TD-1/83
DECISION RENDERED JANUARY 13, 1983

CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BEFORE:
Andre Lacroix, Q.C., Chairman
Raymond Robillard, M.D., F.R.C.P. (C)
Pierre Denault

BETWEEN:
Clement Labelle and Denis Claveau
Complainants
- and -
Air Canada
Respondent

DECISION OF THE TRIBUNAL
Appearances:
Yvon Tarte, for the complainants and
Canadian Human Rights Commission

Victor Marchand, for Air Canada
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The complainants Denis Claveau and Clément Labelle, represented by Yvon Tarte, counsel to the Human Rights Commission, elected to make their submissions in a single hearing in view of the fact that all parties concerned were in agreement that the facts were similar enough to allow for joint conclusions, even if the damages or consequences affecting each of the complainants differ. It was therefore agreed that the two complainants would be given a joint hearing.

The complaint brought by Denis Claveau and filed as an exhibit at the hearing reads as follows [translation]:

There has been a refusal to consider my application to become a pilot, despite my qualifications and experience, on account of slight spondylolysis in the lumbar area which my doctor says will not hinder me at all in carrying out my duties as a pilot.

The complaint brought by Clément Labelle and filed as an exhibit at the hearing reads as follows [translation]:

There has been a refusal to consider my application to become a pilot, despite my qualifications and experience, on account of a slight congenital malformation (spondylolysis) which according to my doctor will in no way detract from my work.

The complainants base their complaints to the Tribunal on sections 3, 7 and 10 of the Canadian Human Rights Act. In brief, the complainants submit that Air Canada refused to hire them on a ground prohibited in the Act; namely, physical handicap. Air Canada, for its part, maintains that this is not a case of physical handicap, and thus there is no infringement of the Act, and that all that happened was that the normal hiring policy for airline pilots was applied.

The facts in the two cases are singularly alike and do not present any significant variations. In each case the individual submitted an application to Air Canada for a job as a staff pilot. Each one furnished the preliminary information and was called to an initial interview in 1978, and was called several months later to a second interview. It appears that up to this stage the applicants provided the necessary proof of their competence and qualifications for the position.

Following this normal procedure, both applicants were required to undergo the standard medical examination, which was carried out by Dr. St. Pierre of Air Canada.

On November 7, 1978 Air Canada notified Mr. Labelle that his state of health was not up to the employer's requirements. L.K. Sanderson wrote him a letter (exhibit C-4) from which we quote as follows [translation]:

We have reviewed the report of your medical examination. After discussing it with our medical services staff we regret to inform you that your state of health does not meet the requirements of Air Canada and that consequently we cannot accept your application.

On December 12, Denis Claveau received a similar letter from L.K. Sanderson, advising him of his condition (exhibit C-11). In both cases, the complainants asked Dr. St. Pierre about their state of health and both discovered that they were suffering from spondylolysis. The complainant Labelle, disturbed by this diagnosis and its effect on his career as an airline pilot,

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consulted another physician, Dr. Anastasiadis, and on the basis of the latter's report (exhibit C-5), asked Dr. St. Pierre of Air Canada to reassess his file. This request was refused by Dr. St. Pierre in his letter of January 15, 1979 (exhibit C-6).

Subsequently, Mr. Labelle filed a complaint with the Canadian Human Rights Commission (exhibit C-7).

The complainant Claveau also asked for his file to be reviewed and apparently was told that nothing could be done. He filed his complaint with the Commission in May 1980 after hearing about another similar case where with new medical evidence it had been possible to have an Air Canada file re-opened.

The evidence shows that in both cases the hiring process was interrupted upon the discovery of spondylolysis, and had it not been for the malformation which showed up on the X-ray examination, Mr. Labelle and Mr. Claveau would have been admitted into the training course for Air Canada pilots. The letters from L.K. Sanderson of Air Canada clearly indicate that both applications were turned down because of the applicants' medical condition.

It does not appear doubtful that in the eyes of the employer, Air Canada, a case of spondylolysis, even an asymptomatic one, constitutes a malformation rendering the sufferer more susceptible to back problems than a normal person, and that the general policy of Air Canada is not to hire a pilot whose X-ray shows the presence of lumbar spondylolysis.

Counsel for Air Canada did not show or attempt to show that the refusal to hire the complainants or the preference granted to other candidates was based on bona fide occupational requirements, as provided for in section 14(a) of the Act. After all, the medical evidence presented by the two parties confirms the presence of a congenital physical malformation in the lumbar region known as spondylolysis, which would not affect the function of pilot in itself but increases the sufferer's susceptibility to back problems in the future. Counsel for Air Canada specifically states that he does not regard spondylolysis as a "physical handicap", and submits that the employer has the right to consider an applicant's physical condition as a factor when selecting employees.

It is appropriate at this point to consider the following submissions:

1. Has there been on the part of Air Canada discrimination on a prohibited ground within the meaning of the Act?

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2. If so, has Air Canada succeeded in discharging the burden of proof imposed by section 14?

The responsibility for establishing that a prohibited ground of discrimination exists lies on the complainants and the Tribunal has concluded that they have met that requirement.

The Tribunal accepts the fact that the complainants' applications were rejected on account of a physical deformity, and had it not been for this deformity they would have been admitted into the 1979 training course for pilots.

The Tribunal rejects the distinction between "physical deformity" and "physical handicap" and is of the opinion that section 20 of the Act does not permit this distinction. We conclude that the prohibited ground of discrimination has been established. We refer here to the decision given in the United States, in Western Weighing and Inspection Bureau v. Wisconsin Department of Industry, Labor and Human Relations, Employment Practices Division, page 5542. That decision deals with precisely

the same questions as those raised in this hearing and the Tribunal is in agreement with the conclusions reached.

The Tribunal also concludes that the employer Air Canada has not provided evidence or an explanation sufficient to meet the onus in section 14 of the Act.

In summary, the Tribunal accepts the complainants' submission that they were refused positions as airline pilots at Air Canada on the ground of a physical handicap, contrary to the Act, and that the employer has not shown that its refusal was based on bona fide occupational requirements.

Delay in filing
Counsel for Air Canada submits that there was an unreasonable delay in filing the complaints and relies on section 33 of the Act. The Tribunal is of the view that the complainants acted reasonably in the circumstances. They continued to dispute the refusal of employment by requesting a review of their files, which was refused. There is no reason to believe that the employer would have altered its position if the complaint had been filed sooner. We conclude that the filing of the complaints with the Tribunal was correctly done and that the delay does not constitute one of the circumstances covered in section 33 of the Act.

Order

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1. Cessation of the discriminatory practice
We do not dispute that it is the employer's function and right to consider medical reasons in the evaluating of applicants for employment; such medical reasons however must amount to a serious factor connected with the requirements of the job to be carried out. Medical criteria or "hiring policies" may perpetuate a discriminatory system when applied in an arbitrary fashion. The medical evidence adduced at the hearing dealt with spondylolysis which might or might not be accompanied by a variable degree of displacement of one vertebra over another, or spondylolisthesis. The extent of the malformation, from simple spondylolysis to major vertebral displacement, is expressed on a universally recognized graduated scale. Thus an acceptable yardstick exists to measure the extent of the malformation using X-rays. However the subjective or objective incapability of the applicant, if it exists, must also be taken into account.

We therefore order Air Canada to cease the general practice of refusing to consider applicants for the position of airline pilot who suffer from spondylolysis, whether with or without spondylolisthesis, and that every applicant be evaluated individually according to his merits or his physical condition.

2. Salary losses
Counsel have agreed that the complainant Claveau has not suffered a loss because he was employed as a pilot with Quebec Air during the period, at a similar salary. The losses of the

complainant Labelle have been calculated as $27,000.00 up to the date of the hearing, and we accordingly order the respondent Air Canada to pay to Clément Labelle the sum of $27,000.

3. Employment
Were it not for the discriminatory practice, the complainants would have been admitted to the Air Canada pilots' training course, a stage which precedes hiring. We therefore order Air Canada to offer to each of the two complainants a place in the next pilots' training course held by Air Canada.

4. Seniority
Counsel for the Commission and the complainants claims seniority within Air Canada for the two complainants, from the date of the training courses in which they could have been registered.

This claim is vigorously contested by Mr. Marchand who does not consider that a Tribunal may grant retrospective rights applicable when they were not employed by Air Canada. He submits that such a measure would upset the existing labour relations system, would affect other employees and would lead to the application of section 42(2) of the Act. He suggests that the compensation should be monetary and that section 41(2)(b) contemplates future and not prior acts.

The Tribunal recognizes the merit in issuing an order which would place the complainant in the position which he would have been in had it not been for the discriminatory practice. Such an order must, however, affect the complainant and respondent, not uninvolved third parties. We therefore accept the submissions of Mr. Marchand and do not make any order as to seniority.

5. Damage to feelings
We recognize that the complainants, after having completed the lengthy and costly studies and training undertaken by people who intend a career as airline pilots, would be affected in respect of their feelings following a refusal of employment by the largest Canadian aviation company. They have shown what they experienced by their behaviour and their actions up to today. We are of the view that there has been suffering in respect of feelings or self-respect within the meaning of section 41(3) and order payment of the sum of $2,000. to each complainant.

Decision given this thirty-first day of December, 1982.

[signed]
André Lacroix
Raymond Robillard
Pierre Denault