

T.D. 8/97

Decision rendered on October 14, 1997

CANADIAN HUMAN RIGHTS ACT
R.S.C, 1985, c. H-6 (AS AMENDED)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

LISE GOYETTE
NICOLE TOURVILLE

Complainants

-and-

VOYAGEUR COLONIAL LIMITÉE

Respondent

-and-

SYNDICAT DES EMPLOYÉ(E)S DE TERMINUS
DE VOYAGEUR COLONIAL LIMITÉE (CSN)

Respondent

TRIBUNAL DECISION

TRIBUNAL:

Jacinthe Théberge, Chairperson
Marie-Claude Landry, Member
Athanasios Hadjis, Member

APPEARANCES:

Lise Goyette
Nicole Tourville, Complainants

Luc Beaulieu, Counsel for Voyageur Colonial Limitée (Respondent)

Réal Daoust, Union Representative (Respondent)

Marie Pépin, Counsel for the Syndicat des employé(e)s de terminus de Voyageur Colonial Limitée (CSN)

DATES AND LOCATION
OF HEARING:

April 24, 1996,
March 17 and 24, April 15 and 16, and August 21,
and 22, 1997, Montreal, Quebec

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On May 21, 1997, following applications submitted by the Employer and the Union to dismiss the complaints, the Tribunal found that the Complainants had established prima facie proof of a discriminatory practice against the Syndicat des employé(e)s de terminus de Voyageur Colonial Limitée (CSN), named as a respondent in the present case. However, the Tribunal allowed the Employer's application, on the basis of the reasons exposed in a prior decision.

When the hearing resumed on August 21, 1997, Counsel for the Union, Ms. Lucie Pépin, advised the Tribunal that a settlement had been reached in Mrs. Nicole Tourville's case and that a withdrawal of the complaint would be filed within the next few weeks. The Tribunal received a document to this end on September 5, 1997.

The Complainants established prima facie that the departmental seniority regime established by the collective agreements signed in 1981 and in December 1989 by the Respondent and the Syndicat des employé(e)s de terminus de Voyageur Colonial Limitée (CSN) discriminated against a group of employees, namely, the telephone operators (the majority of whom are women) by preventing them from becoming eligible for a ticketing office position, a position offering better working conditions.

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The Respondent, through the testimony of two union representatives, presented the facts regarding the negotiation of the so-called discriminatory clauses of the collective agreement signed in December 1989. The Tribunal must now determine whether the Union rebutted the evidence of systemic discrimination against telephone operators, the majority of whom are women.

THE FACTS

The evidence submitted by the Syndicat des employé(e)s de terminus de Voyageur Colonial Limitée (CSN) consists of the facts set out in the following paragraphs.

During 1988 and 1989, telephone operators brought to the attention of union representatives the fact that the clauses of the collective agreement signed in 1980 regarding the implementation of departmental seniority constituted discrimination in employment against the telephone operators and limited their chances for promotion, as they could not accumulate a sufficient number of hours of work in the other sectors of the company, whether as ticketing and express agents or baggage clerks, to be eligible for these positions.

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At that time, there were no combined telephone operator-ticket agent positions similar to those in the express services department. Accordingly, the telephone operators asked the Union to insist that the Employer create combined telephone operator-ticket agent positions as part of the negotiations leading up to the collective agreement signed on December 7, 1989. Thus the Union negotiated clause 14.14 of the collective agreement, allowing for the creation of combined telephone operator-ticket agent positions, but without doing away with the requirement of acquiring departmental seniority in the ticketing sector. This prevented telephone operators from becoming eligible for a permanent ticket agent position and improving their working conditions:

Unless otherwise agreed to in writing by the parties, the Company undertakes to maintain and/or to create a maximum of 3 combined positions per physical location. In the express services department, however, the Company can create a maximum of five (5) combined positions, two (2) of which will be reserved for express and baggage agents. It should be noted, furthermore, that the incumbents in a combined position will not work for more than 27 regular hours per week in either of the following groups: A, B, C or D to which the combined position are assigned. [Translation]

According to the testimony of Union Representatives, they believed that adding clause 14.14 to the December 7, 1989 agreement would solve the problem.

Union Representatives testified that at the time of the signature of the aforementioned collective agreement, they had just gone through an 18-month strike, that employees in all sectors of the Company had taken a twenty percent (20%) pay cut and, furthermore, that positions had been eliminated in the various departments.

When the Complainant, Ms. Goyette, asked the Union if the position of telephone operator-ticketing agent would in fact be created in 1990, the Union in turn asked the Employer who replied that there was no need for such a position and that the Employer was under no obligation to create such a position if there was no need for it.

Union Representatives also tried to demonstrate that the creation of a telephone operator-ticket agent position entailed greater difficulties since the work schedules of the telephone operators were different than those of employees in the other departments. The telephone operator work schedules were based on a five-day, eight hours per day week whereas employees in the other departments worked four-day, nine hours per day week. The creation of telephone operator-ticketing agent positions therefore required changing the telephone operators work schedule into a four-day, nine hours per day week.

It was only in January 1991 that the Employer created the combined telephone operator-ticket agent position, which was awarded to Mrs. Tourville who had accumulated the requisite seniority in the ticketing office because she worked there every summer and because she had also accumulated the most straight seniority in the telephone operator sector, having been hired as a telephone operator in 1970.

When the telephone operators realized, following the creation of a telephone operator-ticket agent position, that they were still subject to the departmental seniority requirements in order to be eligible for promotions and that they had to continue working in the express services department in order to obtain a position in the ticketing office, they asked the Union to intervene once more, but nothing was done.

Discrimination complaints were thus filed and, on the recommendation of the Human Rights Commission's representative, an Advisory Committee was formed in order to amend the seniority regulations in such a way as to consider only straight seniority in appointing employees to positions in the various departments.

On June 22, 1992, during a general meeting of the Syndicat des employé(e)s de terminus de Voyageur Colonial Limitée (CSN), a proposal along these lines was adopted, a move that thoroughly unsettled labour relations, as it meant that several employees could henceforth be bumped by other employees from other sectors of the Company.

During the summer of 1992, there were twenty-two (22) layoffs in the express services department. That is when the majority of union members called for another general meeting of the Union in order to reconsider the vote taken in June 1992.

The Union convened another general meeting of its members in order to reconsider the motion carried on June 22, 1992, aware that this motion had been adopted in order to eliminate the dual seniority regimes, straight and departmental, which discriminated against the telephone operators (the majority of whom are women) as regards opportunities for promotion.

During the second general meeting of Union members, in October 1992, the June 22 resolution was overturned by two-thirds (2/3) of the members present. The telephone operators were thus back to square one and once again deprived of promotion opportunities. Express services employees and those in other departments (the majority of whom are men) were once again protected in their positions.

The evidence introduced before the Tribunal, particularly Exhibit I-2, which established the straight seniority list as of March 28, 1991; Exhibit I-3, which established the list of ticket agents as of March 28, 1991; Exhibits P-9 and P-16, namely the list of ticket agents in 1993, allows us to confirm that male

employees, with less straight seniority than telephone operators (women) obtained permanent positions in the ticketing office as a result of the implementation of the departmental seniority regime, using the case of Mr. Marcel-Yvon Beaulieu in relation to the case of the Complainant, Mrs. Lise Goyette. This evidence was not rebutted by

the Union.

THE LAW

The Complainants submitted that their complaints involved systemic discrimination, since established promotion practices in effect deprived a class of employees, in this case the telephone operators (the majority of whom are women) of employment opportunities and related benefits. In matters of systemic discrimination, it is not a question of whether discrimination is the result of a conscious act; it is necessary to look into the consequences or the results of the employment system in question. In its decision *Action Travail des Femmes v. Canadian National Railway Company et al.* [1987] 1 S.C.R. 1114, the Supreme Court of Canada, in referring to the Abella Report on Employment Equity, outlined the essential elements of systemic discrimination:

Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

This is why it is important to look at the results of a system (pp. 1138 and 1139)

The Court went on to say:

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of

established procedures of recruitment, hiring and promotion, none of which is

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necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural forces". . . . (p. 1139)

Furthermore, when we refer to the Human Rights Tribunal's March 19, 1997 decision in the case National Capital Alliance on Race Relations and Canadian Human Rights Commission and Her Majesty the Queen as Represented by Health and Welfare Canada, T.D.3/97, one can find on pages 53 and 54 of this decision the key elements that were taken into consideration in arriving at a finding of systemic discrimination:

The essential element then of systemic discrimination is that it results from the unintended consequences of established employment systems and practices. Its effect is to block employment opportunities and benefits for members of certain groups. Since the discrimination is not motivated by a conscious act, it is more subtle to detect and it is necessary to look at the consequences or the results of the particular employment system.

It is clear from the evidence in this case that visible minority groups in HC are being affected in a disproportionately negative way. There is a significant under-representation of visible minorities in senior management in HC and in the A&FS category in HC. Visible

minorities are bottlenecked or concentrated in the feeder group in the S&P category and are not progressing into senior management.

To paraphrase Judge Abella, this is a signal that certain employment practices that lead to this adverse impact may be discriminatory.

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Counsel for the Union submitted that many collective agreements include two systems or regimes for acquiring seniority, namely, straight seniority and departmental seniority. Counsel also submitted that, while this may not be the ideal scheme of things, negotiations which resulted in the relevant sections of the 1989 collective agreement had been conducted in good faith and their impact had not been deliberately planned. In light of the aforementioned jurisprudence, however, the Tribunal finds that on the basis of the arguments put forward by the Union, it cannot consider the latter to be exempt from responsibility with respect to the discrimination experienced by the telephone operators.

Jurisprudence also clearly establishes that the Union must at all times find a reasonable solution to accommodate its members. This principle was clearly developed by Judge Sopinka in the Supreme Court case *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. p. 970.

When the Union, whether intentionally or not, participates in the implementation of a discriminatory provision, in this case departmental seniority, it then is obligated to square the interests of the group of workers adversely affected in comparison to the others in such a way as to the requirements of sections 9 and 10 of the C.H.R.A and fulfill its new obligations under these sections.

9.(1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination

- a) to exclude an individual from full membership in the organization;
- b) to expel or suspend a member of the organization; or
- c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual.

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10. It is a discriminatory practice for an employer, employee organization or organization of employers

- a) to establish or pursue a policy or practice, or
 - b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.
- 1976-77, c. 33, s.10; 1980-81-82-83, c. 143, s.5.

CONCLUSION

The Tribunal finds that by accepting and executing the collective agreement signed on December 7, 1989, the Syndicat des employé(e)s de terminus de Voyageur Colonial Limitée (CSN) committed an act of systemic discrimination towards a class of employees, namely, the telephone operators (the majority of whom are women), thereby depriving them of opportunities for employment or promotion within the company.

Although the Union's way of operating meets the needs of workers in general, the present Tribunal cannot support the position that the Syndicat des employé(e)s de terminus de Voyageur Colonial Limitée (CSN) negotiated conditions of work applicable to all employees when it created a parallel system which adversely affected a class of employees who are members of said Union, namely, the telephone operators (the majority of whom are women), thereby depriving them of the same opportunities for promotion within the company as are available to other employees.

COMPENSATION:

The Tribunal, dealing exclusively with the issue of equal opportunity to a life free of discrimination practices based on prohibited grounds as listed in section 2 of the CHRA:

. . . the principle that any individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations

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as a member of society, without being hindered or prevented from doing so by discriminatory practices based on . . .

and seeking to ensure that such protection is provided equally to all persons, and taking into account the fact that the new collective agreement signed by the parties on June 6, 1996 eliminated the two seniority regimes, that is, the straight and departmental seniority tracks, orders as follows as regards the

case of Mrs. Lise Goyette, a declaration of settlement having been filed in the case of Mrs. Nicole Tourville.

On the basis of the reasons stated above in our conclusion, the Tribunal is of the opinion that the following compensation is appropriate in this case and orders the Syndicat des employé(e)s de terminus Voyageur Colonial Limitée (CSN) to pay to the Complainant the following amounts within 30 days of the date of the present decision:

1. Hurt feelings: Pursuant to section 53 (3) b) of the CHRA, the Tribunal finds that the Complainant is entitled to compensation in the amount of \$5,000 for hurt feelings sustained as a result of the discriminatory practice.
2. Loss of salary and benefits: Pursuant to section 53 (2) c) the Tribunal orders the Respondent to reimburse the Complainant for the salary and benefits she lost from December 7, 1989 to June 6, 1996.
3. Additional costs: Pursuant to section 53 (2) d) of the C.H.R.A. and because the Complainant represented herself, the Respondent is ordered to pay the sum of \$3,000 for expenses incurred in filing the complaint as a result of the discriminatory practice.
4. Interests: The Complainant is entitled to simple interest on the amounts awarded pursuant to paragraphs 2 and 3 above, at the prime rate of the Bank of Canada in effect on the date of filing of the complaint and up to the date of the present decision.

Should a problem arise in making the requisite calculations and should the parties fail to agree regarding the approach for determining these amounts, the Tribunal may meet at the request of either party to hear the evidence and resolve the conflict.

Aylmer, September 24, 1997

Jacinthe Théberge, Chairperson

Cowansville, September, 1997

Marie-Claude Landry, Member

Montréal, September, 1997

Athanasios Hadjis, Member