TD 14/ 89

Decision Rendered October 27, 1989

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT, S. C. 1976- 77, c. 33, as amended;

AND IN THE MATTER of a Hearing before a Human Rights Tribunal appointed under Section 49(1.1) of the Canadian Human Rights Act.

BETWEEN:

GILLES FONTAINE Complainant

- and

CANADIAN PACIFIC LIMITED Respondent

- and

THE CANADIAN HUMAN RIGHTS COMMISSION Commission

TRIBUNAL: SIDNEY N. LEDERMAN Chairman, KRISTIAN A. EGGUM Member, JILL M. SANGSTER Member

DECISION OF TRIBUNAL

APPEARANCES
TIMOTHY S. PRESTON Counsel for the Complainant
MARC SHANNON and MICHAEL McLEARN Counsel for the Respondent
RENE DUVAL and PAMELA CLARK Counsel for the Canadian Human Rights Commission

DATES AND PLACE OF HEARING: JULY 25, 26, 27, 28, 1989 Winnipeg, Manitoba >

1 1. THE EVIDENCE

In December 1985, Gilles Fontaine was diagnosed as having the Human Immunodeficiency Virus (" HIV") which might ultimately lead to Acquired Immune Deficiency Syndrome (" AIDS"). Although at first, Mr. Fontaine experienced bed sweats and frequent diarrhea, he was for the most part totally asymptomatic. He came under the care of Dr. John Smith, a family physician in Winnipeg. Mr. Fontaine had been a cook by occupation for many years and Dr. Smith did not recommend that he cease that activity. Mr. Fontaine was told that there was no medical evidence that the infection could be spread in the performance of his work. In fact, the HIV never prevented Mr. Fontaine from doing his work then or now. Moreover, Dr. Smith did not say that he had to disclose the existence of the infection to anyone. Mr. Fontaine was advised that it was at his discretion as to whether this fact should be made known to anyone.

In the Spring of 1987, in response to a newspaper advertisement placed by R. Smith (1960) Limited (" R. Smith") for the position of cook, Mr. Fontaine attended at the company's offices and filled out an application. On that occasion, he met with Mrs. Rita Berthelette, the personnel manager of R. Smith. One and one- half months later, he was advised that he was hired. He was informed that he would be serving as a cook on a Canadian Pacific Limited (" C. P.") railroad crew gang commencing at Broadview, Saskatchewan and that he would travel with the gang up to Moose Jaw as the maintenance work on the rail line progressed. His duties included maintaining the kitchen, ordering food supplies and feeding three meals per day to a crew of approximately 16 or 17 men.

On May 19, 1987, Mr. Fontaine reported to the Road> - 2 master at the campsite at Broadview, Saskatchewan. The Roadmaster was Jeff Fowlie and he was the individual in charge of the C. P. railroad gang. The kitchen and dining area was located in one railcar and Mr. Fontaine's sleeping quarters in another. These railcars were joined to others in which the members of the road crew slept and the train of cars was located on a siding next to the main track.

For a period of approximately one month, Mr. Fontaine handled his cooking responsibilities well and without complaint. His work week was from Monday through Thursday and each day was comprised of 15 hours. In addition, Mr. Fowlie on behalf of C. P. Rail enlisted Mr. Fontaine's services each weekend to be responsible for checking the generator and generally serving as a watchman for security purposes when the road crew was away from the site. Since Mr. Fontaine had no cooking duties on the weekend, it was convenient for both C. P. and himself to enter into this arrangement. It is acknowledged that these efforts were part of a distinct employment arrangement between Mr. Fontaine and C. P. and were quite independent of his cooking responsibilities.

The events which gave rise to these proceedings commenced during the evening of June 15, 1987 when in the course of a discussion with a member of the road crew gang, Mr. Fontaine confided in him that he was infected with the HIV.

The news apparently spread like wildfire through the gang. The following morning Mr. Fowlie had a discussion with Mr. Fontaine about the fact that he had the AIDS virus and the concern that he might infect others in the camp. Mr. Fontaine tried to assure him that there were no specific guidelines issued by Health and Welfare Canada which prohibited his continuing as a cook or which precluded generally anyone infected with the HIV from working in a restaurant and thus no risk was posed to any of his men. Mr. Fontaine testified that later that morning he was told by the timekeeper, Mr. Norman Lewko, that he was to take him to the train station in Broadview so that he could call R. Smith. Mr. Lewko's testimony differs somewhat in this regard. He stated that Mr. Fowlie had spoken to him earlier and advised him that if Mr. Fontaine wanted a ride to a telephone that he should oblige him. This was not an unusual request as far as Mr. Lewko was concerned as he had given such rides to Mr. Fontaine before to permit him to place telephone orders for food supplies. Mr. Lewko testified that around noon Mr. Fontaine asked for such a ride to the phone and Mr. Lewko took him to town.

Mr. Fontaine then telephoned Mrs. Berthelette. She had heard earlier that morning from Mr. Fowlie who advised her that he had a problem in that the cook had AIDS and that his men would

not eat his food. He told her that he didn't know if he could control his men if they decided to attack Mr. Fontaine. Mrs. Berthelette told Mr. Fontaine of this conversation. Mr. Fontaine responded that he did not have AIDS but that he was HIV positive and it was perfectly safe for him to cook. She requested that he remain in place until the end of the work week to permit an individual from R. Smith to go to the camp. Mr. Fontaine, according to his evidence, told Mrs. Berthelette that he couldn't wait until Thursday because the men wanted him out and she authorized him to utilize $20.00 from R. Smith's funds to travel back to Winnipeg if he felt it necessary.

Mr. Fontaine testified that following this conversation he was told by Mr. Lewko that he was under instructions to take him back to the camp to permit him to pack his bag and that he would accompany him to the bus depot in Broadview. Mr. Lewko's evidence differs in that he testified that after Mr. Fontaine completed his telephone call he stated to Mr. Lewko that he had been fired and asked for a ride back to camp to pick up his belongings. Mr. Lewko stated that it was in this conversation that Mr. Fontaine first told him that he had the HIV infection and that he wanted to get out of camp before the men came back from their work on the line. In any event, Mr. Fontaine departed the camp that afternoon.

On the day following his return to Winnipeg, he met with Mrs. Berthelette at her office. Again there are different versions of the conversation that took place at this meeting. Mrs. Berthelette testified that she asked Mr. Fontaine why he left so abruptly and his response was that he was afraid of the men, so much so, that he hid in a laundry room in the local hotel before catching the bus to Winnipeg. She stated that he told her that he had to get out of the hospitality business in view of his illness. He asked about a warehouse position with the company but there was none available. Mrs. Berthelette indicated that she did not offer any other employment positions to Mr. Fontaine. She testified that she didn't recall asking if Mr. Fontaine would be interested in going out with other road gangs.

Mr. Fontaine's evidence about the conversation is as follows: When asked why he left the camp he told Mrs. Berthelette that he feared for his safety and that he had to leave. He was concerned about how the men might react. Mrs. Berthelette told him that once one road gang knew that he was HIV positive, it would get out to C. P. road gangs throughout Canada and he would be blacklisted from cooking for any C. P. crew anywhere. Accordingly, it was assumed that it was out of the question that Mr. Fontaine could be transferred to a cooking position with another road gang in some other location.

Mr. Wayne Hutton who at the time was the purchasing agent for R. Smith overheard this conversation. He confirmed that Mrs. Berthelette asked Mr. Fontaine why he left and that his response was that he had told one of the men that he had the HIV infection and that he was afraid to stay. He was uncertain as to what the men might do to him. Mr. Hutton also overheard Mr. Fontaine state that he had been told by Mr. Fowlie to get off the train because he couldn't be responsible for what his men might do if they discovered that he had the AIDS virus. According to Mr. Hutton, Mr. Fontaine asked Mrs. Berthelette about a warehouse position and she responded that she did not have one available. Mrs. Berthelette asked if Mr. Fontaine was prepared to go out on some other train but he indicated that he should get out of the hospitality

business entirely. On this last point, Mr. Hutton's evidence differs markedly from Mr. Fontaine's.

Several days later Mr. Fontaine came to see Mrs. Berthelette in order to obtain his pay and Record of Employment, a document which was required for unemployment insurance purposes. At this meeting Mrs. Berthelette filled out the Record of Employment which was filed as Exhibit HRC- 1, (Tab B) in these proceedings. Of particular note is the reason for dismissal in the form which was expressed by Mrs. Berthelette as "dismissed by Roadmaster for having AIDS virus". Mrs. Berthelette's explanation for the insertion of this phrase was that Mr. Fontaine insisted that this statement be included. He wanted those express words and Mrs. Berthelette testified that she merely acceded to his request. On cross- examination she stated that Mr. Fontaine told her to put the words down but that she assumed that they were true. Mr. Fontaine testified that he never told her the particular words to insert in the form but merely admonished her to tell the truth. Mr. Hutton apparently had a discussion with Mrs. Berthelette about this form on a subsequent occasion and he specifically asked her why she stated the reason for dismissal as she did. Her response was that she should not have done it but that Mr. Fontaine had said it and, therefore, she put it down.

2. REASON FOR TERMINATION OF EMPLOYMENT

We are asked to decide whether Mr. Fontaine quit his job of his own volition or whether he felt compelled to leave as a result of the discovery of his illness. It is clearly acknowledged by Mr. Fontaine that neither Mr. Fowlie nor Mr. Lewko nor indeed Mrs. Berthelette ever told him that he was fired. There was no direct termination of employment in that sense.

However, one indisputable fact emerges from the evidence and that is the genuine fear that Mr. Fontaine experienced after his conversation with Mr. Fowlie early in the morning of June 16, 1987. Not only did Mr. Fowlie express to Mr. Fontaine his personal concern about the safety of his men and the danger of the spread of AIDS throughout the camp but he personally refused to eat breakfast that morning. That served as a dramatic statement to his own men that they were facing a serious danger. If the Roadmaster who was in charge of the entire crew led by example in this fashion, one could readily imagine how his crew might react towards Mr. Fontaine. Moreover, in cross- examination Mr. Fowlie admitted the truth of a statement that he had made in June 1988 to a Human Rights investigator to the effect that he did not want Mr. Fontaine to cook for the gang for two reasons. One reason was his personal concern that Mr. Fontaine could pass on the HIV infection as little was known about the disease. Even if he and his men were not so exposed, he was worried that his men might nevertheless attack Mr. Fontaine if he remained in camp. His concern about this was so great that he stated that he parked his truck in such a way as to prevent his men from driving their cars to town to seek out Mr. Fontaine. Mr. Fontaine's fear was so intense that he took refuge in a laundry room in Broadview to avoid any altercation. Mr. Fontaine's expression to others of fear for his own safety was confirmed by the testimony of Mrs. Berthelette and Mr. Hutton.

Following the discussion with Mr. Fowlie, Mr. Fontaine was certainly left with the impression that he could not continue his employment at the camp. Even before he went to town to telephone Mrs. Berthelette, he had already started to pack his bags. Mrs. Berthelette in her own

testimony stated that she wanted Mr. Fontaine to remain on the site until the week's end not for the purpose of conducting an investigation into the matter but rather to buy some time to allow her to send a replacement cook up to the site. We must conclude that there was no expectation on her part that Mr. Fontaine's tenure would be anything but short lived. Furthermore, no one not Mr. Fowlie, not Mr. Lewko not Mrs. Berthelette - did or said anything to allay Mr. Fontaine's fears.

Accordingly, although no one told him expressly to get out and no one directly threatened him, an inhospitable climate was created which left Mr. Fontaine no reasonable option but to depart as quickly as possible. This apprehension of fear was created by Mr. Fowlie and there is no question it all arose because Mr. Fontaine possessed the HIV virus. Mrs. Berthelette's very telling statement in the Record of Employment that Mr. Fontaine was "dismissed by the Roadmaster for having the AIDS virus" must have been based upon what Mr. Fowlie told her. In the circumstances, one must conclude that Mr. Fontaine did not voluntarily quit but was constructively dismissed: See Hinds v. C. E. I. C. (1989) 10 C. H. R. R. D/ 5683 at D/ 5696. We find, therefore, that he was dismissed because of that fact and the responsibility for the termination must rest primarily with Mr. Fowlie which in turn is attributable to his employer, C. P: See Robichaud v. Treasury Board (1988) 8 C. H. R. R. D/ 4326.

Moreover, C. P. 's failure to have in place an express and clear policy about AIDS in the workplace has meant that employees such as Mr. Fowlie have been left to deal with these situations based on their own personal misconceptions. Dr. M. Grimard, the Chief of Health and Medical Services for C. P. was called as a witness to state C. P. 's position with respect to individuals who have AIDS or the HIV. He testified that C. P. views such persons just like anyone else, that they pose no threat and have no occupational limitations. Although there is no written policy in C. P. about AIDS and employment, Dr. Grimard had written articles in the C. P. newsletter putting the AIDS problem in perspective and emphasizing that it is not easily conveyed from one individual to another. These newsletter articles, however, are not sufficient for the purpose of making C. P's position on these matters clear to its employees. Dr. Grimard himself estimated that there were 200 to 300 C. P. employees with the HIV infection in 1987 and that fact alone suggests that the Fontaine incident may not be the last one unless C. P. develops and disseminates among its employees a written policy against discrimination of those with AIDS or the HIV infection to educate its personnel and prevent irrational fears that could otherwise arise in these circumstances.

3. LEGAL ISSUES

It was conceded early in the proceedings by counsel for C. P. that a person who suffers from the HIV is in fact under a "disability" within the meaning of Section 3(1) of the Canadian Human Rights Act and, therefore, discrimination on this ground is prohibited. Thus, no argument was presented to the Tribunal on this issue. Similarly, counsel for C. P. acknowledged at the outset that there is no valid basis under Section 15 of the Canadian Human Rights Act for refusing to continue to employ such an individual. That was confirmed by the evidence of Dr. Grimard as well. It was not C. P. 's position that being free of the HIV infection was a valid bona fide occupational requirement of any job function within the company so as to justify discrimination on that basis.

Only two legal issues were advanced by C. P. One was that C. P. was not Mr. Fontaine's employer and, therefore, bore no responsibility for any alleged contravention of Section 7 of the Canadian Human Rights Act. Rather if there was any fault, it rested with R. Smith since it was with that company that Mr. Fontaine had an employment relationship. In addition, C. P. took the position that the Tribunal lacked jurisdiction since the activity in question, i. e. cooking or the catering of food services was a matter within provincial competence and accordingly, the provisions of the Canadian Human Rights Act were inapplicable.

A) IS C. P. IN CONTRAVENTION OF SECTION 7 OF THE CANADIAN HUMAN RIGHTS ACT

Section 7(a) reads as follows:

"It is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual ... on a prohibited ground of discrimination."

Mr. Shannon argued that Mr. Fontaine's employer was R. Smith and not C. P. and, therefore, Section 7 was inapplicable to C. P. In support of this position, he pointed to the following evidence: R. Smith is a separate and distinct entity from C. P. It is a Manitoba company and there is no commonality of ownership, directors, officers or employees between the two companies. R. Smith is in the business of providing catering services and provides these services exclusively to C. P. pursuant to a contract with it. R. Smith has complete discretion and control in hiring cooks. C. P. plays no role in assessing their competence as a precondition to employment. The cooks are assigned to C. P. camps at the discretion of R. Smith. Wages of the cooks are paid by R. Smith. All food supplies and utensils are provided by R. Smith. C. P. 's role is limited to making the kitchen and dining facility available as well as certain appliances such as a stove and refrigerator. C. P. does not exercise any disciplinary control over R. Smith employees nor does it have the power to fire such individuals. A cook on the premises of C. P. is subject to the general rules of safety which would be applicable to any visitor to the site but the specific regulations and guidelines which must be adhered to by all members of the C. P. road gang are inapplicable to the R. Smith cook. Moreover, the cook's sleeping quarters are separate from the members of the road gang and he has sole responsibility for his living accommodation without intrusion by the Roadmaster.

Moreover, Mr. Shannon points out the fact that there was a separate and clear arrangement between Mr. Fontaine and C. P. in connection with his watchman duties and that it is illustrative of the fact that it is only those responsibilities over which there is an employment relationship with C. P. The remuneration for those services came directly from C. P. in contra distinction to the payment from R. Smith for his work as a cook.

Mr. Shannon argues that all of these factors clearly lead to the conclusion that R. Smith was in total control of Mr. Fontaine's hiring, provision of tools and supplies, the manner in which he provided cooking services, job performance, discipline and termination and thus was his employer.

If those were the only factors, we would have little difficulty in agreeing with Mr. Shannon that the employer- employee relationship was only between R. Smith and Mr. Fontaine. However, it is the nature of the relationship between C. P. and R. Smith that gives us some pause. Evidence was adduced to the effect that the only customer that R. Smith has for its catering service is C. P. Pursuant to a contract (the terms of which we are unaware since it was not put into evidence), R. Smith supplies cooks for C. P. road gangs in various parts of the country. That is R. Smith's only business. Reference was made to a sister company known as Manor House Catering which is a separate and distinct company from R. Smith and provides catering services to businesses other than C. P. The two companies are related in the sense that they share common premises and have some common employees. For example, the general manager, personnel manager and purchasing agent are the same for both companies. They also have common ownership in that they are both owned by Mr. Claude Marion and his family. Food supplies for both companies are ordered and stored together. The only real point of distinction is that Manor House Catering does not cater for C. P. Mr. Shannon argued that we must look at R. Smith in relation to Manor House Catering and, therefore, cannot simply conclude that there is a 100% connection between R. Smith and C. P. Our view, however, is that for whatever reason, the shareholders of the two companies have decided to maintain R. Smith and Manor House Catering as two distinct separate legal entities and have chosen to limit R. Smith's business to an exclusive arrangement with C. P. No evidence was elicited from any director or officer of R. Smith and Manor House Catering to explain the basis for this separation. in the absence of such evidence, we are essentially precluded from examining the association between R. Smith and Manor House Catering and must look at the reality of R. Smith's business without regard to Manor House Catering. That reality is that it is completely and inextricably tied to C. P. and totally dependent for its financial existence upon maintaining C. P. as its customer.

Some evidence indicated that there had on occasion been transfers made by R. Smith of a cook from one C. P. camp site to another and that such transfers were determined by R. Smith and not C. P. Upon further examination of those situations, it became clear that the criticism of the cook was not in relation to the nature of his cooking or competence but rather on the basis that there was a personality problem that existed between the cook and some members of the road gang. A transfer to another road gang in those situations would serve to alleviate the problem and satisfy both C. P. and R. Smith. However, if C. P. found a cook to be totally incompetent or unacceptable for other reasons and such problem could not be ameliorated by transferring to another road gang elsewhere, is there any doubt that given the nature of the relationship between R. Smith and C. P. that that person would become unemployable as a cook for a C. P. gang anywhere in the country and, therefore, unemployable by R. Smith? In fact, Mr. Fontaine testified that Mrs. Berthelette told him just that. She stated that once a particular road crew discovered that a cook had AIDS or the HIV, it would get out to every C. P. road gang throughout Canada and he would be blacklisted. Accordingly, the nature of the dependency by R. Smith upon C. P. for all intents and purposes meant that a decision taken by C. P. as to the employability of an R. Smith cook would have to be adhered to by R. Smith. Although R. Smith theoretically controlled decisions of whether to fire its employees, this unique relationship in fact brought it within the control of C. P. in respect of those individuals who served as cooks on C. P. camp sites. If C. P. did not want that particular cook, then R. Smith similarly had no need for him as a cook.

Is this degree of involvement with R. Smith and its cooks sufficient to bring C. P. within Section 7 of the Canadian Human Rights Act? It reads as follows:

"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."

Can it be said that C. P. indirectly refused to continue to employ Mr. Fontaine? Does Section 7 contemplate only an employer- employee relationship in the traditional sense? These questions were considered by Mr. Justice D. C. McDonald of the Alberta Supreme Court in Cormier v. Alberta Human Rights Commission and Ed Block Trenching Limited (1985) 5 C. H. R. R. D/ 2441. In issue in that case was the interpretation to be given to Section 7(1) of the Individual's Rights Protection Act which is the Alberta equivalent of the provision before us and it reads as follows:

"7(1) No employer or person acting on behalf of an employer shall

(a) refuse to employ or refuse to continue to employ any person or

(b) discriminate against any person with regard to employment or any term of condition of employment, because of the race, religious beliefs, colour, sext physical characteristics, marital status, age, ancestry or place of origin of that person or of any other person."

Although the relationship in question in that case was in a strict sense that of a contractor rather than employer- employee, the Court nevertheless felt the section was broad enough to encompass that relationship. The Court held that the Individual's Rights Protection Act must be given a remedial and liberal construction that meets the clear public policy of equal rights for all persons which is enunciated in the preamble to the Act. The Supreme Court of Canada, too, in a number of recent pronouncements has made it clear, in no uncertain terms, that the Canadian- Human Rights Act must be interpreted as to advance the broad policy considerations underlying it and "that task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation": Robichaud v. Treasury Board supra at D/ 4329; Re Winnipeg School Division No. 1 and Craton (1985) 2 S. C. R. 150; Ontario Human Rights Commission and O'Malley v. Simpsons Sears Limited (1985) 2 S. C. R. 536; Insurance Corporation of British Columbia v. Heerspink (1982) 2 S. C. R. 145; Action Travailles Des Femmes v. Compagnie Des Chemins De Fer Nationaux du Canada (1987) 8 C. H. R. R. D/ 4210. The Alberta court also found that the words "employer" "employ" and employment" are used ambiguously in Section 7 of the Alberta Act and, therefore, ought to be interpreted to include any contract in which one person agrees to execute any work or labour for another.

In Pannu et al. v. Prestige Cab Limited (1987) 8 C. H. R. R. D/ 3911, the Alberta Court of Appeal agreed with Mr. Justice McDonald's analysis in Cormier to the effect that words such as "employer", "employ" and "employment" are to be interpreted so as to advance the purposes of the provincial human rights statute. Laycraft C. J. put it this way at page D/ 3914:

"In my view the whole context of the Individual's Rights Protection Act, demonstrates that in section 7 the words are used in a sense broader than the ordinary master/ servant relationship. The Act does not purport to intervene in purely private relationships but where a person provides a service to the public it seems clear the Act does intervene. It does so not primarily by aiming at the offender but by establishing a mechanism to remedy the wrong done or about to be done to the victim of the discrimination. In that context the broader sense of "employ" as meaning "to utilize", is in my opinion, the proper interpretation."

Mr. Shannon would limit the effect of these decisions by saying that at the least there must be a contract in place between the parties in question, i. e. there cannot be any liability upon C. P. unless it is first shown that there is an actual contract between it and Mr. Fontaine and there was none here. In keeping with the manner in which the Canadian Human Rights Act is to be interpreted, as directed so often by the Supreme Court of Canada, such a narrow approach to Section 7 is unwarranted. There need not be an actual contract or a direct relationship between the two parties in question. In any event, the word "indirectly" in the Canadian Human Rights Act provision must be given some meaning and thus provides a further basis for the conclusion that there need not be a contractual nexus between C. P. and Mr. Fontaine so long as there exists a significant element of control over his employment.

In our view the nature of the inquiry should not be whether C. P. is actually Mr. Fontaine's employer as that would not end the matter. To come within the purview of Section 7, one merely has to show that the impugned conduct was by someone who had a considerable degree of control or influence over the actual employer and indirectly upon its employee. The language of Section 7 is broad enough to sweep in discriminatory practices by someone who by reason of his position can induce a breach of an employment arrangement. The section applies equally to a party who has the power to dismiss and to a party who has the power to cause a dismissal. Thus the appropriate inquiry is not whether C. P. was Mr. Fontaine's employer but rather whether C. P. played an instrumental role in the termination of Mr. Fontaine's job even if he was employed by someone else. In this case, by reason of its captive business arrangement with C. P., R. Smith was vulnerable to C. P. 's assessment of its employees and was readily susceptible to C. P. 's inducements to discontinue the employment of particular individuals who it felt were unacceptable as cooks for its road gangs. Mrs. Berthelette must have understood this reality for she wrote in Mr. Fontaine's Record of Employment that he was dismissed by the C. P. Roadmaster. She must have perceived that C. P. had the power to terminate an R. Smith employee. For these reasons, we find that C. P. has engaged in a discriminatory practice in its treatment of Mr. Fontaine in contravention of Section 7 of the Canadian Human Rights Act.

B) IS THE NATURE OF THE ACTIVITY WITHIN THE CONSTITUTIONAL JURISDICTION OF THE CANADIAN HUMAN RIGHTS ACT

Mr. Shannon has objected to the constitutional jurisdiction of this Tribunal and argues that the matter in question is solely within provincial competence and outside the reach of the Canadian Human Rights Act. It is well established that federal jurisdiction over labour relations is regarded as an exception to the general rule of provincial competence in the field. Federal jurisdiction may be asserted over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other federal work, undertaking or business. It is not disputed in this case

that C. P. 's railway by reason of its interprovincial character is a federal undertaking. The question for resolution is whether the contracting out to R. Smith of its catering needs (which from a labour relations and by extension, a human rights point of view falls normally under provincial jurisdiction) is likewise a federal undertaking. The method adopted by the Courts in determining constitutional jurisdiction in labour matters was described by Dickson J. in Northern Telecom Limited v. Communications Workers of Canada (No. 1) (1980) 1 S. C. R. 115 at page 132 as follows:

"First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", essential" or "integral". As the Chairman of the Board phrased it, at pp: 34- 5:

In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i. e., the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking."

As to the practical and functional relationship between R. Smith's activities and C. P. 's federal undertaking, there is total integration. R. Smith had no operations other than those performed for C. P. and thus R. Smith carried on no intra- provincial activity. Clearly, there was an operational or functional relationship between the two companies. Even though R. Smith had no corporate relationship with C. P., that fact alone is not determinative in assessing constitutional jurisdiction: See Northern Telecom Canada Limited v. Communication Workers of Canada (No. 2) (1983) 147 D. L. R. 3d 1 at p. 5.

A useful case for cur purposes is Bernshine Mobile Maintenance Limited v. Canada Labour Relations Board (1985) 62 N. R. 209, a decision of the Federal Court of Appeal, which considered the application of these tests to a fact situation not too dissimilar from the one before us. There, a maintenance employee of an inter- provincial trucking company (Reimer) incorporated his own truck maintenance company (Bernshine) to do the truck company's washing and tire maintenance. Reimer was its sole customer. The question for consideration was whether the nature of the activity carried on by Bernshine was vital, essential and integral to the operation of Reimer's federal undertaking of interprovincial truck transportation. Urie J. speaking for the Court provided this reasoning at pages 216- 217:

"In this case, since, at the time of the hearing, Reimer was Bernshine's only customer, the importance of the Reimer work to it is obvious. It certainly cannot be said that it was exceptional or casual. In that sense, its situation differs markedly from that of suppliers of gas and oil at the various roadside service stations upon which the highway transport drivers must from time to

time rely when shortages of fuel occur. Counsel. for the appellant attempted to equate Bernshine's operations to those of such suppliers. This is not to say, of course, that every company which provides tire maintenance and truck wash services to a federal transport business falls under federal jurisdiction. Whether they do or not must, in part, depend on determining whether or not the services they provide are casual or exceptional. On the peculiar facts of this case they were certainly not."

. . . "Dickson, J., in Telecom no. 2 found (the operational connection between the activity in question and the federal undertaking] factor "to be the most critical in determining whether the federal Parliament or the provincial legislature has constitutional jurisdiction". Estey, J., agreed with this assessment. It is the factor where the test of "vital", "essential" or "integral" comes into play."

"The requisite inquiry thus is one of fact, viz., is the nature of the work performed by Bernshine for Reimer essential, vital or integral to the Reimer operations?

The Board found as a fact that it was. At pages 26 and 27 of the Board's reasons, it was said:

In the present case, as long as the work was being done 'in house' by Reimer, the parties had assumed the truck wash and tire repair operations fell within federal juris- diction as do the rest of Reimer's operations.

Does anything change because of the fact that the services are now performed by Bernshine, a separate company with no corporate connection with Reimer? We think not.

In a labour relations sense Bernshine is a separate company and a separate employer compared to Reimer, but in a constitutional sense Bernshine's business is an integral part of Reimer's federal undertaking. We therefore conclude that this Board has constitutional jurisdiction over Bernshine.

There seems ample support for this finding in the evidence ... Moreover, without trucks Reimer's business could not be carried on. Without proper tires the trucks and tractors and trailers could not be operated."

By way of analogy, R. Smith is in exactly the same position as Bernshine in that it provides exclusive catering services for C. P. road gangs. It has no business purpose other than to provide services to C. P. Moreover. the services that it does provide are vital, essential and integral to C. P. 's operation of the railway. The railway cannot operate without road gangs maintaining the line and the road gangs cannot do their work particularly in isolated areas without being fed by on- site cooks. Accordingly, there is a direct nexus between R. Smith's activities and C. P. 's operation of its railway.

The nature of the catering service provided by R. Smith differs from the catering business that was in question in Lewers et al. v. C. P. Hotels, a decision of the Canada Labour Relations Board (Reasons for Decision: No. 372, June 10, 1982) which was relied upon by Mr. Shannon. The Board concluded that a catering operation providing food for airline passengers was too remote

so as to have a sufficient nexus to the core activity of aeronautics to bring it under federal jurisdiction. Moreover, it was held that the catering operation was the subject of a separate business and not integrated into that of C. P. Air and although the catering business helped C. P. 's airline business, it was clearly severable from it. In the case before us, not only did R. Smith not have any other business and thus could not be considered severable from C. P. Rail; but the provision of food services was vital, essential and integral to the operation of the railway whereas the provision of airline food to passengers might not satisfy the same test. Airplanes can fly without passengers being fed but a railway cannot operate unless maintenance men receive the necessary sustenance.

We, therefore, conclude that R. Smith's catering services to C. P. is a matter which falls within federal competence and is thus subject to the Canadian Human Rights Act.

Counsel for the Canadian Human Rights Commission could not provide an explanation as to the reason that R. Smith was not made a party to these proceedings other than to say that some other branch of the Commission must have taken that decision early on. in our view, the fact that R. Smith was not made a party (although evidence was given by a past and present employee) does not preclude us from dealing with C. P. 's responsibility in this matter. Whether R. Smith contravened Section 7 of the Act is not an issue that we have to decide.

C) THE AFTERMATH

Mr. Fontaine testified that he was devastated by the experience. His family doctor, Dr. John Smith, referred him to a psychiatrist to treat his depression. Following his rejection, his fear that he would spread the virus intensified. His own self- esteem diminished. He no longer felt that he could work in the catering or restaurant business. Even with those self- doubts, he took on a position in a cafe as a morning cook on August 1, 1987. However, he did cut himself on the job. He became alarmed and took the extreme position that everything had to be cleaned in the most thorough way imaginable and felt the need to tell the owner of the restaurant that he had the HIV infection. The effect was that he was let go from that position, having been there for a month.

As a result of these events, he does not have any prospect of being hired as a cook again. In his words "Fourteen years of hard work have gone down the drain". He has not worked as a cook since that time. Nor has he tried. He feels that it would be too stressful as he would be living with the constant fear that he would cut himself and infect other people. His fear has not been allayed by the medical evidence to date that the virus cannot be spread in this fashion.

Dr. Alan Meltzer who is the Senior Medical Advisor, Bureau of External Co- Operation, Federal Centre for Aids, Health Protection Branch of Health and Welfare Canada, provided background evidence with respect to the nature of AIDS and the HIV infection. He indicated that AIDS is the terminal stage of the HIV infection whereby ultimately a body's immune system is broken down and the person becomes susceptible to infection. Most HIV patients do not have any symptoms and may not even know that they are infected. AIDS itself is not transferable. The infection is. There are three modes of transmission. The most prevalent which accounts for 90% of the cases is through sexual intercourse. The second is through exchange of blood, i. e. blood transfusions and the sharing of hypodermic needles. The third is transmission by infected pregnant women to

their unborn children. He testified that there has not been one single reported case in Canada of transmission of the infection by direct contact with blood arising from casual contact in the workplace. That is so because the virus is extremely fragile and although transmission through casual social contact may theoretically be possible, it is extremely unlikely because such activity does not ordinarily involve the exchange of bodily fluids. There is no reported case of transmission of HIV from one member of a family to another in a household context where there has been a sharing of food, kitchen utensils and toilet facilities. Neither has there been any reported case of infection in the workplace. There is no evidence of transmission in food or from contact with blood as a result of cuts in the skin. There should be no restriction on people in the food processing industry. Accordingly, there is no basis for fear among co- workers or customers. His conclusion is that from a practical point of view, the risk is virtually non-existent. An individual in the food processing business need not take precautions beyond those that one would normally take to prevent the spread of other common infections that are found in bodily fluids.

Mr. Fontaine says he was made aware of these scientific facts but the incident in question nevertheless has shaken his belief that the infection cannot be spread in the workplace.

After he left his position with the cafe at the end of August 1987, he resorted to obtaining odd jobs as a painter and housekeeper. For the most part his income has been limited to unemployment insurance and welfare. He returned to school in order to complete his grade 9 and 10 education and has been in school ever since. His total income from these sources was $7,167.00 for the year 1987, and $3,669.00 for the year 1988. In 1989 he was receiving $489.00 per month from social assistance and $80.00 per month from his housekeeping work and that was so until the commencement of this hearing on July 25, 1989.

D) REMEDY

Mr. Fontaine and the Canadian Human Rights Commission seek damages and a letter of apology from C. P. As no question had been raised about Mr. Fontaine's abilities and performance as a cook, there is no reason to believe that if the incidents in question had not arisen he would not have continued on with this employment. Additionally, he would have earned $900.00 per month for his watchman duties. Thus, Mr. Fontaine should be compensated for this loss of work. Mr. Shannon argued that there was no guarantee that Mr. Fontaine would be rehired after the first season. But Mr. Hutton indicated that the general practice was to take back successful employees and pay them progressive raises each year. Moreover, we cannot agree with Mr. Shannon's argument that Mr. Fontaine's damages should be limited to one month, being the period of time it took for him to find another cook's position. The effect of the discriminatory act was such that Mr. Fontaine became totally incapable of working successfully in a kitchen environment.

The work for C. P. is seasonal and takes place from spring to fall for a period of 5 or 6 months. If Mr. Fontaine had continued with his employment as a cook for the balance of the 1987 season, which would have been a further 2 months, he would have earned $3,780.00 inclusive of the monies he would have earned as a watchman. In all likelihood, he would have continued with his weekend watchman duties in addition to providing cooking services during the week days. In 1988 the evidence was that in all likelihood he would have had a raise in pay from $6.00 per

hour to $6.25 per hour and based on a 60 hour work week, he would have earned approximately $12,000.00 for his cooking and watchman functions. With a raise to $6.50 an hour in 1989 for a three- month period up to the date of the hearing, he would have earned $7,380.00 for both his cooking and watchman functions. Compensation for loss of wages usually runs up to the date of the commencement of the Tribunal hearing: Morgan v. Canadian Armed Forces (unreported Human Rights Tribunal, March 17, 1989 at p. 12). The total that would have been earned during this period, therefore, is $23,160.00. We feel that this amount less the amounts Mr. Fontaine received by way of income from all other sources during the seasonal period he would have been employed at a C. P. camp site is an appropriate compensation for his loss of income arising from C. P. 's discriminatory practice. As was ordered in Morgan v. C. A. F. supra, credits for unemployment insurance and other social assistance programmes (exclusive of those funds received during the off- winter and early spring season) may be deducted by C. P. and remitted directly to the appropriate government agency pursuant to the legislation in question. Interest commencing from June 16, 1987 is to be paid on the net amount. Resort may be had to the Tribunal if the parties cannot agree on the figures.

An award for injury to Mr. Fontaine's self esteem is warranted in these circumstances. We acknowledge the fact that Mr. Fontaine harboured the fear of spreading AIDS even before his work for C. P. but his experience with C. P. so intensified these fears that it virtually drove him out of his occupation. An award of $2,000.00 is ordered in this respect together with interest thereon from June 16, 1987.

Moreover, a letter of apology from C. P. to Mr. Fontaine is in order. According to the evidence of Dr. Grimard, C. P. holds the view that any person suffering from the AIDS virus should not be restricted or limited in terms of any occupation with the company. We, therefore, assume that it would have little difficulty and indeed would be sincere in apologizing to Mr. Fontaine for the circumstances which forced him to leave his position as cook because of this disability and would be willing to reassure him and thereby others that in the future greater sensitivity to these matters will be shown.

Dated this 26th day of September 1989.

Sidney N. Lederman, Chairman

Kristian Eggum, Member

Jill Marie Sangster, Member