

TRANSLATION FROM FRENCH

TD 4/ 87 Decision rendered on February 20, 1987

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN: Jean- Louis Pelletier Complainant and

Brazeau Transport Inc Respondent

BEFORE: Claude D Marleau, Chairman

APPEARANCES: Anne Trottier René Duval Counsel for the Complainant and the

Canadian Human Rights Commission Rolland Forget Counsel for the Respondent

> - 2 Decision 1. Appointment of the tribunal On June 9, 1986, the President of the Human Rights Tribunal Panel appointed this tribunal to look into the complaint filed by Jean- Louis Pelletier on February 18, 1982.

The complaint, alleging discrimination on the basis of age, in violation of sections 7 and 10 of the Canadian Human Rights Act (SC, 1976- 77, c 33), stated:

[TRANSLATION] In response to an advertisement published in the Sudbury Star, I applied for a job as a dispatcher with Brazeau Transport Inc of Sudbury. The manager of the Sudbury office telephoned on January 19, 1982, to ask me to come for an interview. He told me at that time that I had a good chance of getting the job in question, but that I might not be able to join the company's group insurance plan because of my age (fifty- six). I agreed to those terms, but on January 27, after meeting with his superior from Toronto, the manager told me his boss refused to hire me because of my age; according to his boss, my age would create too many legal problems for the company. I therefore believe that I have been

discriminated against on the basis of age, in violation of sections 7 and 10 of the Canadian Human Rights Act.

The hearing of the complaint was held September 30, 1986, in Sudbury, Ontario, and the document appointing the tribunal was entered as Exhibit T- 1.

At the start of the hearing, counsel for the Canadian Human Rights Commission withdrew the part of the complaint dealing with section 10 of the Act, giving notice to the tribunal that there would be no evidence produced in connection therewith.

> - 3 2. The issues A. Complainant's evidence In January 1982, the complainant, Jean- Louis Pelletier, age fifty- six, applied for a job as a dispatcher at the respondent's Sudbury office.

Mr Pelletier submitted the application after seeing a job advertisement in the Sudbury Star.

In testifying before the tribunal, he described the experience he had gained in seven years as a dispatcher with Motorways Ontario Ltd. He added that Motorways Ontario Ltd had closed its Sudbury operation in October 1980, putting himself and the rest of the staff out of work.

Mr Pelletier's duties in that position consisted in dispatching drivers, invoicing, chartering and doing job-related filing. He was also required to use computers in the course of his work.

Mr Pelletier told the tribunal that he had worked in the mining industry for twenty-five years, as a uranium miner and mine carpenter.

Mr Pelletier said that he had been contacted three times by the respondent's manager, Mr Rajotte.

He stated that Mr Rajotte had told him during their first meeting that he would be hired, providing he demonstrated that he was in good health by having an impartial doctor conduct a medical examination. Mr Pelletier's account of this was as follows:

[TRANSLATION] Q. It was he who asked you to come?

A. Pardon? Q. It was he who asked you to come? > - 4 A. Yes, he called me for an interview, and then after the interview he

told me that as far as he was concerned, the job was mine. Q. And you mentioned a medical . . . it was on the condition that you

undergo a medical, if I understand correctly? A. Yes, the only condition was a medical and a waiting period and

there was a slight delay in finding a doctor to do the medical, because he didn't want my family doctor to do it. He wanted it to be an impartial doctor. There was no staff doctor, so I found Dr Blais, who agreed to give me the medical.

I had the medical, and when I went back with the results, he had no intention . . . well, his superiors in Toronto had said that, because of my age, they would not be hiring me. (Transcript, pages 9- 10)

Mr Pelletier testified that, at the second interview, Mr Rajotte had given him a form, asked him to find an impartial doctor to do the medical examination, and said that if the results were good, the job would be his.

Following the medical examination, Mr Pelletier was told by Mr Rajotte that the Toronto office had rejected his application.

Mr Pelletier met with Mr Rajotte once more, this time to ask him to reconsider his decision. His efforts were in vain.

In the ensuing period, Mr Pelletier did a bit of carpentry work and applied for jobs with transportation companies and hotels. He also offered his services through classified ads, in an effort to find work as a self-employed carpenter.

He was subsequently offered a job as a truck driver with Brazeau Transport, through the investigators from the Canadian Human Rights Commission. The offer was conditional on his passing the Ontario Ministry of Transport examination, and on the availability of the

> - 5 job in question. According to Mr Pelletier, he did not pass the Ministry examination, and as a result lost his chance of getting the job.

Evidence of Mr Pelletier's income for 1982, 1983, 1984 and 1985 was provided by his own testimony and his tax returns, which were submitted in support of the complaint.

During cross-examination, counsel for the respondent pointed out that Mr Pelletier's testimony was inconsistent with the statement of complaint, which did not mention the fact that he had been assured he would get the job if he passed the medical examination.

The tribunal heard Mr Pelletier testify under cross-examination that the statement had been prepared by an employee of the Canadian Human Rights Commission, and that he had not written it:

[TRANSLATION] He might have softened that. That was written in Ottawa; I signed it . . . I didn't write it. (Transcript, page 25, line 10)

Mr Pelletier later said:

[TRANSLATION] He could have changed it, perhaps, that the job was mine if I passed the medical. It was conditional on me having the medical; the complaint was accurate. (Transcript, page 26, line 5)

Having heard Mr Pelletier's testimony during both evidence in chief and cross-examination, and having had an opportunity to assess the witness, the tribunal sees no reason to doubt that testimony. Mr Pelletier was categorical with regard to the meetings, and remained so throughout the cross-examination.

> - 6 B. Respondent's evidence In its defence, the respondent called upon Dan Nancekivell, who said he had been in the respondent's employ since 1978, to testify.

He started out as a part-time OSD dispatcher in Pembroke, Ontario, and later spent two years in a full-time position, also in Pembroke.

Following that, he was transferred to Ottawa, where he worked as a dispatcher in a branch with a heavier volume. He remained in that position until February 1982, when he moved to Sudbury to take the job involved in this dispute. In other words, the position was filled by means of an internal transfer.

Mr Nancekivell had occasion to work with Mr Rajotte (who was the respondent's manager at the time) until June 1982, when, according to his testimony, the company relieved him of his duties.

Later, in 1984, Mr Nancekivell was transferred to Toronto. From February 1982 to October 1984, his salary was \$325 a week.

The respondent later called as a witness Pierre Lefebvre, director of human resources for the Brazeau Transport Group.

Mr Lefebvre described Brazeau Transport as a company with some forty branches across Canada and approximately two thousand employees.

Based in Ville St-Laurent, Quebec, Brazeau divides its operations into administrative regions, each of which is headed by a regional director.

According to Mr Lefebvre, the manager of the Sudbury branch reports to a regional director in Toronto, who in turn reports to a vice-president of operations, at head office.

Mr Lefebvre gave a lengthy description of the company's hiring policy, which has been in place for between two and two and a half years. The policy apparently

> - 7 existed before then, but was not organized by the human resources unit. Mr Lefebvre explained:

[TRANSLATION] Q. With regard to policies, hiring policies, can you tell us how

things work at Brazeau? A. We introduced a hiring policy two and a half years ago. There was a policy before then, but it was more informal; there was no written document.

So for two and a half years, Brazeau has had a hiring policy under which efforts are made to encourage internal promotion and internal transfers; in other words, whenever a position becomes vacant, it is posted internally, and a number of individuals who are likely to be considered or have already expressed an interest in being transferred or doing another job are contacted. (Transcript, pages 71- 72)

Mr Lefebvre further testified that the company's hiring policy was set up in such a way that there were several stages to go through internally. He explained:

[TRANSLATION] Q. If I may come back to this for a moment, you mentioned that work

has been done at the human resources level. Can you tell us how the whole procedure works, particularly at the local manager's level? How is that person involved?

A. Okay. If there's a position that needs to be filled, a personnel request - a sort of Job requisition - comes in to head office, and then the job is posted internally and the actual

competition opened, either by internal means or, in some cases, as I said earlier, through external announcements in newspapers, employment centres . . . it all depends on the job and the region.

The applications come in, and my unit does a preliminary screening of the applicants.

> - 8 At that point, the line managers - either the director of the branch or the head of the unit concerned, the requesting unit, in other words are not yet involved. They will become involved during the second phase of the staffing process, namely . . . the screening phase. So, we refer to the line managers a number of applicants - they may be internal or external - who are likely . . . who meet the basic requirements. (Transcript, pages 73- 74)

Mr Lefebvre testified at length about the hiring process and the role of the branch manager. He said that the manager was not involved in the early stages (preliminary screening and so on). The branch manager's opinion was not considered until the screened applicants were referred.

The manager would then conduct the interviews, with or without a representative of the human resources division.

Mr Lefebvre ended his testimony on the hiring process by saying that the final hiring decision, in the case of a dispatcher, was made by the regional director, with due regard for the opinion of the branch manager.

He added that, prior to his joining the company in 1984, human resources had not been involved at all, because there had been no human resources unit. He did say, however, that the procedure in 1982 had been basically the same, and that the regional director had made the final decision on who would be hired. The tribunal cannot consider this evidence, as Mr Lefebvre was not with the company before 1984.

The respondent then submitted as Exhibit R- 1 a section of the administrative policy and procedures manual dealing with transfers.

Under cross- examination, Mr Lefebvre stated that the dispatcher who had come in after Mr Nancekivell's transfer in 1984 had initially earned approximately \$305 a week and had received annual 5- per- cent raises, bringing his salary to \$340 a week in September 1986.

> - 9 3. The law Before discussing the arguments made by counsel, it would perhaps be advisable to reproduce the legislation involved in this dispute.

Section 3( 1) of the Canadian Human Rights Act states: 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 of the Act states: 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.

Section 14( a) of the Act states: 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;

These are the provisions which apply to the parties in the present dispute and which the tribunal must consider in determining whether or not there was discrimination on the basis of age.

Referring to the Borough of Etobicoke ruling, which was followed by the O'Malley and Bhinder rulings, counsel for the Commission argued that the burden on the Commission was

> - 10 to establish prima facie evidence of discrimination, and that, if such

evidence was established, the burden was reversed, and it was then up to the respondent to show that there had been no discrimination.

The tribunal shares the view of counsel for the Commission, and, in light of the evidence, finds that the Commission has discharged the chief burden on it by establishing a prima facie case of discrimination on the basis of age.

The tribunal is satisfied, given the balance of probabilities, that: a) a job as dispatcher was available at Brazeau Transport; b) Mr Pelletier applied for a job as dispatcher with Brazeau Transport; c) Mr Pelletier was qualified for the job; and d) Mr Pelletier was denied

the job as a result of unlawful discrimination based on age. It follows, then, that the burden is now on the respondent, and the tribunal must, in light of the evidence laid before it, determine whether the respondent's defence has the elements needed to discharge that burden.

In paragraph b, page 208, of *The Ontario Human Rights Commission and Bruce Dunlop and Harold E Hall and Vincent Gray versus The Borough of Etobicoke* [1982] 1 SCR 202, McIntyre J wrote:

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

> - 11 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.

The principle was upheld in *Ontario Human Rights Commission and Theresa O'Malley (Vincent) versus Simpsons- Sears Limited* [1985] 2 SCR 536, and in *K S Bhinder and the Canadian Human Rights Commission versus Canadian National Railway Company, the Attorney General of Canada et al* [1985] 2 SCR 561.

Thus, the burden on the respondent is to show that the refusal to hire Mr Pelletier was the result of a bona fide occupational requirement.

In paragraph g, page 208, of the aforementioned Etobicoke decision, McIntyre J defines a bona fide occupational requirement:

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.

The tribunal cannot accept the respondent's arguments as being within the

meaning of section 14(a) of the Canadian Human Rights Act, since the internal promotion or transfer of employees is by no means a bona fide occupational requirement.

Having examined the testimony of Mr Nancekivell and Mr Lefebvre, the tribunal cannot conclude that the respondent has discharged the burden upon it. Mr Lefebvre was not with the company when the complainant was refused employment, and the evidence relating to the transfer policy can be considered only for the period after 1984.

> - 12 Further, the respondent was free to call as a witness the branch manager, Mr Rajotte, and/or the person who was then regional director. Having failed to do so, it was unable to enlighten the tribunal as to the meetings with Mr Pelletier and the hiring policies in place at the time.

Having considered the evidence, the arguments of counsel and the cases cited in support of those arguments, the tribunal finds that the respondent, Brazeau Transport, discriminated against the complainant in refusing to hire him because of his age, thus violating section 7 of the Canadian Human Rights Act, and that this discrimination was not the result of a bona fide occupational requirement within the meaning of section 14 of the Act.

Having found that the complainant was the victim of unlawful discrimination, the tribunal must consider the question of compensation.

4. Damages Counsel for both sides made representations in their closing address about the damages that should be awarded.

Counsel for the Commission asked that the complainant be hired at the first reasonable opportunity and be awarded substantial special damages, as well as compensation for lost wages.

Counsel for the respondent, on the other hand, argued that, if it concluded from the evidence presented that there had been discrimination on the basis of age, the tribunal should award between \$500 and \$2,000 in special damages.

The powers of the tribunal in awarding damages are set out in sections 41 and 42 of the Act. These sections give the tribunal considerable leeway in correcting discriminatory situations and compensating the victims of discrimination.

Counsel for the respondent maintained that, in light of the cases cited, the respondent should not be held liable for the lost wages, because there was no indication that Mr Pelletier would have kept the job beyond the probationary period.

> - 13 Further, counsel for the respondent told the tribunal that Mr Pelletier had had an obligation to reduce the damages by actively looking for work and claimed that, according to the testimony heard, Mr Pelletier had not fulfilled this obligation.

Counsel for the Commission, meanwhile, claimed - and cited precedents to support the claim - that the fact the complainant might not have kept the job beyond the probationary period should not be taken into consideration.

On this point, the tribunal, having reread the pertinent sections of *Labelle and Denis Claveau versus Air Canada*, *Canadian Human Rights Reporter*, Vol 4, 266, and *Via Rail Canada Inc versus Marilyn Butterill, David J Forman and I Cyril Wolfman and the Canadian Human Rights Commission*, [1982] 2 FC 830, accepts the arguments of counsel for the Commission.

According to the evidence, the dispatcher who was given the job in question initially earned \$325 a week, or \$16,900 a year.

Further, the respondent's representative testified that the company had given the dispatcher an annual raise of 5 per cent since 1984.

The tribunal notes that for 1984, the salary of \$16,900, increased by 5 per cent, would be \$17,745. With a 5-per-cent increase in 1985, the figure would be \$18,632.25. Yet another increase of 5 per cent in 1986 would bring the salary to \$19,563.86.

The evidence also showed that the complainant earned the following amounts in the years covered by the complaint:

1982 - \$1,831.52 1983 - no income 1984 - \$767.81 1985 - \$110.46

No evidence relating to 1986 income was submitted. > - 14 The total amount of lost wages would therefore be \$89,741.11, less the amount earned by Mr Pelletier as indicated by the evidence (that is, \$2,709.49), for a total of \$87,031.32.

However, the tribunal accepts the arguments of counsel for the respondent that the complainant had an obligation to reduce the damages by actively looking for work.

For this reason, and in light of the evidence submitted and the circumstances surrounding the present case, the tribunal believes that the amount referred to above should be reduced by one-third, bringing the compensation for lost wages to \$58,020.88.



Further, on the basis of the evidence submitted by both sides, the tribunal finds that the complainant suffered in respect of feelings or self-respect as a result of the discriminatory practice, and awards him \$2,500 in special damages.

FOR THESE REASONS, THE TRIBUNAL ORDERS the respondent, Brazeau Transport Inc, under section 41(2)(c) of the Canadian Human Rights Act, to pay the complainant, Jean-Louis Pelletier, compensation in the amount of \$58,020.88.

ORDERS the respondent, Brazeau Transport Inc, under section 41(3) of the Canadian Human Rights Act, to pay the complainant, Jean-Louis Pelletier, the sum of \$2,500 in special damages.

SIGNED IN QUEBEC CITY THIS 15th DAY OF JANUARY 1987. (signed) CLAUDE D  
MARLEAU Chairman of the Tribunal