T. D. 2/ 85 Decision rendered on May 9, 1985

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT S. C. 1976- 1977, c. 33, as amended;

AND IN THE MATTER OF the appeal filed under Section 42.1(2) of the Canadian Human Rights Act by Patricia Bennett MacPherson and the Canadian Human Rights Commission, dated March 13, 1984, against a Human Rights Tribunal decision pronounced on February 28, 1984.

BETWEEN: PATRICIA BENNETT MacPHERSON,

Complainant (Appellant)

- and WHITE PASS AND YUKON ROUTE

CORPORATION LIMITED, Respondent (Respondent)

Decision of the Review Tribunal

BEFORE: JOHN D. McCAMUS Chairman

WAYNE PETERSEN Member JOAN WALLACE Member

TRIBUNAL OFFICER Gwen Zappa

APPEARANCES: RUSSELL JURIANSZ Counsel for the Complainant and the Canadian Human Rights Commission

PATRICIA JANZEN Counsel for the Respondent

HEARD: July 10, 1984, Vancouver, British Columbia >

The matter before this Review Tribunal is an appeal taken by the Complainant, Patricia Bennett MacPherson, and the Canadian Human Rights Commission from a decision rendered by Dean Frank D. Jones who, sitting as a Tribunal appointed under Section 39(1) of the Canadian Human Rights Act, dismissed a complaint brought by the Complainant Bennett MacPherson alleging that her application for appointment to the position of Hostler by the respondent corporation was rejected on discriminatory grounds in contravention of Section 7 of the Canadian Human Rights Act. It was the

Complainant's allegation that the responsible officer of the corporation, a Mr. William Dickson, then serving as Assistant Manager of the Rail Division of the Respondent, refused to appoint the Complainant Bennett MacPherson to the Hostler position by reason of the fact that she is female, and thus contravened the Act's prohibition against discrimination on the basis of gender.

At the hearing before the Tribunal, considerable evidence was led with respect to the nature of this position and with respect to the circumstances leading up to Mr. Dickson's decision not to appoint the Complainant to this job in the Spring of 1980. It is common ground between the parties that the following list of responsibilities represents a reasonable job description of the Hostler position:

1. Check oil levels in governors, compressors & engines. 2. Check water levels and temperatures in engines. 3. Maintain constant surveillance to ensure R. P. M. 's are at proper

level and all other gauges are functioning in idling locomotives. 4. Sweep and collect up garbage in all locomotives and coaches daily. > 2.

5. Clean windows of locomotives and coaches inside and outside. 6. Fill and distribute water containers to each locomotive and coach. 7. Move locomotives into position for fuelling. 8. Fuel locomotives and add coolant as necessary. 9. Check journal boxes on coaches and flat cars daily. 10. Add oil to journal boxes requiring servicing. 11. Change brass in journals as required. 12. Make repairs to brake rigging as required. 13. Replace broken air lines and air hoses as required. 14. Place oil drums on stands as required. 15. Assist on yard derailments as required. The Hostler position is the bottom rung in a hierarchy of four jobs in train crew service. Employees who move through the ranks become in turn, Brakeman, Conductor and Engineer, after successful service as a Hostler.

It is also common ground between the parties that the Complainant is quite capable of successfully discharging the responsibilities of the Hostler position. Indeed, some time after the present dispute the Respondent, without conceding liability with respect to the present allegation, actually appointed the Complainant to the Hostler position. It was the evidence of Mr. Dickson that she discharged her responsibilities as Hostler very well indeed.

The area of dispute between the parties relates, of course, to the decision taken in the Spring of 1980 by Mr. Dickson. It is the Respondent's position that Mr. Dickson acted on the basis of non-discriminatory criteria in preferring other applicants for the

> 3. Hostler position at that time. As the work is to some extent seasonal, appointments are normally made in the Spring of each year. In 1980, two appointments were made. In addition to the application of the Complainant who was, at the time, serving as Head Waitress for the corporation in an establishment at Bennett, B. C., three other candidates for the position surfaced, a Mr. Bob Krewey, a Mr. Mike Lightle and a Mr. Donald Dickson. Mr. Krewey was variously described in the Proceedings as a waiter or a bellhop at the Bennet, B. C., facility. Mr. Lightle was not at the time an employee of the Respondent. Mr. Donald Dickson, a student at the time, had previously worked four summers and, in one instance, year- round, for the respondent employer. A biographical fact of greater importance for present purposes, it would appear, is that Mr. Donald Dickson was also the son of Mr. William Dickson.

It is the Respondent's position that the decision ultimately taken by Mr. Dickson to appoint Mr. Lightle and Mr. Donald Dickson as Hostlers in the Spring of 1980 was taken entirely on non-discriminatory grounds. The decision to appoint his son appears to have been taken at a fairly

early point in 1980, prior to the submission of an application by the Complainant. Mr. Dickson testified that his son had asked him if he could find work for him at the end of the school year, and that he had promised his son that he would hire him as a Hostler when the hiring for this position ultimately took place (Transcript, p. 157). Perhaps it should be added that Mr. Dickson felt that this was a defensible commitment on his part for two reasons. First, the appointment

> 4. of relatives was not uncommon in the Company. Secondly, he believed his son had had relative work experience which made him an attractive candidate for the position.

As far as Mr. Lightle's appointment is concerned, it was Mr. Dickson's evidence that his prior work experience rendered him a more attractive candidate than the Complainant. Mr. Dickson testified that an important criterion in making these appointments is to look for previous experience in the handling of heavy equipment. Mr. Lightle's qualifications were considered by him to be more impressive in this regard. He had previously operated front- end loaders, trucks and something referred to as "an air track rail". Mr. Dickson noted that as well, Mr. Lightle possessed a "blasting ticket" which was "an added attraction since we only have one person on the railroad with the blasting ticket, and it's always handy to have someone around who we can fall back on in case of an emergency". (Transcript, p. 158)

As far as Mr. Dickson was concerned, the Complainant's previous experience which was characterised by him as "basically employment in the catering industry with some work in the White Horse General Hospital" (Transcript, p. 159) was not as impressive. The Complainant had not had

similar experience with the operation of heavy equipment although, as he noted, the Complainant indicated that she had worked on her father's farm. She noted that, as well, she had spent some time with her then fiance, Mr. Neil MacPherson, whom she later married and who was at the time an incumbent of the Hostler position, familiarising herself with the responsibilities of the Hostler position.

> 5. The position taken by the Complainant before the Tribunal and again on appeal to this Review Tribunal, is that this explanation for the decision taken by Mr. Dickson is not convincing. Mr. Dickson's conduct, it was alleged, evidenced a discriminatory bias against the hiring of women as Hostlers. In particular, counsel for the Complainant argued that his failure to enquire carefully into the nature of the Complainant's farm experience manifested a disinterest in her application. Considerable evidence led before the Tribunal indicated that that experience had involved the operation of a number of different kinds of farm equipment and some maintenance work related to them. Mr. Dickson, in his own evidence, conceded that if he had known more about the complainant's work on her father's farm, he would have considered the information material.

Apart from this alleged failure to enquire, it had evidently been argued on behalf of the Complainant that there were a number of other signals of evidence of bias on the part of Mr. Dickson. Some reliance was apparently placed, for example, on the alleged reference by him to the heaviness of the work in explaining to the Complainant his decision not to appoint her to the Hostler position. Counsel for the Complainant argued that the circumstances were such as to

suggest the existence of an "overt" (by which he appeared to mean "conscious") discriminatory attitude, or perhaps a subconscious attitude of this kind which was the underlying motivation of his decision to not appoint the Complainant. (Transcript, p. 255, Tribunal decision p. 11)

> 6. The Tribunal dismissed the complaint and, in so doing, accepted the evidence of Mr. Dickson that he made his judgment on the basis of the relative merits of the work experience of the Complainant and Mr. Lightle and, further, accepted Mr. Dickson's evidence that he "was unaware of the experience Mrs. Bennett MacPherson had with machinery during her youth and at the time she was living on the farm". (Tribunal Decision, p. 9) The Tribunal concluded that "there is no direct evidence as to any discrimination with respect to women in relation to the job of Hostler by White Pass and Yukon Route Corporation Limited. I am also of the opinion that there is no evidence to infer such discrimination and indeed, the direct evidence is contrary to such an inference." (Tribunal Decision, p. 11)

With respect to the suggestion that Mr. Dickson may have laboured under or been motivated by a subconscious bias in making his decision, the Tribunal expressed the opinion that it was bound by the decision of the Federal Court of Appeal in Canadian National Railway Co. v. Canadian Human Rights Commission and K. S. Bhinder (1983), 147 D. L. R. (3d) 312 to find that discrimination exists only when there is "intention to discriminate". (Tribunal Decision, p. 12) Given the context of the discussion in the Tribunal's Decision, we understand this to mean that the Bhinder decision was considered by the Tribunal to establish that in order to substantiate a

complaint, the Tribunal would have to be able to find that the person who engaged in the discriminatory conduct was consciously aware of his discriminatory bias and had consciously acted on the basis of bias.

> 7. It was further noted in the Tribunal's decision that Bhinder is currently under appeal to the Supreme Court of Canada.

As a preliminary point, we should note that we do not agree with this characterisation of the decision in the Bhinder case. The holding in Bhinder, as we understand it, is that acts of so-called "indirect" discrimination are not embraced by The Canadian Human Rights Act. By indirect discrimination we mean situations in which decisions are made on the basis of criteria which are, in discriminatory terms, neutral but which have the unintended effect of, say, restricting the availability for employment opportunities to a particular group. Thus, in Bhinder itself, the respondent employer had discharged a Sikh employee who had refused to comply with a condition of his employment that he wear a safety hat. The complainant argued that as a member of the Sikh religion he was required to wear a turban and that he was therefore discharged on the basis of a failure to comply with a rule which discriminated against members of the Sikh religion. At the tribunal level, the complainant had successfully argued as had other complainants in cases under federal and provincial human rights codes, that although the employer had no intention to discriminate against the members of a religious group in adopting the rule that requires employees to wear safety hats, the indirect effect of the rule in decisions to dismiss on the basis of non- compliance was to deprive the members of a religious group of an employment opportunity in a manner which contravenes The Canadian Human Rights Act. The Federal Court of Appeal, Le Dain J. dissenting, rejected the view that "indirect

> 8. discrimination" of this kind constituted a contravention of the Code.

In our view, the Bhinder decision does not touch upon the question raised in these proceedings by counsel for the Complainant, that is, whether an individual subconsciously motivated by a bias would be acting in contravention of the Code. It is possible to imagine circumstances in which an individual would genuinely believe himself or herself to be not acting in a biased fashion, but could in fact make judgments on the basis of attitudes of a discriminatory or stereotypical nature. In such a case, it is our view that the individual would, in the requisite sense, be "motivated" by a discriminatory attitude and would therefore engage in an act of "direct" discrimination.

Having noted our disagreement with Dean Jones on this point, we should add that his findings do not, in any event, allow much room for an inference of the existence of a subconscious bias. Indeed, his decision indicates that he accepted Mr. Dickson's explanation of his decision as a truthful one in the sense that the criterion he employed did, in fact, relate to prior work experience and that he genuinely believed that Mr. Lightle had a more attractive record from this point of view than the Complainant. Further, Dean Jones was of the view that "there was no evidence to retrospectively suggest that there was some nefarious reason on the part of Mr. Dickson Sr.

that he did not ask detailed questions as to her farm experience" in the context of his interview with the Complainant. Tribunal Decision, p. 10) Dean Jones went on to say that in his opinion "there is an onus on an interviewee to put all

> 9. the pertinent facts in his or her knowledge before the individual doing the interviewing when applying for a job" and it was quite evidently his view that the Complainant had not done so, with the consequence that Mr. Dickson had reasonably concluded that Mr. Lightle was a stronger applicant.

It is from this decision, then, that the present appeal has been taken. In essence, the Complainant and the Commission have invited this Review Tribunal to make different findings of fact than those of the Tribunal on the basis of our reading of the transcript of the evidence led before the Tribunal. Counsel for the Complainant and the Commission has argued before us that the decision of the Tribunal manifests a reluctance to make the kinds of inferences, some of them concededly quite subtle, which in his view are appropriate to make in the context of a dispute of this kind. Further, it was submitted that in the event of conflict between the evidence of the Complainant and the evidence of Mr. Dickson, the evidence of the Complainant should be accepted with the result that, for example, Mr. Dickson's explanation of the nature of his decision would be considerably undermined by the Complainant's evidence to the general effect that when he telephoned her to advise her of his decision, he indicated that he was disinclined to give her the job because the work would be too heavy for her, a statement which Mr. Dickson denies having made.

Counsel for the Respondent has urged upon us two lines of analysis in response. First, it has been argued that notwithstanding the broad jurisdiction conferred upon a Review Tribunal by Section

> 10. 42.1(4) of The Canadian Human Rights Act which stipulates that "an Appeal lies to a Review Tribunal from a decision or order of a Tribunal on any question of law or fact or mixed law and fact", Review Tribunals ought, in the exercise of their appellate jurisdiction, to defer to the findings of the Tribunal on questions relating to the credibility of witnesses. Secondly, it has been argued that the record before the Tribunal substantiates, in any event, the defence offered by the respondents before the Tribunal and, further, suggests that the credibility of the Complainant is more vulnerable to attack than that of Mr. Dickson.

Before turning to consider the merits of the arguments put forward on behalf of the Complainant and the Commission, therefore, it is necessary to consider the extent to which a Review Tribunal such as this has the authority to overrule or ignore findings of credibility in proceedings of this kind, either as a general matter or in a factual situation such as the present one. Counsel for the Respondent has placed considerable reliance on the decision of the Review Tribunal in Kotyk et al v. Canada Employment and Immigration Commission et al (1984), 5 C. H. R. R. D/ 1895 (S. N. Lederman), a case in which the Review Tribunal was asked to overturn an assessment of credibility made by the initial Tribunal. In reaching the conclusion that the Review Tribunal ought not to intervene in this way, Chairman Lederman noted (at p. D/ 1899)

the importance of the observation of the demeanour of witnesses to findings of credibility in the following terms:

> 11. In making a finding of credibility, the demeanour of the witnesses, their manner of expression and other personality- related aspects of their testimony, although not necessarily determinative, are relevant.

In his view, the established practice of appellate courts to defer to such findings made by a trier of fact is an appropriate model for the functioning of a Review Tribunal established under The Human Rights Act, and he therefore found apposite the following words of Viscount Simon in Watt or Thomas v. Thomas (1947] A. C. 484 at p. 486 H. L.):

... If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

Chairman Lederman went on to reason as follows: (at p. D1900) There is no principle or rule that a Review Tribunal can apply by which to measure the personalities of the protagonists by an examination of the written record. Without the advantage of seeing and hearing the witnesses first hand, we are not in a position to come to any conclusion that the Tribunal was plainly

wrong. Indeed, our review of the transcripts indicates that there was ample evidence upon which the Tribunal could have made the findings of fact and credibility that it did. The evidence giving rise to those findings are set out at length by Ms. Ashley in her Reasons and it is therefore unnecessary for us to repeat it here. Nor do we find it necessary to review

> 12. in our Reasons the various contrary inferences of the evidence urged upon us by Mr. Wasylyshen. Suffice it to say that the findings of fact and inferences of fact made by the Tribunal were reasonable and well founded in the circumstances and we do not accept the contrary inferences suggested by Mr. Wasylyshen. This is not a case where the findings of the Tribunal were groundless or

perverse and warranted interference by a Review Tribunal. Accordingly, we hold that the findings made by the Tribunal as to credibility and facts were in accord with the evidence and the weight of the evidence.

Two general questions are raised in these passages from the decision in Kotyk. First, it is suggested that the jurisdiction of Review Tribunals in cases such as the present ought to be considered to be essentially similar to that of an appellate court. Second, the difficulty confronted by an appellate tribunal asked to reach different findings of fact than the trier in cases in which issues of credibility arise is touched upon.

As will be seen, it is not necessary for us to offer a definitive view with respect to the persuasiveness of the first point. Moreover, this is not a matter which has been fully argued before us. We signal, however, some reservations about the appropriateness of the appellate court analogy in the present context. As Chairman Kerr noted in Carson et al v. Air Canada (1984), 5 C. H. R. R. D/ 1857 Review Tribunals have been given very broad powers with respect to the admission of additional evidence and the rendering of decisions that, in their opinion, the Tribunal appealed from should have rendered and by implication, therefore, they appear to have been given a broader mandate than that typical of the appellate courts. Chairman Kerr's conclusion, which we find persuasive, is that the jurisdiction of the Review

> 13. Tribunal ought /not to be narrowly constrained. More particularly, if the tacit suggestion being made in the above- quoted passage from the decision in Kotyk is that the Review Tribunal ought not to reach a different conclusion of fact than the Tribunal unless the findings of the Tribunal were "groundless or perverse", this would, in our view, represent too narrow an interpretation of the mandate conferred by the provisions of Section 42.1 under which Review Tribunals are established. The Review Tribunal in Kotyk did, however, go on to hold that the "findings made by the Tribunal as to credibility and facts were in accord with the evidence and the weight of the evidence". Accordingly, it may well be that the Review Tribunal did not have so constrained a view of its appellate role as the passage might otherwise be taken to suggest. Certainly, in our deliberations in this case, we have assumed a broad mandate to review the findings of fact of the Tribunal and to reach our own independent conclusion as to whether they are in accord with the weight of the evidence.

The second point is, however, of greater concern and represents, in our view, a serious practical restraint on the capacity of the Review Tribunal to engage in an independent exercise in fact

finding. As the discussion in the Kotyk decision indicates, a Tribunal that is asked to make findings of fact from a transcript alone might well feel that its inability to observe the demeanour of witnesses makes it either impossible to reach an independent view with respect to questions of credibility or, alternatively, renders it very unwise for it to reach a different conclusion on such questions than the trier of fact who has had

> 14.

an opportunity to observe the witnesses in question. The strength of these convictions might well vary considerably with the extent to which the lower Tribunal itself indicates that it is placing reliance on demeanour and observation as a measure of credibility and on the extent to which the transcript itself reveals internal inconsistencies and contradictions in evidence which undermine the confidence of the Review Tribunal in the veracity of the witness in question. The important point for present purposes, however, is that in a case such as the present in which credibility is in issue, a Review Tribunal which has not observed the witnesses is confronted with a very serious practical impediment to the reaching of independent conclusions of fact and where an opportunity to observe witnesses is thought by the Review Tribunal to be material, it should, in our view, defer to the findings of the lower Tribunal on the question of credibility.

In the present case, as counsel for the Complainant and the Commission has noted, the Tribunal decision does not evince an extended consideration of the credibility issue with respect to either of the two witnesses, notwithstanding the fact that an obvious conflict in the evidence of the Complainant and Mr. Dickson was noted. The two witnesses were apparently in agreement on what appeared to be the most important finding of fact for the Tribunal, that is that the Complainant did not offer a detailed account of the nature of her experience in working with farm machinery, during the course of her interview with Mr. Dickson. In this respect, the Tribunal might appear to have been spared the difficulty of reaching

> 15. a definitive /conclusion on the respective credibility of the two witnesses. On the other hand, if the Tribunal had accepted the evidence of the Complainant to the general effect that in explaining the nature of the decision not to appoint her to the Hostler position, Mr. Dickson had said that his concern was that the work was "too heavy" for her, surely the explanation proffered by Mr. Dickson for his decision would have been thrown into some doubt. We are inclined to the view, therefore, that the Tribunal decision is fairly to be read as implicitly rejecting this evidence tendered by the Complainant and, in this respect, preferring the evidence of Mr. Dickson. Nonetheless, given the absence of explicit and reasoned discussion on the credibility point, we have taken the view that we can at least consider the credibility issue in light of submissions made to us by counsel and against the background of the constraint imposed by our inability to observe the demeanour of these witnesses.

Before turning to consider the submissions of counsel with respect to credibility questions, it should be noted that counsel for the Complainant and the Commission offered the view that the evidence of the Complainant ought to be preferred to that of Mr. Dickson but he urged, as well and in the alternative, that even in the absence of a finding of this kind, there were what might be referred to as signals of biased attitudes evident in Mr. Dickson’s conduct and testimony which could lead to a finding of the existence of a discriminatory motivation even if one could not, as a

general matter, reach the conclusion that the evidence of the Complainant was more credible than that of Mr. Dickson.

> 16.

As will be seen, it is our view that these two strands of argument are rather closely interwoven and, indeed, we do not think it is possible to make a finding with respect to the existence of a discriminatory motivation, in the present case, without reaching as well the conclusion that Mr. Dickson's evidence is not to be accepted. Whatever suspicions there might be with respect to Mr. Dickson's attitudes on the part of the Complainant, or other observers, it is nonetheless the case that Mr. Dickson provided a plausible explanation for his decision. He explained that his judgment was based on a criterion which both parties accept as being job- related and to have been the criterion actually used by the respondent in this context. He adverted to an understanding of the factual circumstances of the previous work experience of the two critical competitors, the Complainant and Mr. Lightle, and gave a plausible explanation for his decision to prefer the application of Mr. Lightle.

In the context of human rights cases dealing with discriminatory employment decisions, it is not uncommon, of course, that employers offer plausible explanations for decisions taken with respect to complainants. In order to succeed in the face of such a response, complainants attempt to demonstrate that the justification or explanation given by the employer is "pretextual" in the sense that it does not represent the real reason for the decision taken. A variety of different kinds of evidence might be led in order to demonstrate the "pretextual" nature of such explanations but, in the normal case, a successful "pretext" attack on the justification would carry with it the implication that the credibility of the

> 17. evidence of the decision- maker is thrown into some doubt. Thus, if it were shown that the decision- maker in question adverted to criteria employed in the impugned decision which were irrational or not employed by him in making similar decisions with respect to individuals other than the complainant, the justification given may be thought to be pretextual with the implication that the evidence given relating to the decision- making process was not to be believed to be a faithful account of the actual decision- making process.

We understand that counsel for the Complainant and the Commission in the present case is urging upon us that there may be situations in which a witness who genuinely believes that he did not discriminate could in fact be motivated by a subconscious bias, and that in such a case, the individual in question might honestly and credibly testify that he believed his decision-making not to be motivated by bias, but the Tribunal could nonetheless find that a decision motivated by subconscious bias had, in fact, occurred. We agree with this submission and this is indeed the point of our disagreement, already noted above, with the Tribunal's interpretation of the significance of the decision of the Federal Court of Appeal in the Bhinder case. We do think it most unlikely, however, that a finding of subconscious bias would be made in a case where the evidence was consistent with a genuine attempt to rely on a job- related criterion employed consistently by the employer in the making of decisions of the kind in question. Whether this view is correct as a general matter or not, however,

> 18. it is our view that in the present case a successful attack on the

explanation given by Mr. Dickson for his decision not to appoint the complainant must rest on a finding that his evidence is not to be believed, and that on issues with respect to which his evidence and the evidence of the Complainant conflict, the evidence of the Complainant is to be preferred.

We turn, then, to consider the submissions made by Counsel with respect to the credibility issue. Counsel for the Complainant and the Commission submitted that the evidence of the Complainant should be preferred and suggested that the main reason for this was that the evidence of Mr. Dickson is not internally consistent. The illustration offered by Counsel of this inconsistency related to Mr. Dickson's evidence concerning his discussion, or lack of discussion, of the Complainant's farm experience during the course of their interview. In Mr. Dickson's examination- in- chief, the following exchange occurred: (Transcript, p. 160)

Q: In your interview with her, did you discuss her farm experience at all? A: No, she just mentioned that she worked - had been on the farm, and I

didn't go into that. And, at a later point in this examination: (Transcript, p. 184) Q: What about the experience on the farm? A: We didn't go into that. She never volunteered. Q: Did you make any enquiries? A: No. Q: You didn't make any enquiries about the farm experience? A: No, she - I didn't put much weight on that. > 19. The alleged inconsistency is said to reside in the following passages from the cross- examination of Mr. Dickson: (Transcript, p. 185- 186)

A: Well, I suppose if she'd pushed a little further on that, I would have got a little more information, but she never volunteered any.

Q: Well, the application form had on it her farm experience? A: That's right. Q: You noticed that? A: She brought it to my attention that she had been on a farm. It has been urged upon us that Mr. Dickson contradicts himself in these passages by suggesting on the one hand that the Complainant did not volunteer any information about her farm experience, and on the other that she did, in fact, bring up the subject and try to direct the conversation into a discussion of her farm experience. We do not share the view that there is a palpable and troubling inconsistency in these passages. If, as may well have been the case, the farm experience which was referred to on the application form and briefly mentioned by the Complainant in the course of the interview

was not the subject of further discussion by either party, all of Mr. Dickson's comments would have a plausible ring to them. The Complainant "just mentioned" her farm experience but Dickson didn't "delve" into it. If she had "pushed a little further", Dickson concedes elsewhere in his evidence that the information might have been quite material, but she didn't "volunteer" details in the sense that she did not, of her own initiative, press him with

> 20. information of this kind. Accordingly, we do not view this as a clear and troubling inconsistency in Mr. Dickson's evidence which would lead us to doubt the wisdom of the Tribunal's apparent willingness to place some confidence in his testimony.

Counsel for the Respondent has argued that the evidence of the Complainant should not be relied upon by this Review Tribunal. The principal basis for this submission was the existence of certain misstatements in a letter written by the Complainant to the Canadian Human Rights Commission, entered as Exhibit R4. The more troubling of the two alleged misstatements relates to a statement made in the letter that "When I applied for the position of engine Hostler, I was told that I would not be given a job because I am a woman". As Counsel for the Respondent noted, in the Complainant's evidence before the Tribunal, she did not suggest that a statement of this kind had been made by Mr. Dickson in her discussions with him. It was therefore urged upon us that the Complainant is an individual who is prepared to engage in gross distortion of the facts in order to attract sympathetic interest in her situation and accordingly, that this Tribunal should be reluctant to place any weight on her testimony.

Although we agree that this incident would be relevant to determination of credibility, we do not feel that we can, without having had the opportunity to observe the witness in the course of offering her testimony, make a finding that the Complainant was not a credible witness.

> 21. In summary, then, we find that our review of the transcript does not put us in a position to find that either the Complainant or Mr. Dickson were not credible witnesses. Given that the burden of proof in cases of this kind rests with the Complainant, we find ourselves in the position that we must assume, for the purposes of our deliberations, that the evidence given by Mr. Dickson was credible.

Against the background of this conclusion, we turn to consider the other submissions made by Counsel for the Complainant and the Commission with respect to other evidence of bias. First, considerable reliance was placed on the fact that Mr. Dickson did not enquire in a more vigorous manner into the nature of the Complainant's farm experience. Counsel noted that the Tribunal had, in its decision, indicated that there was an "onus" on the Complainant to put forward material in a submission of this kind in the course of her interview. It was urged upon this Tribunal that no such onus exists in law. We certainly agree with this submission, but we are not convinced, however, that the Tribunal meant, by the use of this phrase, anything other than that the Complainant should have been more forthcoming in the context of an employment interview in which the obvious objective is to

ensure that one's potential employer is made aware of all pertinent information. We also agree, however, that a failure to enquire into relevant matters might constitute some evidence of the existence of bias, and we therefore find it important that Mr. Dickson, elsewhere in his evidence, provides plausible explanations of his failure to do so. He indicates that it was

> 22. his view that he was much more interested in previous working experience rather than childhood experience on the family farm. Moreover, he indicated that he didn't know very much about farming and therefore did not realise that extensive experience with large machinery might be involved. We think it quite possible that a man in Mr. Dickson's position could be genuinely susprised to learn of the extensiveness of the Complainant's relevant experience on the farm and, again, against the background of our assumption that his credibility has not been impugned, we do not find his failure to delve further into this prior experience to be a significant indicator of the presence of bias.

Considerable reliance was also placed on the fact that in the course of his interview with the Complainant, Mr. Dickson asked her whether she thought she would be able to handle those aspects of the job which involved physically demanding tasks. Both the Complainant and Mr. Dickson testified that he made an enquiry of this kind. Mr. Dickson's explanation for this was that the Complainant is not a large person, and he therefore made the enquiry quite innocently. When advised by the Complainant that she thought she was quite capable of performing these tasks, his concerns were resolved. Mr. Dickson denies the suggestion made by the Complainant that in the course of explaining his decision not to appoint her, he mentioned that the job was "too heavy" for her. Perhaps it is possible that a reference made by Mr. Dickson to her lack of experience with "heavy equipment" might have been misconstrued but, in any event, as we are not in a position to reject Mr. Dickson's evidence on credibility grounds, we accept that the only discussion

> 23. of the Complainant's ability to cope with the physically demanding aspects of the Hostler job occurred in the course of the interview. Mr. Dickson's explanation of this exchange is plausible and, in the absence of evidence before this Tribunal which would suggest that the Complainant's appearance would not reasonably give rise to such an enquiry, we do not view the evidence concerning this enquiry to be significant evidence of the existence of bias.

The third major signal of the existence of bias relied upon by Counsel for the Complainant and the Commission arose in the context of the discussion between the Complainant and Mr. Dickson in which he communicated his decision not to appoint her to the Hostler position. When apprised of the decision, the Complainant accused Mr. Dickson of making the decision on discriminatory grounds, and then asked whether the respondent corporation had hired women for other jobs. At this point, Mr. Dickson mentioned that he understood that there was a female truck driver in the Highway Division. In his evidence- in- chief, Mr. Dickson described the exchange that followed in the following terms: (Transcript, p. 164)

Q: And what did she say? A: I believe she asked if this woman was still there, and I indicated she

was not. Then she said 'Why not? ', and I said, 'Well, I understand the job was just too much for her'.

As Mr. Dickson himself conceded in cross- examination, the driver and successful in question had extensive/ prior experience as a truck driver and had developed a back injury or ailment. Such injuries or ailments are

> 24. commonplace for truck drivers. Accordingly, it was argued that Mr. Dickson's characterization of this situation as one in which "the job was just too much for her" represents rather an unsympathetic account of the situation and manifests a tendency to view woman as unsuitable for this particular line of work, which would be consistent with the existence of a discriminatory bias. We are in agreement with the view that the account offered by Mr. Dickson in this context may be characterised in this way. Although, as Counsel for the Respondent noted, it is true that it was the Complainant herself who asked the question which led to this exchange and, although it is also true that his remarks followed an allegation of discriminatory bias by the Complainant, it does appear that Mr. Dickson offered an account of this situation which was

misleadingly incomplete and may well have been designed to make the point that women may not be suitable for this particular kind of work. On the other hand, it is not abundantly clear from the transcript that this was the motivation underlying his remarks. More importantly, however, we do not feel that this is a sufficient basis for inferring the existence of general bias on Mr. Dickson's part and certainly is not sufficient to support the further inference that in his dealings with the Complainant, Mr. Dickson was motivated by bias of this kind.

A fourth signal of bias was said to be the fact that Mr. Dickson preferred an outside candidate, Mr. Lightle, to the Complainant who was, at the time in question, already an employee of the Company. The position taken on behalf of the Complainant

> 25. was that there was a Company policy of promoting from within and accordingly, this apparent departure from Company policy offered some basis for an inference that discriminatory bias was present. Before the initial Tribunal, some attention was drawn to an excerpt (Exhibit C-6) from a personnel manual of the Respondent which refers, amongst other objectives, to the encouragement of "internal advancement". In his evidence, Mr. Harold Hoskin, the Respondent's Manager, Industrial Relations and Personnel, noted that the manual applies to salaried personnel and not to employees such as the Complainant who are the members of bargaining units covered by collective agreements. Indeed, Mr. Hoskin noted that some of the collective agreements, although not the one under which the Complainant was employed as a waitress, contained "hiring hall" provisions which would preclude transfer or seniority arrangements in transferring employees from one bargaining unit to another. Although Counsel for the Complainant and the Commission was suspicious of the motivation underlying the introduction of this evidence (inasmuch as the Complainant was not at material times covered by such an agreement), we understand Mr. Hoskin's evidence as being designed only to reinforce the

point that the "internal advancement" objective stated in the personnel manual has no general application to employees covered by collective agreements. Mr. Hoskin did concede, however, that where "hiring hall" arrangements were not in place, it was his understanding that some preferential treatment should be given to existing employees. Any suspicion that might otherwise be generated by Mr. Dickson's apparent failure to give preferential treatment to the Complainant's

> 26. application is, however, in our view undermined by the fact that we are not in a position to question, for reasons already considered, the veracity of his evidence that he was unaware of any policy of this kind. Accordingly, we do not consider the absence of preferential treatment by Mr. Dickson to be a basis for inferring the existence of discriminatory bias.

It is not necessary for us to review in further detail other submissions of this general nature made by Counsel for the Complainant and the Commission. We have directly responded to what appear to us to be the more persuasive of the submissions made and do not believe it to be necessary to respond to other submissions which appear to rest on what were, in our view, much more ambiguous and therefore unhelpful passages in the transcript. We appreciate that from the Complainant's perspective, suspicions were aroused when, feeling herself to be very well qualified for the position, she found that an individual who was not at that time an employee of the Company was appointed to the position. When one assumes, however, as we are obliged to

assume, that the evidence of Mr. Dickson has not been significantly undermined, it is our view that the Complainant and the Commission have not discharged their burden to dislodge the plausible explanation for the decision not to appoint the Complainant offered by Mr. Dickson, that is, that he applied his mind to a relevant criterion, that he believed himself to be under no obligation to appoint current employees (albeit in the case of both the Complainant and Mr. Krewey, employees in other bargaining units) ahead of what

> 27. appeared to him to be more qualified outsiders, and that it was his genuine belief that Mr. Lightle was significantly more qualified for the job than the Complainant.

It follows from the foregoing that the appeal from the Tribunal decision must be dismissed.

DATED at Toronto this 1st day of March, 1985

John D. McCamus
Wayne Petersen
Joan Wallace