempts were made by the Respondent to introduce administrative procedures that might reduce the number of potential abusers.

Where a service otherwise available to the general public is being denied, the justification for such denial must be based on the strongest possible evidence. The justification must be a question of fact in each situation and not merely a blanket application to a particular group of individuals.

The Tribunal therefore finds that the Respondent has not demonstrated any bona fide justification for the denial of benefits to the complainants.

REMEDY Counsel for the Respondent argued that in the event that the complaints

were found to be substantiated the Tribunal could not order the Respondent to cease nor could it order the C. E. I. C. to pay benefits to the Complainant on the basis of the Bailey case. The Tribunal maintains that the Bailey case supports the proposition that section 41 of the Canadian Human Rights Act does not extend to allowing an order rendering a statutory provision inoperable. However, Section 41(2)(g) the Act allows the Tribunal to make an order requiring the Respondent to compensate the victim for any wages and expenses incurred as a result of the discrimination.

Both counsel agreed that if the complaints were substantiated the appropriate remedies would be payment of benefits that would have been received had the entitlement not been discontinued. Counsel were agreed that they could determine the approximate amount of the lost benefits. The Tribunal will therefore reserve jurisdiction in the event that agreement cannot be reached on the amount of the benefits owing. Any party may apply upon reasonable notice to the other parties to have the amount determined.

With regards to the expenses incurred by the Complainants, the Tribunal makes the following award:

To Marna McMillan the sum of $425.00 for lost wages while attending the hearings, lost interest and miscellaneous expenses.

- 11 > To Carla Druken the sum of $1,385.11 for legal fees, lost income

while at the hearing, interest, monies garnisheed from wages and miscellaneous expenses.

To Hilda Isbitsky the sum of $300.00 for expenses including photocopies.

With respect to the claim for injury to feelings and self- respect under s. 41(3) of the Act, the evidence indicates that the three Complainants who appeared before the Tribunal all suffered from feelings of frustration, disillusionment and anger as a result of treatment received. At the same time I am satisfied that the Respondent believed that it was following the requirements of the law and was justified in disentitling the complainants. There was no evidence of any wanton, willful or malicious acts on the part of the Respondent.

On the basis of the above, the Tribunal awards Marna McMillan, Carla Druken and Hilda Isbitsky the sum of $1,000.00 each to compensate for their feelings of self- respect under section 41(3).

CONCLUSION. The complaint of Jeanne Berube on which no evidence was led before the Tribunal is dismissed.

The complaints of Hilda Isbitsky, Marna McMillan and Carla Druken are substantiated. The Complainants are entitled to payment of the regular unemployment benefits that each would have received but for the discontinuation. Any amounts previously received and not repaid and any premiums refunded are to be set off against the final award. Each successful complainant is also awarded $1,000.00 for injury to feelings and self respect. Each successful complainant is to receive reimbursement for expenses in the amounts stated above.

It is ordered that the Respondent Canada Employment and Immigration Commission cease the discriminatory practice of applying Sections 3(2)(c), 4(3)(d) and Regulation 14A of the Unemployment Insurance Act.

- 12 > Jurisdiction is reserved for a period of two months in the event that the parties are unable to agree to the amount of benefits to which the Complainant is entitled. Any party may apply within that period for a further hearing to determine the amount, upon notice to the other parties.

Dated this 15th day of July, 1987 HUGH L. FRASER HUMAN RIGHTS TRIBUNAL.