T. D. 2/ 89

Decision rendered on February 8, 1989

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

Charles F. Holden Appellant

and

Canadian National Railway Company Respondent

Tribunal: Niquette Delage, Chair, Nicolas Cliche, Antonio De Joseph

DECISION OF THE REVIEW TRIBUNAL

Appearances: James Hendry Counsel for the Complainant and the Canadian Human Rights Commission
Jacques Perron Counsel for the Respondent

The present Tribunal, composed of Mr. Antonio De Joseph of Ccchrane, Ontario, Mr. Nicolas Cliche of Beauce, members and of Mrs Niquette Delage, of Montreal, President, heard the appeal made by Mr. Charles Holden of Châteauguary against Canadian National Railways, pursuant to article 42.1 of the Canadian Human Rights Act, 1976- 77, c. 33, amended by 1977- 78, c. 22, 1980- 81- 83, cc. 111, 143, 1984, c. 21 and 1985, c. 26.

42.1 (1) Where a Tribunal that made a decision or order was composed of fewer than three members, the Commission, the complainant before the Tribunal or the person against whom the complaint was made may appeal against the decision or order by serving a notice in a manner and form prescribed by order of the Governor in Council, within 30 days after the decision or order appealed from was pronounced, on all persons who received notice from the Tribunal under subsection 40(1).

(2) Where an appeal is made pursuant to subsection (1), the President of the Human Rights Tribunal Panel shall select three members fran the Human Rights Tribunal Panel, other than the member or members of the Tribunal whose decision or order is being appealed from, to constitute a Review Tribunal to hear the appeal. The notice of appeal invokes the following reasons:

1: The Tribunal did not deal with the fundamental issue of whether or not there was age discrimination in Mr. Holden's forced retirement but rather concerned itself with the question of whether or not he really wanted to be reinstated in the Company once he was terminated.

2: The Tribunal did not decide whether a prima facie case of discrimination had been made out requiring a response from the respondent.

3: The Tribunal assumed that an individual assessment had been made of Mr. Holden in the job from which he was retired when there was no such evidence presented to the Tribunal.

4: The Tribunal erroneously appears to have considered that the receipt of some severance pay by Mr. Holden finalized any claims against the Respondent under the Canadian Human Rights Act.

5: The Tribunal gave far too much weight to evidence that Mr. Holden's retirement took place in the time of economic downturn. Clearly an economic downturn does not give an employer a licence to discriminate. 6: The Tribunal ignored the weight of evidence from which it should have found that he was retired against his will because of his age. 7: The Tribunal failed to substantiate the complaint of Charles Holden and award the appropriate remedy.

The Facts

Mr. Charles Holden joined the Canadian National Railways (hereinafter «CN») in January of 1941 at age 18.

Between 1941 and 1963, Mr. Holden worked in the Accounting area. He became in March 1963 a Statistical Development Analyst in the Marketing area and was asked to set up a Freight Sales Statistics Program for computerization.

In June 1966 and until July 1980, Mr. Holden went from the position of Assistant Freight Statistics Officer to that of Coordinator for Freight Sales Statistics.

In July 1980, Mr. Holden became Senior Financial Planning officer where he worked as an assistant to the Coordinator of Financial Planning, who, in turn reported to the System Manager, Planning and Systems Development

At the relevant time, Mr. Holden was working with six Financial Planning officers, each in charge of a market segment: Fuel and Chemicals, Forest Products, Intermodal, Automobiles, Agriculture and Food Products, Oil, Metals, Minerals and Manufacturing.

An assessment of his performance was done on September 24, 1980, after he had been working as Senior Financial Planning officer for two months. A complete appraisal of his performance was made on April 8, 1981. It revealed that Mr. Holden was not meeting the expectations of his supervisors fully.

Mr. Holden had been ill with diabetes, but he was better by the Fall of 1981.

In September 1981, Mr. Holden became a Financial Planning Officer, for Grain and Agricultural products. His salary remained the same and he received a 10% raise in pay in January, 1982.

On February 24, 1982, Mr. Holden was told by his manager, the Systems manager, that he was going to be retired effective July 31, 1982 because the company was reducing staff. A letter was presented to him at that time, but he refused to take it.

A similar letter, dated March 1, 1982, reached Mr. Holden. It was accompanied by a summary from the CN Pension Bureau, dated February 8, 1982, informing Mr. Holden of his pension details and how much money was to be forwarded to him each month after his retirement.

In a letter dated March 16, 1982, Mr. Holden asked that the letter of March 1st, 1982 be withdrawn until new financial arrangements are negotiated, or a suitable relocation is made for him in C. N. He stated also that «any separation allowance short of one year's salary would at this time impose a severe financial burden, both in the immediate and short term period of my retirements.»

In a letter dated March 25, 1982, Mr. Gowan, System Manager, Market Development, explained that an ex- gratia equivalent to a full year's salary was not possible. The CN Separation Policy did not allow for that. But the company offered, at its expense, professional financial planning councelling and Mr. Gosman further stated: «the requirement of marketing to reduce its operation costs remains unchanged. It is therefore, not possible to consider delaying the decision that would see you retire effective July 31, 1982.»

On April 26, 1982, Mr. Holden wrote to Mr. R. E. Lawless, President CN Rail, and alluded to the circumstances of his eventual leave of the CN. He requested again an ex- gratia payment over the standard one being offered. His financial position at the time was the basis for his claim.

On May 3rd, 1983, Mr. Lawless answered Mr. Holden Is letters and referred him to Mr. J. H. D. Sturgess, Vice- President of Marketing at CN.

Mr. Holden had a meeting with Mr. Sturgess as a follow- up to the letter from Mr. Lawless as he explained himself in his testimony, at page 99 et seq. Volume 1, February 16, 1987.

On August 25, 1982, J. Maurice LeClair, President and Chief Executive Officer of CN, wrote to Mr. Holden as regards the formal announcement approving his pension under the 1959 Pension Plan, and thanked Mr. Holden for his contribution to the CN.

The position left by Mr. Holden was, eventually, taken over by Mr. Bob Babcock with the title Financial Planning Officer, Grain and Agricultural Products. Mr. Babcock was, at the time, 41 years old as explained by Mr. Larkman, Assistant to the Vice- President of Marketing for Personnel and Administration, at page 388, Volume 3 , February 18, 1987.

Before Mr. Holden left CN, the position of Financial Planning Officer for Fuel and Chemicals became available and was taken over by the Financial Planning Officer for the Forest Products segment, while the Forest Products position was filled by another person who had been working in another region. This was provided in the Examination in chief of Mr. Charles Holden at page 109, Volume 1, February 16, 1987.

As a matter of fact also, it is to be noted that Charts 3- A and 3- B show the merger in 1982 of the Automobile (Auto) segment with the Oil, Metals and Minerals and Manufacturing (OMM& M) segment, as explained by Mr. Peter Gosman, Assistant manager Marketing Development during his testimony at page 414 and seq., Volume 3, February 18, 1987.

Organizational diagrams filed by CN as Exhibit R- 4 show a Chart Number 3- A, dated January, 1982, with Mr. Holden as the Financial Planning Officer for Agricultural and Food Products. In Chart 3- B, dated September, 1982, the same position. is occupied by Mr. R. Babcock. Mr. Holden had left the CN on July 31st, 1982.

THE DECISION

This Tribunal recognizes that the articles in the Canadian Human Rights Act, 25- 26 Elizabeth II, Chapter 33, assented to 14th July, 1977 invoked by Mr. Charles Holden as the basis of his complaint are sections 7 and 10 of said Act.

Section 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

Section 10. It is a discriminatory practice for an employer or an employee organization a) to establish or pursue a policy or practice, or b) to enter Into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

In reviewing the various questions put to this Tribunal by the appelant, it is our intention to answer each and every one of them in the order presented.

I. To the question: Has the Tribunal of first instance failed to deal with the fundamental issue of whether or not there was age discrimination in Mr. Holden's forced retirement and rather concerned itself with the question of whether or not he really wanted to be reinstated in the Company once he was terminated, this Tribunal answers no.

It is the view of this Tribunal that the situation prevailing at the time called for staff reductions in the CN; that, in fact, there were cuts amounting to 10% of the staff in the total marketing group; that 97 individuals were let go, some younger, some older than Mr. Holden; specific references to said cuts can be found in a letter dated September 24, 1982 addressed to Mr. R. E. Lawless and signed by Mr. J. H. D. Sturgess, filed as Exhibit R- 3, and also at pages 353, 355 and 407, Volume 3, February 18, 1987, when Mr. A. Larkman is interrogated by Mr. Perron, lawyer for the CN.

The justification for said cuts is a $670,000.000.00 loss of revenues by the CN, as explained at pages 405, 406 and 407, Volume 3, February 18, 1987 by Mr. Peter Gosman.

Was Mr. Holden's sole concern that of being reinstated in the company once he was terminated? Was that really what the Tribunal of first instance understood of the goings on between February 1982 and July 31st, 1982?

This Tribunal does not read into the decision rendered by the Tribunal of first instance a lack of concern of and pronouncement on the fundamental issue of age discrimination in Mr. Holden's forced retirement. Firstly, on the question of reinstatement: Is it not a definite perspective when a collective agreement provides for it in the case of a lay- off decreed by an employer because of lack of work for example? In this case, them is no collective agreement to protect Mr. Holden. There existed no safeguard for management staff in circumstances such as the ones describes by the company representatives who were called upon to testify as to the options which existed at the relevant time.

Secondly, what about seniority rights? Those were alluded to, but this issue cannot be considered, we think, for the same reason. A decision by the Quebec Court of Appeal, that of Jules Décarie c. les Produits pétroliers d'Auteuil Inc., (1986) RJO (C. A.) 2471 et 2472, as quoted by Mr. Jacques Perron, the lawyer for the CN explains why:

«Seniority is a non existent rule of law. It exists only if it is provided for in a collective agreement or a work contract.» (The translation is ours).

There is, thus, no hesitation on the part of this Tribunal in declaring that CN had no duty to lay off, first, people with a lesser number of years of services in the CN than Mr. Holden before they even considered him as a possible casualty of the corporate reorganization necessitated by the disastrous economic situation affecting the whole of Canada.

This Tribunal finds no fault with the judgment appealed fran. It is clear to us that in its dealings with the fundamental issue of age discrimination, the Tribunal of first instance discarted this motive of prohibited ground of discrimination as being the real cause for Mr. Holden's dismissal by the CN.

There is no doubt that Mr. Holden wanted to be relocated in the company, as he stated in his letter of March 16, 1982. But that alternative was invoked in the event that there was no possibility of bettering the financial offer made by the CN. This documentary proof was examined by the Tribunal of first instance, and there is no denying that what Mr. Holden wanted was what he wrote.

This tribunal would like to point out that the recourse which Mr. Holden chose to take was possibly the wrong one. When these events took place, we believe that Mr. Holden, if he was convinced that he was wrongfully dismissed, should have gone to the Commission des Normes du Travail du Québec to seek redress.

II. To the question: Has the Tribunal of first instance failed to decide whether a prima facie case of discrimination has been made out requiring a response from the Respondent, this Tribunal answers no.

Not only do we find no intent to discriminate on the part of the CN, but we also find that the jurisprudence on the question of intent is not pertinent: A look at the relevant statement in the case Ontario Human Rights Commission and Theresa O'Malley (Vincent) versus Simpsons-Sears Limited, (1985) 2 SCR 536, aims at clarifying our position:

«(...) to (...) hold that intent is a required element of discrimination under the code (Ontario Human Rights Code), would seem to me to place a virtually insuperable barrier in the way of a complainant seeking remedy. (...) It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.» McIntyre J.

The total lack of proof of intent in this case is determinant. Why? Because there is no proof of discrimination to start with. And, although, as states the O'Malley case, there is no necessity to prove intent to determine discrimination, this Tribunal looked at the whole picture before it found that there is no prima facie case of discrimination here as claimed by the appellant. Our review of the evidence presented by both parties has been careful and thorough. Our examination of the reasoning by the Tribunal of first instance has been very close indeed. We took pains to look objectively at both sides and to listen attentively to both argumentations. Thus, there is no doubt in our minds that the Tribunal of first instance did not err in its determination here.

In fact it is the view of this Tribunal that the complainant, having accumulated a great deal of experience in the work force, and more specifically at the CN, a company for which he worked 41 years, must have expected that, given certain circumstances, present here, a company is forced at times to make decisions which are as difficult upon itself as they are upon the employess it has to designate for release because of financial constraints of a magnitude as large as these.

Mr. Holden's written communications leave no doubts as to his appreciation of the existing situation with which CN was faced. He understood the problem and did not quarrel with the facts as presented to him to explain the decision which had been taken. It so happens that, at that time of crisis, he himself was not in the best of financial positions and he based his requests for a higher severance pay on this premise.

This being said, this Tribunal finds that CN acted in its own best interests at the time, which is legitimate, and that it demonstrated a genuine desire to limit the consequences of a difficult decision on all parties concerned.

Now, this Tribunal was told that: 1. The Tribunal of first instance did not deal with evidence in the normal course of procedural rules of evidence in Human Rights Tribunals. 2. The Tribunal of first instance was obliged to deal with the prima facie case of age discrimination presented to it, and did not do so.

To support this allegation, also ground for appeal, the appellant quotes a number of cases which have developed their own procedural rules. They are:

-The Ontario Human Rights Commission and Bruce Dunlop and Harold E Hall and Vincent Gray versus the Borough of Etobicoke (1982) 1 SCR 202, -Ontario Human Rights Commission

and Theresa O'Malley (Vincent) versus Simpson- Sears Limited (1985) 2 SCR 536, -K S Bhinder and the Canadian Human Rights Commission versus Canadian National Railway company, the Attorney General of Canada et al (1985) 2 SCR 561, -Furnco Construction Corporation v. William Waters et al., U. S. Supreme Court Employment Practices Decisions, p. 6028 et seq., an American case, -Mary Gadowsky versus the School Committee of the CountY of Two Hills, No. 21, CHRR, Volume 1, Decision 37, October 20, 1980, -Foster Wheeler Limited versus Ontario Human Rights Commission and Gladstone Leslie Scott, CHRR, Volume 8, Decision 656, September 1987.

After careful review of said decisions, this Tribunal reiterates that the Tribunal of first instance was in the best of positions to examine the proof presented to it, that it evaluated all the elements which constituted said proof, based on the written documents made available to it and which were contemporary to the events which took place in 1982, and found that the complainant had not established a prim facie case of discrimination because of age, thus had not reversed the burden of proof to the employers we see no reason to disturb this finding.

III. To the question: Did the Tribunal of first instance assume wrongly that an individual assessment had been made of Mr. Holden in the job from which he was retired when there was M such evidence presented to the tribunal?

This Tribunal has reviewed the testimonies in which the question of assessment was raised, and it is of the opinion that the Tribunal of first instance did not assume wrongly that an individual assessment had been made of Mr. Holden in the job from which he was retired. In point of fact, an assessment had taken place, as explained by Mr. Peter Gosman, Mr. Holden's immediate superior.

Mr. Gosman was faced with direct orders fran the CN upper management to cut jobs, and this was to be done fairly quickly. What Mr. Gowan proceeded to do was to evaluate the performance, the qualifications and the capacity of each and every person in the marketing group to cope with a reduced staff situation, as well as what each and every person in place at the time could accomplish during these difficult times. The more performant, the more competent, the more apt to face up to this situation were singled out. Mr. Holden was not one of them. Here is what Mr. Gowan said about the whole process, which, by the way, did not result in any written documents being submitted to the Tribunal of first instance.

«First of all, I had to come up with a shrink, there's no question about that.» (page 408, Volume 3, February 18, 1987). «(...) secondly, I was trying to do it in a way that would minimize I guess the impact on our ability to do the job.» (...) From I guess an experience point of view, and from a proven track record point of view, the best you could put in that situation, that was an assessment that I made.» (page 412, Volume 3, February 18, 1987).

In doing so, did Mr. Gowan discharge his «obligation» as created in section 2 of the Canadian Human Rights Act, so claims the appellant, to consider the individual merit of Mr. Holden? The appellant also quotes two decisions to support his claim, namely the Etobecoke case quoted earlier, and Air Canada versus Carson (1985) 1 F. C.

Do said decisions underscore the emphasis on indivual merit in dealing with that issue clearly and completely in the proof», as inferred by the appellant?

It was a practice in the CN to evaluate once a year its management staff, as was explained to the Tribunal of first instance by Mr. David Bartlett at page 276, Volume 2, February 17, 1987, and at page 408, Volume 3, February 18, 1987 by Mr. Peter Gosman.

This Tribunal believes that the Tribunal of first instance realized fully that Assessments of performance, Exhibit C- 5 of Mr. Charles Holden in his job of Senior Financial Planning Officer were conducted on two occasions: the first one on September 24, 1980, a rather short time after Mr. Holden started in this job. Upon reading this assessment, Mr. Holden requested, says a note on said Assessment of performance form, that a formal review be made in six months tune which would have been on March 21st, 1981. It is to be noted that said assessment pointed to results more or less satisfactory in Mr. Holden's performance as a Senior Financial Officer, a job where the pressure and the stress were part and parcel of the everyday requirements.

A second Assessment of performance was made on April 8, 1981, Exhibit C- 6, and its conclusions were that Mr. Holden's performance left to be desired. Mr. Holden commented this evaluation of performance in a hand written document annexed to said Assessment.

Mr. Holden was eventually dismissed from the Senior Financial Planning Officer job and given a job of Financial Planning officer for Grain and Agricultural Products in September 1981. He was in this job less than five months when orders came from the top echelon at the CN to reduce the staff.

Again, the assessment made by Mr. Peter Gosman was not a formal one and the Tribunal of first instance was not presented with a document entitled Assessment of Performance for Charles Holden as Financial Planning Officer for Grain and Agricultural Products. But, it heard the testimony given by Mr. Gosman on how he proceeded to respond to the orders he had gotten. A quick decision had to be made by him, and after evaluating all his players and how they could best perform in a given situation, he made a choice.

Within that context, the Tribunal of first instance came, rightly so, to the conclusion that «since it was demonstrated that positions were abolished on the basis of recommendations made by the immediate supervisor in each department, which in turn were based on individual performance during the year preceding these recommendations and the downsizing, the complainant's allegation of discrimination against him because of his age is unsubstantiated.»

This Tribunal would like to stress the fact that the Tribunal of first instance cud not refer to any annual performance assessment but rather to an individual performance evaluation done at a given turn when the work done by all staff in the past twelve months would show the strong points and the weak points of each and everyone in place at the time.

It so happened that Mr. Holden did not fare well in this evaluation and a decision was made to let him go since the cuts having been determined, there were two people for only one job, the second job being slated for abolition.

IV. To the question: Did the Tribunal of first instance erreneously appear to have considered that the receipt of sane severance pay by Mr. Holden finalized any claims against the Respondent under the Canadian Human Rights Act, this Tribunal thinks not.

The Tribunal of first instance did not err in stating as it did: «Since, on June 16, 1982, the complainant finalized his negotiations with his superiors and accepted the negotiated financial arrangements by signing an authorization to transfer a sum of $15,706.00 to his registered retirement savings plan upon termination of his duties with his employer;»

The appellant quotes, in support of his claim that he did not finalize his negotiation with the CN, a passage from the Etobicoke case:

«The Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract.» (The Ontario Human Rights Commission and Bruce Dunlop and Harold E Hall and Vincent Gray and the Borough of Etobicoke (1982) 1 S. C. R.

The appellant also quotes the following passage from the Craton case School Division versus Craton (1985) 2 S. C. R.:

«There is no merit in the argument raised below, but not pressed in this Court, that the parties by agreeing to article 14 of the Collective Bargaining Agreement have contracted themselves out of the provisions of s. 6 (0). The Human Rights Act is legislation declaring public policy and may not be avoided by private contract. See: Ontario Human Rights Commission v. Borough of Etobicoke (1982) 1 S. C. R. at pp. 213- 14.»

Although parties make arrangements, claims the appellant, this does not oust the jurisdiction of the Tribunal to look at the issue of discrimination, and the acceptance of a sum of money did not terminate the recourses opened to me.

This Tribunal listened to all arguments presented by both sides, and although it is his finding that what happened between the CN and Mr. Charles Holden is close enough to a transaction as described by the lawyer for the CN, M. Jacques Perron, the agreement in question cannot be envisaged as having the finality a transaction has.

This being said, the fact remains that Mr. Holden did accept the proposal put to him by the CN. There were negociations as reflected by the exchange of correspondance which took place, and which the Tribunal of first instance consulted.

That the Tribunal of first instance would arrive at a conclusion that there was no undertaking on the part of the CN to insure a job to its employees for an unlimited number of years, and to, furthermore, garantee the same job to its employees for «x» number of years seems to be clear.

That the Tribunal of first instance agreed that it is a management prerogative to move its employees where it sees fit and according to needs also seems clear. Therefore, in expressing its

conclusions the way it did, the Tribunal of first instance noted, rightly so, that there had been an acceptance on the part of Mr. Holden as regards what was offered by the CN, and that this gesture was enough to convince any objective observer that Mr. Holden did not feel he was being discriminated against.

One has to remember that the decision to let run go was communicated to him in February, 1982. In the owing weeks and months, he had time to think about his situation, and when, in June, 1982, Mr. Holden was presented, for his signature, the agreed upon documents, surely he could have, had he been convinced that his age was the real reason why he had to leave, refused to sign them and carried further the negociations. And, who knows what might have resulted?

The Tribunal of first instance, thus, did not err in its determination that age discrimination was not being exercised by the CN. All the actions of Mr. Holden, between the time of the announcement and that of his departure fran the CN, point to an acceptance of the situation, cutting in the signing of documents.

It is this acceptance which this Tribunal sees reflected in the words used by the Tribunal of first instance to justify its finding of non- discrimination, and this Tribunal sees no reason to disturb said finding.

V. To the question: Did the Tribunal of first instance give far too much weight to evidence that Mr. Holden's retirement took place in the time of economic downturn, and clearly an economic downturn does not give an employer a licence to discriminate, this Tribunal answers that this general question calls for many arguments.

It is not a cut and dry case as the Tribunal of first instance appreciated. It was presented with many elements, and it had to evaluate each and every one of them. Its pronouncement points to its firm belief that the proof submitted in support of the complainant's case was not strong enough to conclude that a prima facie case of discrimination was successfully put before it. Clearly the Tribunal of first instance did not find here the elements put forth by McIntyre J. in the Ontario Human Rights Commission v. Simpson- Sears (1985) 2 S. C. R case, and they are:

«A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favor in the absence of an answer from the respondent- employer.» (p. 558)

The jurisprudence quoted by the complainant is that of Mrs. Gadowski's case who was discriminated against because of her age, and this was a prima facie case of discrimination, we all agree on this.

Here, there was an onus placed on the employer to demonstrate that there was some real reason for the dismissal of Mr. Holden, argues the appellant.

In this case, from the start, the employer, the CN, invoked the economic situation as the basis for its decision to downsize. No one could contest that a bad financial situation existed; that, in fact,

it was a severe state of affairs for everyone in the business world, and that measures had to be taken to cope with the problem created by this recession which hit hard in 1981-82.

Is the Tribunal to substitute itself to the management of this very large company in determining which steps should have been taken by the managers at the time, rather than the ones which were effectively taken? Surely this is not what is envisaged by the Canadian Human Rights legislation. What the Act prohibits are actions that lead to no other conclusion but that discrimination was the basis for one's decision in a given case.

Proof of discrimination has to be established, and the Tribunal of first instance honestly believed that such proof had failed to materialize. No wonder its decision was that, -given the particular circumstances which existed at the relevant time, -they and they alone explained the behaviour of the CN management. As this Tribunal noted earlier on, it was impossible not to take into account the context in which decisions were taken and actions were carried out. As regards the total picture, this Tribunal does not find that too much weight was given by the Tribunal of first instance to the evidence put before it as regards the economic downturn.

Furthermore, the economic downturn was not the occasion, as claims the appellant, to resort to discrimination based on age, to let go an employee who had accumulated 41 years of loyal services to the CN. This Tribunal is convinced that the real real reason why Mr. Holden was dismissed was because the events and the economic problem they created were such that decisions based on economic considerations had to be taken. And the fittest survived. It is as simple as that.

VI. To the question: Did the Tribunal of first instance ignore the weight of evidence from which it should have found that he was retired against his will because of his age, this Tribunal concludes that this was not so.

The Tribunal of first instance, if this claim were true, would have reached the wrong conclusion, and then it would be this Tribunal's job to correct that error. This Tribunal cannot agree that a wrong conclusion was reached by the Tribunal of first instance, since it is convinced that the right decision was rendered in the first place.

This Tribunal examined closely the evidence as it was presented to the Tribunal of first instance. It is true that Mr. Holden was not immediately prepared to leave the CN. It is also true that the evaluations of the situation which, month by month, deteriorated, had to be repossessed. Faced with several hundreds of millions of lost revenues, the CN had to react. No one, in the CN, wanted to be the one whose job was put on the line. But, in our modern world, there are not many possibilities to correct a problem such as this one.

Recessions have occurred before, and companies have had to adjust: this has meant that insecurity becomes the order of the day. There is no guarantee that a job will be safe from elimination.

In this case, the evidence pointed to a very critical situation forcing an employer to rationalize its operations, to cut because it found there was no other solution; and, in the process of cutting, it had to determine what could be cut and how.

Because the goal was to allow for continued operations, but on a smaller scale, the market forces having changed the situation, the company singled out the operations that were to remain.

The result was: a surplus of personnel for the remaining functions. Someone had to go. And how does one go about chosing that someone? The CN gave orders. Its management staff had to come up with a plan of action to meet the desired effects.

It used procedures that were felt appropritate at the tune and the conclusion it reached was that so many people could handle the pressure and the demands imposed upon the Company by a deteriorating, if not a fast deteriorating situation. Those who were perceived as not being able to cope, based on their performance in the past preceding months, were dismissed.

It is never easy to accept that one is not as good as one thinks. Could it be that taking it for granted that his competence was not the issue here, Mr. Holden deliberately avoided any reference to it or his other qualifications in his written communications? Would that also be the reason why he avoided any reference to the fact that he felt he was being dismissed because of a faulty evaluation of his capacities?

On the basis of what he wrote, the Tribunal of first instance was left with no other option but to conclude that Mr. Holden was after a larger settlement. Retirement was not, so claims the appellant, something he had considered. His pension was paid up though, and he had dedicated 41 years of his working life to the CN. This was quite an achievement and should be adequately recognized by the employer. The exact terms used by Mr. Holden in his letter dated April 26, 1982 to R. E. Lawless were:

«I will be sixty years of age shortly, in good health and have been with the CN over forty years. My career started in January 1941 as an office bay, advancing to a senior management position in early 1967. I have devoted a lifetime to CN and on many occasions have placed the Company ahead of personal family responsibilities. In view of the financial burden CN has imposed on me, I feel strongly that past achievements and service have not been considered. While I have been offered the standard ex- gratia payment for early retirement, this in itself falls short of previously made commitments for this year, let alone the additional irrevocable commitments I have made for the next three years.»

The Tribunal of first instance could not agree, on the face of the evidence before it, that age discrimination was the source of Mr. Holden Is problematic financial position. Yes, Mr. Holden was dismissed. At a time when his immediate superior, in fulfilling his responsabilities to the CN, released the persons less capable of dealing with the requirements of a reorganized marketing department. The nice way to do it was to make this release coincide with early retirement in Mr. Holden's case.

Mr. Holden had not realized that he had reached a limit in his working environment which was undergoing changes. Could he adapt? Mr. Holden most certainly would respond affirmatively. His boss was of a contrary view. A question of appreciation which the Tribunal of first instance, cognizant of the question after hearing all the testimonies and reading the documentary proof, found favorable to the CN.

Age was not the reason of Mr. Holden's release. The Respondent convinced the Tribunal of first instance that other factors intervened in the decision and this Tribunal is of the same opinion.

VII. To the question: Did the Tribunal of first instance fail to substantiate the complaint of Charles Holden and award the appropriate remedy, this Tribunal answers yes. Of course.

The obvious reason why this result was achieved is that the proof does not amount to an air thight case of discrimination based on age. Countrary to other cases, there is no written policy at the CN, nor is there a tacit rule to impose mandatory retirement at age 60.

As we are, in turn, asked to appreciate said proof to determine if errors have been committed, if correctable failings in the judgment of the Tribunal of first instance have occurred, if, in short, the decision first rendered should be reversed, we respect the rules as defined in many previous judgment as regards the role of an appeal tribunal.

«Dans un cas comme celui, qui nous occupe, les règles qui doivent. guider une première et une seconde cour d'appel sont bien connues. En raison de la position privilégiée du juge qui préside au procès, voit, entend les parties et les témoins et en apprécie la tenue, il est de principe que l'opinion de celui- ci doit être traitée avec le plus grand respect par la Cour d'appel et que le devoir de celle- ci n'est pas de refaire le procès, ni d'intervenir pour substituer son appreciation de la preuve à celle du juge de première instance à moins qu'une erreur manifeste n'apparaisse aux raisons ou conclusions du jugement frappé d'appel.» Roger Dorval c. Marcel Bouvier, (1968) R. C. S. 288, p. 293.

«In a case such as this one, the rules that must guide a first and a second court of appeal are well know. Because of the privileged position of the judge presiding the trial who sees, hears the parties and their witnesses and appreciates their reactions, it is a principle that his opinion must be treated with the utmost respect by the Court of Appeal, and that its duty is not to rehear the trial, nor is it to intervene in order to substitute its appreciation of the proof

to that of the tribunal of first instance unless a manifest error appears in the reasons or conclusions of the judgment appealed from.» Roger Dorval c. Marcel Bouvier, (1968) R. C. S. 288, p. 293. (The translation is ours).

Since the rules are clearly stated and we adhere to them, it is our opinion that the best proof is the documentary proof as opposed to testimonial proof, and since the writings by the appellant as well as his actions in February, March, April, May, June and July, 1982 were such that he gave no inkling to anyone that age discrimination was the real cause for his dismissal, or that he thought that was the case, we cannot find fault with the decision rendered by the Tribunal of first instance.

This Tribunal shares entirely the opinion expressed by the Tribunal of first instance to the effect that a prima facie case of discrimination was not not made, and that the complaint by Charles Holden was not substantiated.

CONCLUSION

Our conclusion is, then, paraphrasing Mr. William A. Sutherland, Chairman in the Lorenzo Goyetche v. French Pastry Shop Limited case, CHRR, Volume 1, Decision 24, August 20, 1980:

«While we have deep sympathy for Mr. Holden's unfortunate position, the question put to us was whether he was discriminated against because of his age, contrary to the Canadian Human Rights Act. In the result, we find that he was not.»

In view of the fact that we have concluded that no discrimination based on age took place in this case, we see no reason to discuss remedies.

Niquette Delage Chair

Nicolas Cliche, member

Antonio de Joseph, member

January 12, 1989