T. D. 9/ 89

Decision Rendered on July 13, 1989

THE CANADIAN HUMAN RIGHTS ACT R. S. C. 1985, c. H- 6 as amended IN THE MATTER OF: A hearing before a Human Rights Review Tribunal Appointed under subsection 42.1 (2) of the Canadian Human Rights Act.

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION Appellant

-and

CANADIAN ARMED FORCES Respondent

-and

DONALD DOUGLAS GAETZ Complainant

DECISION OF THE REVIEW TRIBUNAL

HEARD BEFORE: J. Gordon Petrie, Q. C., Chairman; Stephen I. Cole and Sharon Marshall, Tribunal members

APPEARANCES: Rene Duval, Counsel for the Canadian Human Rights Commission
Brian J. Saunders, Counsel for the Respondent

Heard in Ottawa, Ontario on April 18, 1989

This matter concerns the Appeal of the Canadian Human Rights Commission (hereinafter referred to as "the Appellant") from a decision of the Human Rights Tribunal. The oral decision was rendered on September 28, 1988 and written reasons were dated November 3, 1988 by the Tribunal, S. Charles Facey, Q. C.

The grounds of Appeal filed by the Appellant are the following:

1. The Tribunal misdirected itself on the burden of proof of the Appellant.

2. The Tribunal misdirected itself on the burden of proof of the respondent.

3. The Tribunal erred in finding that the medical evidence indicated that there was more than a mere possibility of major diabetic reaction.

4. The Tribunal erred in not dealing with the section 10 allegation contained in the complaint form.

5. The Tribunal erred in basing its decision on speculations. The relevant provisions of the Canadian Human Rights Act (hereinafter referred to as "the Act"), dealing with an appeal from a decision of a Tribunal are contained in section 42.1 which provides:

"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 thirty 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 from 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.

(3) Subject to this section, a Review Tribunal shall be constituted in the same manner as, and shall have all the powers of, a Tribunal appointed pursuant to section 39, and subsection 39(4) applies in respect of members of a Review Tribunal.

(4) 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.

(5) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed from and of submissions of interested parties but the Review Tribunal may, if in its opinion it is essential in the interests of justice to do so, receive additional evidence or testimony.

(6) A Review Tribunal may dispose of an appeal under this section by

(a) dismissing it; or (b) allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed from should have rendered or made. 1976- 77, c. 33 s. 42.1; 1985, c. 26, s. 72."

The Complainant, Donald D. Gaetz was employed by the Respondent during the period August 7, 1979 until August, 1985. He was discharged from the employment of the Respondent on the last mentioned date because he was an insulin- dependent diabetic.

The Tribunal of first instance found at page 60 of the written decision:

"In the circumstances of the present case I am satisfied that the medical restriction placed upon Mr. Gaetz qualified as a bona fide occupational requirement and that the 'real risk factor' in this case is more than a possibility and is certainly more that hypothetical one. I am satisfied that the present case falls well within the parameters of the Etobicoke and Bhinder cases."

A Review Tribunal is restricted to the record of the proceedings before the Tribunal, except for the circumstances set forth in subsection 42.1 (5) of the Act. Neither party to the Appeal sought to lead additional evidence or testimony.

Mr. Duval, on behalf of the Appellant, raised issues for the consideration of the Review Tribunal dealing with the burden of proof, and issues of safety and risks.

In summary, Mr. Duval argued that in order for a bona fide occupational requirement to exist there must be credible, reliable evidence that a real risk exists. This, he submits, can occur only if all or substantially all persons in a certain category (ie. insulin- dependent diabetics) are not capable of performing the job in question without risk to the safety of that person, his/ her fellow employees or the public.

Finally, Mr. Duval submits that the evidence led before the Tribunal of the first instance was only impressionistic and therefore cannot be the basis of a proper finding. Mr. Saunders, on behalf of the Respondent, submits that the Tribunal decision was correct on the findings of fact and application of legal principles. In particular, Mr. Facey's findings as to the existence of a "real risk factor" was not only correct but, submits Counsel, not reviewable by the Review Tribunal.

The original complaint of the Complainant claimed violations of sections 7 and 10 of the Act. These provisions provided as follows:

"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."

"10. It is a discriminatory practice for an employer, employee organization or organization of employers

(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 or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. 1976- 77, c. 33, s. 10; 1980- 81- 82- 83, c. 143, s. 5."

The Tribunal of first instance found that the Respondent had met the burden of proof to establish a bona fide occupational requirement under section 14(a) which states:

"14. It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;"

The role of the Review Tribunal in respect to the findings of the Tribunal of first instance is summarized in the following passage from Cashin v. Canadian Broadcasting Corporation et al (1988) 86 N. R. 24 (F. C. A) at pages 27- 28:

"[6] The first question that arises is as to the powers of the Review Tribunal in relation to the initial Tribunal. Section 42.1 of the Act is as follows:

'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 thirty days after the decision or order appealed from was pronounced, an all persons who received notice from the Tribunal under subsection 40(1). '

[7] In Dennis Brennan v. The Queen as represented by the Treasury Board and Bonnie Robichaud, [1984] 2 F. C. 799; 57 N. R. 116, at 819 reversed by Bonnie Robichaud and the Canadian Human Rights Commission v. Her Majesty the Queen, as represented by the Treasury Board, [1987] 2 S. C. R. 84; 75 N. R. 303; 40 D. L. R. (4th) 577, on other grounds, Thurlow, C. J., wrote for the majority of this court:

'It is no doubt true that in a situation of this kind where no evidence in addition to that before the Human Rights Tribunal was before the Review Tribunal the latter should, in accordance with the well- known principles adopted and applied in Stein et. al. v. The Ship 'Kathy K' [1976] 2 S. C. R. 802; 62 D. L. R. (3d) 1, accord due respect for the view of the facts taken by the Human Rights Tribunal and, in particular, for the advantage of assessing credibility which he had in having seen and heard the witnesses. But, that said, it was still the duty of the Review Tribunal to examine the evidence and substitute its view of the facts if persuaded that there was palpable or manifest error in the view taken by the Human Rights Tribunal. '

The dissent (at p. 841) assumed the same standard without deciding the question."

"[8] The first respondent argued that, whether the Review Tribunal heard additional evidence or not, its power to render the decision 'that, in its opinion, the Tribunal appealed from should have rendered' enabled it effectively to conduct a hearing de novo. However, in addition to the authority of the Robichaud case, such an interpretation should not, it seems to me, be given to section 42.1 unless it is the clear intention of Parliament, since the bias of the law runs strongly in favour of fact- finding by the Tribunal which heard the witnesses. Parliament's intention, as I read it, appears in fact to be that the hearing should be treated as de novo only if the Review Tribunal receives additional evidence or testimony. Otherwise, it should be bound by the 'Kathy K' principle. [Stein v. The Ship 'Kathy K', [1976] 2 S. C. R. 802; 6 N. R. 359; 62 D. L. R. (3d) 1].

[9] The findings of the adjudicator must therefore stand unless she committed some palpable and overriding error."

It is apparent therefore that the Review Tribunal may only alter findings of fact within very limited parameters. A similar judicial direction was made by Justice Pratte in Canadian Pacific Limited v. Canadian Human Rights Commission et al [1988] 1 C. F. 209 (F. C. A.) at p. 217:

"In the present case, as in the Etobicoke case, the subjective element of the requirement in question did not raise any difficulty. The only question to be resolved was whether the evidence adduced justified the conclusion that there was 'a sufficient risk of employee failure' among insulin dependent trackmen to warrant the refusal of Canadian Pacific Limited to hire them. That question was a question of fact. The applicant is, therefore, attacking what is in essence a finding of fact. Such a finding is not normally reviewable under section 28 of the Federal Court Act. In order to succeed the applicant must, therefore, either show that the Tribunal erred in law or that it based its decision on an erroneous finding of fact made in the manner described in paragraph 28(1) (c) of the Federal Court Act. The applicant cannot ask the Court to review the evidence and substitute its opinion for that of the Tribunal on the question it determined. For that reason, the last attack made by the applicant against the decision of the Tribunal need not be considered. Whether or not the evidence disclosed that there was a substantial risk involved in employing insulin dependent diabetics as trackmen was a question of fact that the Tribunal had to determine and that this Court does not have the power to decide."

In the instant matter, Mr. Facey found that a "real risk factor" existed relative to the Complainant.

The applicable principles in respect to a bona fide occupational qualification or requirement is contained in the following passage from the judgement of Justice McIntyre Ontario Human Rights Commission et al and The Borough of Etobicoke [1982] 1 S. C. R. 202 (S. C. C.) at p. 208:

"Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.

Two questions must be considered by the Court. Firstly, what is a bona fide occupational qualification and requirement within s. 4(6) of the Code and, secondly, was it shown by the employer that the mandatory retirement provisions complained of could so qualify? In my opinion, there is no significant difference in the approaches taken by Professors Dunlop and McKay in this matter and I do not find any serious objection to their characterization of the subjective element of the test to be applied in answering the first question. To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in a objective sense to

the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

In the same decision at page 212- 3, Justice McIntyre stated the following regarding the nature of evidence required to establish a b. f. o. q.:

"I am by no means entirely certain what may be characterized as 'scientific evidence'. I am far from saying that in all cases some 'scientific evidence' will be necessary. It seems to me, however, that in cases such as this, statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is a 'a young man's game'. My review of the evidence leads me to agree with the board of inquiry. While the evidence given and the views expressed were, I am sure, honestly advanced, they were, in my view, properly described as 'impressionistic' and were of insufficient weight. The question of sufficiency and the nature of evidence in such matters has been discussed in various cases, and of particular interest are: Hodgson v. Greyhound Lines, Inc., 499 F. 2d 859 (1974); Little v. Saint John Shipbuilding and Drydock Co. Ltd. (1980), 1 C. H. R. R. 1."

The Appellant argues in the instant matter that the evidence adduced by the Respondent before the Tribunal of the first instance was entirely "impressionistic" and therefore cannot be the basis of a finding of the existence of a bona fide occupational requirement.

Mr. Facey found that such evidence was not "impressionistic". Secondly we do not regard Justice McIntyre's statement as authority that impressionistic evidence is never sufficient to found a b. f. o. q. Rather it is understood that his comments were addressing the question of weight to be provided to such evidence in any particular case.

Finally, in reviewing the transcript, the Review Tribunal finds ample evidence to support Mr. Facey's finding that a real risk factor existed in connection with the employment of the Complainant as a Supply Technician in the Canadian Armed Forces. In particular the Review Tribunal is impressed by the expert testimony of Dr. Fisher contained in pages 280- 346 of the Transcript. In addition the balance of the evidence led by the Respondent dealing with the roles, responsibilities and expectations of members of the Armed Forces was germane to the issue of a bona fide occupational requirement.

We are satisfied therefore that the Tribunal of first instance did not make any palpable and overriding errors in its findings of fact.

Mr. Duval submits further that the Tribunal erred in relying upon the following passage from the decision in Rodger v. Canadian National Railways Ltd. (1985) 6 C. H. R. R. D./ 2899 (C. H. R. Tribunal):

"It is clear that where there is a public safety element involved, the burden on the employer is lower than the ordinary civil standard."

While the Review Tribunal agrees with the Appellant's submission on the principle that the ordinary civil standard, that is upon a balance of probabilities, is the appropriate test, (Air Canada v. Carson et al (1985) 1 F. C. 209 (F. C. A.) at p. 229), we also conclude that the Tribunal of first instance did have before it ample evidence to support its findings of the existence of a bona fide occupational requirement.

The complainant is an insulin- dependent diabetic. This condition was described in detail by Dr. Fisher in her testimony.

In the Canadian Pacific - Mahon (supra) judgement, Justice Pratte made the following pertinent comments at page 214:

"If there is a risk in employing insulin dependent diabetics, it does not come directly from their illness but, rather, from the fact that they take insulin. It is the taking of insulin that makes them susceptible to hypoglycaemic reactions. Some diabetics, however, can, more easily than others, control their illness and maintain a proper balance of the insulin and sugar in their system. For the reason they are less likely to experience severe hypoglycaemic reactions. They are called stable diabetics. Mr. Mahon is one of them. There is always a possibility, however, that even a stable diabetic will, on occasion, experience mild hypoglycaemic reactions; there is also a possibility that a stable diabetic may experience a sudden severe neuroglycopenic reaction."

Further, at pp. 220- 222: "In the applicant's submission, these passages of the decision disclose a fundamental error, namely, that a bona fide occupational requirement relating to safety must necessarily increase safety substantially and that an employer's requirement that merely eliminates a small risk of serious damage cannot qualify as a bona fide occupational requirement. In support of its argument, the applicant refers to the decision of the Supreme Court of Canada in Bhinder et al v. Canadian National Railway Co. et al, [1985] 2 S. C. R. 561, where, it is said, a requirement that reduced risk of injury by a small amount was recognized as a bona fide occupational requirement.

I find merit in that argument. The decision of the Supreme Court of Canada in Etobicoke is authority for the proposition that a requirement imposed by an employer in the interest of safety must, in order to qualify as a bona fide occupational requirement, be reasonably necessary in order to eliminate a sufficient risk of damage. In Bhinder, on the other hand, the Supreme Court upheld as a bona fide occupational requirement one which, if not complied with, would expose the employee to a 'greater likelihood of injury - though only slightly greater' (at page 584). The effect of those decisions, in my view, is that, a fortiori, a job- related requirement that, according to the evidence, is reasonably necessary to eliminate a real risk of a serious damage to the public at large must be said to be a bona fide occupational requirement.

The decision under attack, it seems to me, is based on the generous idea that the employers and the public have the duty to accept and assume some risks of damage in order to enable disabled persons to find work. In my view, the law does not impose any such duty on anyone. The error committed by the Tribunal in this case is comparable to that which had been committed in the Bhinder case where the Tribunal had wrongly decided that the job requirement there in question

was not a bona fide occupational requirement for the reason that the employer had the duty to accommodate his employee's religion.

Once it had been found that the applicant's policy not to employ insulin dependent diabetics as trackmen was reasonably necessary to eliminate a real risk of serious damage for the applicant, its employees and the public, there was only one decision that the Tribunal could legally make, namely, that the applicant's refusal to engage the respondent Wayne Mahon was based on a bona fide occupational requirement and, as a consequence, was not a discriminatory practice."

The Review Tribunal agrees with and accepts the finding of the Tribunal of first instance that there existed a real risk of serious damage for the Respondent, its employees and the public in the continued employment of an insulin- dependent diabetic in the occupation of Supply Technician in the Canadian Armed Forces.

In the Mahon decision, Justice Marceau made the following relevant observations at page 226:

"The Bhinder decision, as I read it, makes it clear that the proper approach to verify whether an occupational requirement, adopted in good faith for the sake of safety, meets the objective test of paragraph 14(1) as it was set out in the Etobicoke decision is to look into the duties to be performed and the conditions demanded for their proper performance (in the present case that of a trackman) and then compare those requirements against the capabilities and the limitations of the class of persons affected (here insulin dependent diabetics as a group). The Tribunal here, on the basis of the evidence, found, in a first step, that the trackman position required 'certain physical attributes' the diminution of which, in the work environment, might 'put an employee, co- workers, and the general public at greater risk in terms of safety'. It found, in a second step, that insulin dependent diabetics, even stable diabetics like Mr. Mahon, could suffer such a diminution of their physical (and mental) capacities, a possibility which was 'real... and not farfetched or fanciful' (pages 103- 104 of the decision). These two findings were, it seems to me, decisive: it was then an unavoidable conclusion that the policy not to hire insulin dependent diabetics was based on a bona fide occupational requirement. In going further and assessing Mr. Mahon's own personal physical attributes to determine that notwithstanding his being an insulin dependent diabetic his limitations, although real, were under sufficient control, the Tribunal, in my view, misapplied paragraph 14(a) of the Act."

The Appellant has submitted that the Respondent had a duty to test Mr. Gaetz to determine his specific suitability for continued employment notwithstanding his condition.

The Review Tribunal rejects this submission based upon the Supreme Court of Canada's judgement in Bhinder et al and Canadian National Railway Company et al [1985] 2 S. C. R. 561 (S. C. C.). In particular from the majority opinion of Justice McIntyre at pp. 588- 9, the following excerpt is relevant:

"Where a bona fide occupational requirement is established by an employer there is little difficulty with the application of s. 14(a).

Here, however, we are faced with a finding - at least so far as one employee goes - that a working condition is not a bona fide occupational requirement. We must consider then whether such an individual application of a bona fide occupational requirement is permissible or possible. The words of the Statute speak of an 'occupational requirement'. This must refer to a requirement for the occupation, not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application. The Tribunal sought to show that the requirement must be reasonable, and no objection would be taken to that, but it went on to conclude that no requirement which had the effect of discriminating on the basis of religion could be reasonable. This, in effect, was to say that the hard hat rule could not be a bona fide occupational requirement because it discriminated. This, in my view, is not an acceptable conclusion. A condition of employment does not lose its character as a bona fide occupational requirement because it may be discriminatory. Rather, if a working condition is established as a bona fide occupational requirement, the consequential discrimination, if any, is permitted - or, probably more accurately - is not considered under s. 14(a) as being discriminatory.

It was said in Etobicoke that the rule under The Ontario Human Rights Code was non-discrimination, while the exception was discrimination. This is equally true of the Canadian Human Rights Act. The Tribunal was of the opinion that a liberal interpretation should be applied to the provisions prohibiting discrimination and a narrow interpretation to t. Accepting this as correct, it is nevertheless to be observed that where s. 14(a) applies, the subsection in the clearest and most precise terms says that where the bona fide occupational requirement could have no application to one employee, because of the special characteristics of that employee, is not to give s. 14(a) a narrow interpretation; it is simply to ignore its plain language. To apply a bona fide occupational requirement and to render meaningless the clear provisions of s. 14(a). In my view, it was an error in law for the Tribunal, having found that the bona fide occupational requirement existed, to exempt the appellant from its scope."

The Review Tribunal is therefore satisfied that the Tribunal of first instance made appropriate findings of fact to determine that the Respondent had meet the burden of proof which existed to establish a bona fide occupational requirement.

Based upon the evidence adduced before the Tribunal, particularly that relating to the duties of Supply Technician and the risks inherent with an insulin- dependent diabetic, the Review Tribunal is satisfied that "all or substantially all persons within the class would be unable to perform the duties of the position safely and effectively". See Carson (supra) at p. 235.

We are therefore satisfied that the Tribunal of first instance did not misdirect itself on the issue of the respective burdens of proof. Furthermore, it made finding of fact based upon credible evidence which cannot be reversed by a Review Tribunal in the circumstances of the issue under appeal.

Finally, the Appellant submits that the Tribunal of first instance erred in failing to deal with the section 10 complaint. The conclusions of Mr. Facey are summarized on page 59 of his decision.

The findings conclude that the Complainant had established a prima facie case of discrimination under the Act but that the Respondent had established a bona fide occupational requirement under s. 14(a) of the Act.

The Review Tribunal concludes therefore that the Tribunal of the first instance found a prima facie violation of both section 7 and 10. However, such violations were answered by the finding of the existence of a b. f. o. r. under section 14(a).

We do not disagree with such conclusions and understand that it was an entirely proper result in application of the Bhinder (supra) judgement. Moreover the Review Tribunal had some difficulty in respect to the issue of a "policy or practice" when requesting guidance from Counsel for the Appellant. It is not clear in what respect the Appellant has claimed the existence of a discriminatory police or practice. In any event, it is entirely answered by the finding that a bona fide occupational requirement existed.

In conclusion, the Review Tribunal dismisses the appeal. We are satisfied that the Tribunal of first instance did not err in that the Respondent had met the applicable burden of proof to establish a bona fide occupational requirement for the occupation of Supply Technician in the Canadian Armed Forces.

DATED this 27th day of April, 1989

J. GORDON PETRIE, Q. C. Chairman

Stephen I. Cole

Sharon Marshall