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DECISION RENDERED ON FEBRUARY 14, 1983

CANADIAN HUMAN RIGHTS COMMISSION
HUMAN RIGHTS TRIBUNAL

BEFORE: MARIE CLAIRE LEFEBVRE
BETWEEN:
VALERE BRIDEAU
Complainant,
- and -
AIR CANADA
Respondent,
CANADIAN HUMAN RIGHTS COMMISSION
Intervenor.

DECISION OF THE TRIBUNAL
COUNSEL: Mr. Yvon Tarte, counsel for the Canadian Human Rights Commission and Valère Brideau

Mr. Victor Marchand, counsel for the respondent
HEARING HELD October 13, 1982.
COMPLAINT:
Mr. Valère Brideau filed a complaint dated Febraury 28, 1981, pursuant to Sections 7 and 10 of the Canadian Human Rights Act, alleging that respondent Air Canada discriminated against him in an employment matter because of a physical handicap.

Facts and admissions:
At the start of the hearing, counsel for the parties informed the Tribunal that they intended to make a series of admissions on the facts and to submit the related documents, subject to an objection raised by counsel for the respondent as to the jurisdiction of the Court.

The following, in chronological order, are the admitted facts and certain complementary points regarding the documents submitted

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in connection with this matter:
- creation of the Tribunal (Exhibit C-1);
- employment application for the position of flight attendant received by Air Canada on 9/9/80 along with a panel of candidates, and the results of three interviews (Exhibit R-1);

- compulsory medical examination of complainant by Dr. T.V. Luu; reported by Dr. W. Light, a radiologist, dated 14/11/80 and indicating the presence of air bubbles at the apexes of the lungs, and review of the medical file by Dr. R. Dufresne, containing the notation "not recommended" dated 21/1/81 (Exhibit R-2);

- copy of complaint - medical examination by Dr. A. Crépeau dated 4/12/80, concluding that the complainant was in good health
- letter from Air Canada dated 2/2/81, telling Mr. Brideau that he

did not have the qualifications for the job in question (Exhibit C-2); letter to Mr. Julien Delisle, of the Human Rights Commission, including Dr. R. Dufresne's medical report dated March 19, 1981; the said report confirming the presence of air bubbles and his refusal to hire Mr. Brideau (Exhibit R-3);

- a second medical report by Dr. André Crépeau, dated November 29, 1981, this time at the request of the Human Rights Commission: this report was made necessary by the contradictory findings of the specialists - result of X-rays - result of tomogram - Dr. A. Crépeau confirmed that complainant was in good health (Exhibit R-4);

- reassessment of complainant's medical file by Drs. Antoine St-Pierre and R. Dufresne, following the second report by Dr. Crépeau;

- Air Canada admitted that its diagnosis was incorrect accepted the opinion of Dr. A. Crépeau - reactivated Mr. Valère Brideau's file - offered to reimburse the complainant for all actual expenses incurred.

Those, briefly, are the facts and documents submitted. This series of admissions by counsel for the parties made it possible to shorten the proceedings and the Tribunal would like to thank them.

A - Jurisdiction of Tribunal
As we noted above, counsel for the respondent raised an objection to the Tribunal's jurisdiction.

In support of his argument he cited the principle that a complaint is only valid if the Commission can prove that the

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complainant was the subject of a discriminatory practice on a prohibited ground of discrimination, listed in Section 3 of the Canadian Human Rights Act. He pointed out that it had already been established that the complaint was based on conflicting medical opinion, and not a physical handicap, which does not exist. Pursuing this reasoning, he concluded that if there was no complaint, Section 4(2) or (3) of the Act, providing for compensation, did not apply.

In the submission of counsel for the respondent, therefore, this case belongs in a common court, and [he] maintained that Section 33 of the Canadian Human Rights Act, which reads as follows:

. . . the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance . . . procedures . . .

also applies.
Counsel for the complainant cited the decision in Latif as showing that Section 33 of the Canadian Human Rights Act is directed only at the Commission and determines the way in which its mandate will be carried out.

We also feel that this is the central idea in the context, and for this reason the Tribunal is of the opinion that Section 33 is inadmissible.

Must we therefore conclude that this Tribunal has jurisdiction?

An affirmative answer to this question is to be found in the decision in Foucault, 1 and Heerspink 2 and by reference to the intent of the legislator and the Interpretation Act.

The preceding references led the Tribunal to conclude that it has jurisdiction, as follows.

In Foucault it was decided that what matters is not the physical handicap but the "perception" the employer has of the future employee's physical condition. In the instant case the complainant, Mr. Valère Brideau, was "perceived" by Air Canada as having air bubbles on his lungs, and therefore as having a physical handicap, though the condition did not exist.

If the Tribunal adopts this decision, it is because it would be too easy for an employer to circumvent the law by citing a thousand more or less valid reasons or pretexts, such as lack of information, prejudice, errors in diagnosis or other arguments of the same type.

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1 Philip Foucault v Canadian National Railways, p. 4; decision rendered on July 30, 1981.

2 Robert C. Heerspink v The Insurance Corporation of British Columbia (Supreme Court of Canada), August 9, 1982.

Additionally, Antonio Lamer J of the Supreme Court of Canada in Heerspink, cited above, expressly indicated the interpretation that must be given to human rights statutes when he said:

. . . They are more important than all others . . . It is intended that the code supersedes [sic] all other laws when conflict arises . . .

that no one is beyond their scope and that they should be interpreted as liberally as possible.

Finally, in adopting the Canadian Human Rights Act, the legislator sought to eliminate abuses of human rights, to ensure equal opportunity of employment and to guarantee that the victims of discriminatory practices obtain justice.

For all the reasons cited above, the Tribunal concludes that it has jurisdiction to hear this case.

B - The respondent: did Air Canada discriminate against the complaint in a matter of employment because of a physical handicap, contrary to sections 7 and 10 of the Canadian Human Rights Act?

Before answering this question, the Tribunal wishes to reiterate and emphasize the principle that it is the "perception" an employer has of the future employee's physical condition that must be considered, not the physical handicap itself.

It was established that Dr. Light, a radiologist, Drs. St-Pierre and Dufresne, all of Air Canada, discovered or confirmed the presence of air bubbles in complainant's lungs. It is therefore clear that the prohibited ground of discrimination was, so to speak, "present" in the mind of the respondent . . . and more than "present", since the employer went beyond the stage of mere knowledge and took a very concrete action, refusing to consider him qualified for the employment in question, namely as a "flight attendant": hence the letter to complainant dated 2/2/81 and filed as Exhibit C-2.

Before proceeding, we should strongly emphasize the actions taken by complainant at the express suggestion of Dr. V. Luu of Air Canada, that he consult a specialist of his own choosing. Subsequently, the medical report of Dr. A. Crépeau was entered in complainant's file, and this gave Air Canada additional, though contradictory, medical information.

The Air Canada medical team did not see fit to take this contradictory opinion into consideration because:

1. Dr. A. Crépeau's report seemed to be incomplete;
2. it had no reason to doubt its own competence;
3. it had not retained the services of Dr. A. Crépeau.

We should also emphasize that there had to be a second report by Dr. A. Crépeau, this time requested by the Human Rights Commission, in order for the Air Canada specialists to agree they had made a "diagnostic error" and to accept the diagnosis of Dr. A. Crépeau.

In light of the foregoing facts, the Tribunal wonders whether there could not have been more "prudence" and "consultation".

Having made these observations, we should say that it was established to the Tribunal's satisfaction that there had indeed been a case of valid discrimination [sic].

It was then up to Air Canada to prove that the discriminatory practice was based on a bona fide occupational requirement mentioned in section 14 of the Canadian Human Rights Act. This duty is less onerous, in the opinion of the Tribunal, if the employer can prove that the employee's safety or that of the public is at stake. "However, though we can conclude that the burden of proof is less when safety is at stake, a bona fide occupational requirement should nonetheless be strictly interpreted". 3

This rule must be therefore applied to the instant case, and the Tribunal must consider whether, in rejecting Mr. Valère Brideau as a "flight attendant" because of its "perception" of a physical handicap, Air Canada established that this requirement was real, just and based on everyday on-the-job reality and everyday risk, both to himself and to passengers. We feel that evidence of this was presented. This can be seen from a careful reading of the testimony in which Dr. St-Pierre described the possible repercussions of the existence of air bubbles and the connection of this with the duties of a flight attendant. 4

3 Michael Ward v Messageries de CN, pp 42-43: decision rendered January 19, 1983.

4 Pages 62 and following of October 13, 1982 hearing.

Although the instant case is in fact based on an erroneous diagnosis - and we in no way question the good faith of the doctors concerned - the Tribunal adopts the principle of an employer's "perception" of the future employee's physical condition, and as

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Air Canada has proved to the satisfaction of this Tribunal that its refusal was based on bona fide occupational requirements, this Tribunal concludes that sections 7 and 10 of the Canadian Human Rights Act, and consequently Sections 41(2) or (3), do not apply to the instant case.

In conclusion, for the foregoing reasons the Tribunal:
(a) DISMISSES the complaint;
(b) approves Air Canada's offer to reimburse to the complainant, Mr. Valère Brideau, all expenses actually incurred, namely the sum of $136.95.

Marie-Claire Lefebvre
Chairperson of Tribunal

January 23, 1983