T. D. 1/ 85

Decision rendered on March 21, 1985

CANADIAN HUMAN RIGHTS TRIBUNAL

LAURELLE CASSAN, JOANNE DALLAS, CATHY OVERBY, DEBBIE BORLEY, JOHN BURKE, ROBERT GLEN BURKE, and BARRY BEST,

COMPLAINANTS,

AND:

HUDSON BAY MINING AND SMELTING CO., LIMITED, RESPONDENT.

BEFORE: David H. Vickers, Chairman
Dr. Peter Cameron
Judith Setrakov

WINNIPEG, MANITOBA DECEMBER 10, 11, 12, 1984

Appearances:

Rene Duval, Esq. for the Complainants and the Canadian Human Rights Commission
Walter Ritchie, Q. C. (assisted by D. H. Kells, Esq., K. S. MacLean, Esq. and W. Thoms) for the Respondent

TRIBUNAL OFFICER Gwen Zappa >

This Tribunal was appointed pursuant to the provisions of Section 39 of the Canadian Human Rights Act, 1976- 77, Chapter 33. The Hearing took place at Winnipeg, Manitoba, December 10, 11 and 12, 1984.

The Complainants allege that the Respondent has discriminated against them on the grounds of sex. A series of difficult questions of both fact and law are raised by this case which has its genesis in a policy of the Respondent which restricts the employment of female persons in its smelter at Flin Flon, Manitoba, because of the presence of lead contaminants at that industrial location.

Counsel for the Commission and the Complainants called evidence in support of the complaints filed by the female complainants. No evidence was called on behalf of the male complainants. It was explained that they could not be located.

Non- Suit Motion At the conclusion of the evidence, counsel advised the Tribunal that they had agreed upon a division of the case.

Counsel for the Respondent moved for a dismissal of the complaints filed by the four female Complainants upon the single ground that there was an absence of any evidence of discrimination. A motion to dismiss the complaints filed by John Burke, Robert Glen Burke and Barry Best, was also made but their cases differed in that no evidence whatsoever had been called on their behalf.

We note that a non- suit application was made in the case of Philip Foucault v. Canadian National Railways, Robson, July 30, 1981; T. D. 8/ 81. In that case, the Respondent, C. N. R., moved to have the complaint dismissed "on the ground that there was no evidence, or alternatively no evidence showing on the balance of probability that the Act is applicable". Counsel in this case took the same position as counsel in the Foucault case and agreed that if a prima facie case of a discriminatory practice based on sex was made out, then the onus would shift to the Respondent to establish bona fida occupational requirements pursuant to Section 14 of the Canadian Human Rights Act.

Thus, the Respondent's motion to dismiss at this stage, upon the ground that no discriminatory practice has been disclosed, is in the nature of non- suit. John Sopinka's text, The Trial of an Action, at page 124, describes such a motion as follows:

"A Motion for non- suit in modern practice is made by the Defendant, contending that the trier of fact should not proceed to evaluate the evidence in the normal way, but should dismiss the action. The Defendant must satisfy the Trial Judge that the evidence is such that no jury, acting judicially, could find in favour of the Plaintiff. The decision of the Judge in both jury and non-jury actions, is a decision on a question of law".

In this case, Counsel for the Commission did not argue that the Tribunal should require Mr. Ritchie to elect whether to call evidence at this stage in the hearing. We note that in Foucault such an argument was advanced but the Tribunal in that case declined to put Counsel for the Respondent to any such election. By agreement, if this Tribunal finds that a prima facie case has been made, the Respondent is at liberty to call evidence when the hearing resumes, as it may be advised by Counsel.

The Facts

Ms. Cassan was employed in the anode casting plant of the Company's smelter in 1979 when she was advised by management to transfer out of that position. She did so because she was not prepared to take th risk of injury to any unborn child occasioned by the presence of lead contaminants. She was given a choice to remain in the smelter or transfer out to another position. She would have remained, had she not planned on having a family some time in the future.

Ms. Borley, now Warren, says that in 1979 she was working as a Converter Operator Puncher in the smelter. Because of the presence of lead contaminants and the risks which they posed, she was offered a transfer out of the smelter to another position with the Respondent Company. She

declined because she would have lost pay and seniority. She elected to leave her employment because she was advised that there was a risk to women of child- bearing age due to high lead levels and she had difficulty in wearing safety equipment because of a nose fracture which she had suffered. When she left, she was of the opinion that she had no choice.

Ms. Overby, now Krochak, was working in the smelter in 1979 and is currently employed as a Utility Operator in the smelter. In the spring of 1979, she was advised by management that there was a risk of injury to unborn children due to lead contaminants. She was given a choice to transfer out of the smelter. Notwithstanding that she remains of child- bearing age, she elected to continue her employment in the smelter.

Ms. Dallas, now Cober, was a Converter Operator in the smelter in 1979. She transferred to another job in the assay laboratory because she was satisfied that there was a risk of injury to an uborn child if she continued her work in the smelter. She later sought to transfer back to a position in the smelter. She was denied the transfer because she remained capable of bearing children and there was a risk of injury to an unborn child due to lead contaminants.

There was some dispute as to the nature of the Respondent's policy which it attempted to implement in the spring of 1979. Counsel for the Respondent argued that the policy was not a prohibition against employing all females in the smelter, but was a restriction directed towards the employment of females capable of bearing children.

Because there was some conflict in the evidence, Counsel for the Complainants argued that the Tribunal should not make any decision at this stage that would call for a weighing of the evidence. He argued that there was some evidence, to conclude that the prohibition was against all women and that any doubt should be exercised in favour of the Complainants until such time as the Respondent had called evidence to explain the apparent conflict. In any event, he argued that whether the prohibition was against all females or restricted only to fertile females, the practice was nevertheless discriminatory.

In a letter dated December 30, 1980, from the Respondent to the Canadian Human Rights Commission signed by W. K. Callander, Vice- President and General Manager, the Respondent delivered to the Commission what was described as "our policy with respect to smelter workers". An extract from that policy reads as follows:

"Evidence presented at the OSHA hearings on the lead standard indicate that blood- levels as low as 30ug/ 100 grams can lead to behavioral disturbances and other impairments in young children. Further, this evidence indicates a risk exists at these levels to the fetus as well. This risk to the fetus exists throughout the gestation period. Short- term elevated blood- lead levels could have adverse effects on an embryo at any stage of development. An embryo, which may be carried undetected, must therefore be protected from conditions which could potentially lead to even short- term elevated levels of blood- lead. To provide this ensurance and protection, we feel that the best alternative is to follow a policy which restricts the placement of females in certain portions of our operation.

The portion of our operation affected by this policy, our copper smelting and refining section, represents fewer than 12% of our workforce. The actual occupational groups where potential lead exposure can be considered as high risk only includes some 2% of our total workforce; our ability to administratively bypass these few occupations is limited by established seniority and progression systems. Hence, our policy includes the entire copper smelting and refining section." (Underlining by the Tribunal)

As already noted, three of the four female Complainants testified that they had a choice as to whether they would remain in the smelter. One of the four elected to remain and continues to be so employed. Thus it would appear that the foregoing extract of the Respondent's policy is an overstatement.

We have concluded that it is not necessary for us, at this stage in the proceedings, to make any findings of fact where the evidence is contradictory. Thus, it is our intention to consider this motion in the light of both contingencies. We also note that we are not called upon at this stage in the proceedings to determine the propriety of either policy. The issue is simply whether a policy excluding all females or females capable of bearing children constitutes discrimination because of sex.

Dr. Radhey L. Singhal gave expert evidence in the field of pharmacology and toxicology. From his evidence, which was unchallenged, the Board concludes that lead is a heavy metal which is absorbed in the human body by inhalation and ingestion. It is stored in the blood in three types of storage pools; first, a fast pool (blood) with a half life of approximately twenty- five to thirty days; second, a slightly slower pool (mainly soft tissues) with a half life of approximately thirty to thiry- five days; and third, a long pool (primary bone) where the half life is up to one hundred thousand days.

The effects of lead are exerted on almost any system of the body including kidney function, liver function, pancreatic function, reproduction function, the nervous system both peripheral and central, the brain and the hemoglobin biosynthesis.

In all of these functions, the evidence leads us to conclude that bodies of male and female persons are affected to the same extent by exposure to lead. It cannot be said that the male or the female reproductive organs are more or less susceptable to damage from overexposure to lead contaminants.

The same is not true of a foetus. A foetus is much more at risk and will be damaged by lead contaminants at a far lower level than the organs of male or female persons.

Finally, lead crosses both the placental barrier and the so- called mammary barrier. In short, lead can be carried in suckling milk as well as through the placenta. The correlation of the level of blood lead in the mother and the level of lead in the foetus is one to one.

The Arguments

Counsel for the Respondent argued that the Respondent's policy was to deny employment in the smelter to female persons who were capable of bearing children. He submitted that such a policy was not discriminatory. Rather, it was established for the protection of the foetus, regardless of sex. It was the foetus to which the policy was directed and not the female worker. The policy was not designed to deal with possible damage to sperm or ovum.

The Respondent relied upon Re General Motors of Canada Ltd. and United Automobile Workers, Local 222 (1979) 24 L. A. D. (2d) 388. That was an award of Mr. E. E. Palmer in a labour dispute which began as an issue of the effect of exposure to lead upon females with childbearing capabilities. At the hearing, the Union abandoned the issue of the employer's right to exclude females with childbearing capabilities from exposure to lead in certain areas of the plant. The issue apparently was reframed so as to advance an argument that "the effect upon the foetus where impregnation was caused by males similarly exposed to lead was of such a nature that these men, too, should be excluded on the same basis as the aforesaid female group".

Palmer notes that there was a general policy of long standing in which the Company had excluded females of childbearing years from excessive exposure to lead while the proprietry of that policy was not before him. He said at page 389:

"Here one would note parenthetically, but emphatically, that such a policy is clearly reasonable. A perusal of the literature and evidence presented to me clearly establishes this point. Similarly, the mere fact that such a policy merely affects females per se does not make such a step "discriminatory". In some areas there are distinctions between the sexes and one can think of no more obvious such difference than in relation to the procreative function. "Discrimination", in the sense here used, has a pejorative meaning. Such an implication does not readily arise from the points made above, although the possibility still exists.

In any event, for the purposes of this case, the parties have accepted that the battery department and the company's Oshawa plant gives rise to sufficent danger from exposure to lead to bring into play the aforementioned policy and, as I have already stated, one cannot fault this policy as a general matter. It's application in a particular area may be a matter of dispute; however, here that question does not arise. What initially is in issue, then, is whether the medical evidence adduced at the hearing in this matter and also subsequently supplied to me supports a finding that the policy is "discriminatory" as between men and women in the procreative stages of their lives".

The issue before Mr. Palmer differs from the issue before this Tribunal. Palmer was called upon to weigh evidence of the effect of lead upon the reproductive organs of male and female persons. On that point, he concludes at page 394:

"... that the evidence discloses that there does exist clear evidence that the effects of exposure to lead on fertile females creates greater danger than similar exposure to males capable of procreation."

As already noted in our discussion of the facts, we have reached an opposite conclusion. We believe there is no distinction to be made between the effects of exposure to lead on male and

female persons. There is a clear difference, however, between male and female persons and the foetus, which itself is far more sensitive to lead exposure.

Counsel for the Respondent then argued that an analogy could be drawn between the situation which we are called upon to consider, women capable of bearing children, and those judgments and awards in recent cases where Courts and Tribunals have been called upon to address the issue of whether discrimination based on pregnancy constituted discrimination on the grounds of sex. In that regard, we note that the Canadian Human Rights Act was amended July 1, 1983, to provide in Section 3(2) the following:

"Where the ground of discrimination is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex".

That provision is not retroactive and is thus not available to assist these Complainants whose cause of action arose in 1979.

The Respondent relies upon the obiter dicta of Mr. Justice Ritchie in the Supreme Court of Canada in Bliss v. The Attorney General of Canada (1978) 92 D. L. R. (3d) 417. That case involved the application of Section 46 of the Unemployment Insurance Act of Canada which, in substance, provided that a claimant could not receive certain benefits during the period commencing eight weeks before the week in which her child was due to be born and terminating six weeks after the week of birth. The specific question before the Court was whether that provision contravened Section 1(b) of the Canadian Bill of Rights establishing the right of every individual to equality before the law.

Ritchie, J., delivered the unanimous judgment of the Court and concluded that the legislative provision did not deprive the appellant, Bliss, of her right to equality before the law. In passing, however, he said:

"... that I cannot share the view held by the Umpire that the application of Section 46 to the Respondent constituted discrimination against her by reason of sex".

The Supreme Court of the United States reached a similar conclusion in Geduldig v. Aiello 417 U. S. 484; General Electric Company v. Gilbert 429 U. S. 125; Nashville Gas Company v. Satty 434 U. S. 136. Thereafter, the Congress of the United States enacted an amendment to Title VII of the Civil Rights Act in terms similar to Section 3(2) of the Canadian Human Rights Act, so as to include discrimination based on pregnancy within the meaning of discrimination based on sex.

The Judgment in Bliss was followed in an award of a Board of Adjudication under the Human Rights Act of Manitoba in Susan Brooks v. Canada Safeway Ltd., J. F. Reah Taylor, unreported, October 26, 1984. A similar conclusion was reached in Vivian Wong v. Hughes Petroleum Ltd. 4 C. H. R. R. Decision 296; France Breton v. La Societe Canadienne De Metaux Reynolds Ltee. (1981) 2 C. H. R. R. Decision 118.

An opposite conclusion was reached in two decisions of Boards of Inquiry under the Human Rights Code of British Columbia. See Holloway v. Macdonald and Clairco Foods Ltd.

(1983) 4 C. H. R. R. Decision 291; Polly Paton v. Brouwer and Co. (1984) 5 C. H. R. R. Decision 345.

Finally, counsel for the Respondent drew our attention to the case of Canada Safeway Ltd. v. The Manitoba Human Rights Commission, a decision of the Court of Appeal of Manitoba presently unreported, October 17, 1984, 260/ 84. In that case, the Respondent, Canada Safeway Ltd., had a "no beard" policy. A Board of Adjudication had held that the policy was discriminatory. That conclusion was upheld by Mr. Justice Wright of the Manitoba Queen's Bench. In passing, it is interesting to note that in his Judgment, Canada Safeway Ltd. v. Manitoba Food and Commercial Workers Union and Manitoba Human Rights Commission (1984) 5 C. H. R. R. Decision 366, Wright, J., concludes in obiter dicta that pregnancy would constitute discrimination based on sex, a view conflicting with that of Ritchie, J., in Bliss. That aside, the Court of Appeal in its brief decision, concludes that "a no beard policy is a grooming policy applicable to employees and is definitely not a matter of sexual discrimination".

Mr. Ritchie asks us to conclude that the Respondent's policy, in this case, is not a policy constituting discrimination based on sex but is a medical rule designed for the protection of the foetus.

Mr. Duval, on behalf of the Complainants, cautioned the Tribunal not to engage in an exercise of weighing evidence at this stage of the proceedings. He argued that there was some evidence to support a conclusion that the Respondent's policy was an exclusion of all females from smelter employment.

Further, he relied upon the decision in Page v. Freight Hire (Tank Haulage) Ltd. /1981/ 1 A. E. R. 394. That was a decision of an Employment Appeal Tribunal arising from a complaint by a woman that she had been discriminated against contrary to Section 1 of the Sex Discrimination Act, 1975. The woman, a twenty- three year old lorry driver, had been denied the opportunity to transport certain chemicals because they were said to be potentially harmful to women of child-bearing age.

The original industrial tribunal had concluded that there had been discrimination based on sex. That conclusion was upheld by the Appeal Tribunal but for different reasons. The point which Mr. Duval relied upon was that an exclusion of women capable of bearing children could constitute discrimination based on sex.

Decision

We are concerned with an application of Section 3(1) and Section 7 of the Canadian Human Rights Act which reads as folows:

"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.

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."

On this motion, we must decide whether there has been a discriminatory practice - not whether that practice can be justified as a bona fide occupational requirement. Does the Respondent's policy establish a distinction between men and women or, as Mr. Ritchie has argued, is it a policy directed to the foetus, regardless of sex?

We are unable to accept the Respondent's argument in that regard. While the result of the policy might be to protect the foetus, it is nevertheless a policy directed towards the employment of female persons either in their totality or in the class defined as female persons capable of child-bearing. In that respect, it marks a difference between men and woman.

A policy which is directed at all women capable of bearing children, or all women, is one which focuses on a distinct class of persons. The class is in no way restricted to those who intend to have children. In short, the Company's policy in that respect seems to say that women will be granted equal treatment in the work force only on the condition of, and at the price of, denying their role as mothers. If only women who never become pregnant are treated equally, then surely women as a class have been denied their full humanity. The Company's policy seems to say to women that if they want to be equal, then they must be the same as men and not have babies. The conclusion can be no different if the policy is directed to all female persons or to all female persons capable of bearing children.

We do not have to decide whether discrimination based on pregnancy is discrimination based on sex. Here, the policy of the Company in it's narrow interpretation is directed at the potential of pregnancy - to those women who are capable of bearing children. If women, who are capable of bearing children are not to be treated as full and equal partners in the work place, then women as a class are not equal and are immediately on an inferior footing in the work force.

We have concluded that the Company's policy is discriminatory and constitutes discrimination based on sex. We are reinforced in that conclusion upon considering the "Code for Medical Surveillance for Lead", published by the Ministry of Labour, Occupational Health and Safety Division for the Province of Ontario. That medical surveillance program establishes actionable levels of lead in blood. The same levels are used for men and women without distinction. The Code addresses workers without reference to gender except for Section 4(1)(a)(i) where, in the last paragraph, it is said that:

"In order to safeguard a developing foetus a woman capable of bearing children must be removed from lead exposure when the blood lead concentration is found to exceed 0.40 mg/ L." In short, all women capable of bearing children are not excluded. It is only when the blood lead concentration reaches a particular level that women capable of childbearing are removed for medical reasons.

Thus, we have concluded that the Company's policy of excluding women who are capable of bearing children or alternatively of excluding all women is discrimination based on sex and in that respect, is a contravention of Section 7 of The Canadian Human Rights Act. In our opinion, a prima facie case has been established.

Disposition of Complaints

The hearing of the complaints of the female Complainants will now resume at a time and place to be fixed. We do not ignore Mr. Ritchie's argument that each complaint must be judged on its own merits. We have merely concluded at this time that there is a prima facie case of discrimination, a decision on the propriety of the Respondent's policy and the merits of the individual complaints will await the conclusion of the hearing.

No evidence was called to support the complaints of John Burke, Robert Glen Burke and Barry Best. Counsel for these Complainants and the Canadian Human Rights Commission explained that they could not be located. Accordingly, in the absence of any evidence and upon motion by the Respondents, the complaints of John Burke, Robert Glen Burke and Barry Best are dismissed.

DATED at Victoria, British Columbia, this 28th day of February, 1985.

David H. Vickers
Dr. Peter Cameron
Judith Setrakov