

T.D. 11/91
Decision rendered on July 24, 1991

THE CANADIAN HUMAN RIGHTS ACT
R.S., 1985, c. H-6, as amended

HUMAN RIGHTS TRIBUNAL

ROBERT LEBEL

Complainant

and

CANPAR, DIV. OF CANADIAN PACIFIC
EXPRESS & TRANSPORT LTD.

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

Tribunal

William I. Miller, Q.C. - Chairman
Rose Fortin - Member
Henriette Guerin - Member

DECISION OF TRIBUNAL

Appearances:

Me. Anne Trotier
Counsel for the Commission

Me. R. Michael McLearn and
Me. Melinda Munro
Counsel for the Respondent

Dates and Places of Hearings:

June 12, 1989, Montreal, Que.
June 13, 1989, Montreal, Que.
April 18, 1990, Montreal, Que.

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I. Introduction:

On November 21, 1988, the President of the Human Rights Panel, Sidney N. Lederman, appointed the undersigned, William I. Miller, Rose Fortin and Henriette Guerin as a Human Rights Tribunal to examine the Complaint filed by Mr. Robert Lebel, dated September 23, 1985, against the Respondent Canpar, Div. of Canadian Pacific Express and Transport Ltd. ("CANPAR").

Mr. Lebel's Complaint alleges that the Respondent practised discrimination based on disability in having refused to hire him as a chauffeur on or about August 15, 1985 in violation of Article 7 of the Canadian Human Rights Act ("Act") . The text of the Complaints, as it appears in the original complaint form filed under HRC-1, alleges as follows:

"By refusing to hire me as a truck driver because I recently received demerit points for driving under the influence of alcohol, and because it perceived me to be alcohol-dependent for this reason, the respondent practised discrimination against me based on disability, in violation of section 7 of the Canadian Human Rights Act."

The pertinent Sections of the "ACT" affected by the present Complaint are the following: Sections 3a, 7, 25 and 15(a).

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Preliminary Objections and Motions by Respondent

Prior to dealing with the merits of the present Complaint, it is necessary to deal with a series of 4 objections and/or motions which were presented by Respondent's Attorney at the opening of the Hearings with a view to suspending or postponing the Hearing and which can briefly be summarized as follows:

i) That there was a reasonable apprehension of bias in the appointment of the Tribunal based upon the lack of tenure, the manner and remuneration of the Members of the Tribunal and other similar reasons which have been submitted to and are under consideration by the Federal Court in a number of cases including one filed by Bell Canada. It was Respondent's contention that this justified suspending the present Hearing until disposition of the case before the Federal Court. After giving consideration to Respondent's Attorney's submission, the Tribunal decided to proceed with the Hearing with the understanding that a final decision would be withheld should it prove necessary in order to protect the rights of the parties. Since nothing has occurred in the present case or in any other cases to the awareness of the Tribunal which would justify withholding its decision, the Tribunal therefore dismisses Respondent's Motion and proceeds to render its decision on the merits;

ii) That in refusing to accept the Conciliator's recommendation that the Complaint was without merit, the

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Canadian Human Rights Commission failed or neglected to provide the Respondent with its reasons for ignoring the Conciliator's recommendation and submitting the Complaint to the Tribunal for Hearing. Since the law does not oblige the Canadian Human Rights Commission to follow the recommendations of the Conciliator any more than the Tribunal is bound by the Conciliator's report and recommendation, Respondent's objection in this respect, is dismissed;

iii) That in representing and acting on behalf of both the Canadian Human Rights Commission and the Complainant, the Commission's legal counsel is violating the spirit of Section 51 of the "ACT" which requires that the Commission adopt a position before the Tribunal which, "is in the public interest". However, since the "ACT" conveys to the Commission the discretion to determine what is in "the public interest", the Tribunal cannot decide that in having its legal counsel act on behalf of both the Commission and a Complainant, that such direction is not in the public interest. The Respondent's objection, in this respect, is consequently dismissed;

iv) That the failure or inability to secure or obtain a copy of the Complainant's Driver's Abstract which Respondent intended to deposit before the Tribunal for purposes of the Hearing, was unavailable to the Parties should necessitate a suspension of the Hearing until such

exhibit was obtained from the proper Provincial authorities. Following discussion, the Tribunal ordered a subpoena to be issued forthwith to the Regie de l'assurance automobile du Quebec with a Duces Tecum in

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order that the Complainant's Driver's Abstract be produced during the Hearing and that it was not necessary to suspend the Hearing until its production.

Having disposed of the foregoing preliminary objections and Motions by way of oral rulings during the opening session of the Hearing, the Tribunal proceeded with the substance of the Complaint.

Legal Issue

The principal issue to be decided by the Tribunal is to determine whether at the time of Complainant's Application for Employment as a chauffeur, after having examined the Complainant's Driving Abstract which indicated that the Complainant's driving permit had been suspended for having driven while intoxicated, and having allegedly told the Complainant that the Respondent "does not hire drunks", the Respondent committed a discriminatory act in violation of the Human Rights Act based upon a disability relating to a dependency on alcohol, in having rejected the Complainant's application for a job as a truck driver.

The Facts

Complainant's occupation has been that of a truck driver and chauffeur of various classification of vehicles having obtained his license at an early age. His initial experience

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was obtained while serving in the Armed Forces around 1965 to 1967 during which time he was exposed to driving all types of vehicles including buses, tanks, trucks and the like, used in the military. He also served as an Instructor in the servicing of vehicles. Complainant subsequently obtained licenses from the Province of Quebec which entitled him to be a chauffeur

for all classes of vehicles, namely, Classes 1, 2, 3, 4a, 4b, 4c, 5 and 6a, all except that of taxi driver.

Following his Army service the Complainant chauffeured for his own account from 1975 to 1981. He also obtained American driving licenses and permits (ICC) in certain states. He transported all forms of merchandise except dynamite and nitroglycerine which he considered too dangerous to handle. He sold his truck in 1981 and then did part-time work for Cyclone Transport Agency, a placement agency, while at all times seeking full-time employment, until Cyclone went out of business.

Complainant's permit was suspended for three months from February 4, 1985 to May 3, 1985 after having pleaded guilty to a charge of driving under the influence of liquor in 1984, but which nevertheless entitled the Complainant to continue driving under restrictive conditions. In addition to the suspension of his permit, the Complainant paid a \$300.00 fine and also received 2 demerit points on his driving record.

Complainant continued to do part-time chauffeuring to destinations such as New York and Pennsylvania, under a restricted permit, making 2 or 3 trips weekly, but always seeking to obtain a fulltime job.

On or about August 12, 1985, Complainant responded to an advertisement placed by Canpar seeking chauffeurs for city

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driving for delivery of small parcels as a P & D driver and visited their office where he was handed an Application form, copy of which is produced as HRC-2.

Following initial contact with Canpar's representative Andy Senechal, he was referred to John Crosby who was Canpar's Linehaul Supervisor whose duties included the testing of prospective chauffeurs and tractor-trailer drivers who had applied for employment. Mr. Crosby instructed the Complainant to return the following day for a written test, first with respect to driving small trucks and respecting traffic regulations and was told to return the following day to write tests with respect to large trucks. The Complainant was also instructed to bring his Driving Record (dossier de conduite) otherwise referred to in the trade as the Driver's Abstract ("Abstract").

According to the Complainant, after examining his Driver's Abstract, Mr. Crosby declared that, "we don't hire drunks around here" or words to that effect and added that Complainant had failed the test and was therefore not suitable for hiring as a truck driver for Respondent.

Complainant then took on other chauffeuring jobs and at the time of making the present Complaint he was filling in for one Ken Craig while the latter took vacation and for whom he continued to work for about 2 months or so.

Complainant also worked for the Montreal Transport Commission as a bus chauffeur from May 24, 1988 but was dismissed after 5 1/2 months ostensibly for having failed to disclose to

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the Commission's hiring authority his earlier revocation of permit and which the Commission deemed Complainant to have made a false Declaration of Employment. For some inexplicable reason, the Complainant's dossier omitted mention of his license suspension at that time. Complainant, on the other hand, testified that there was no specific question on the Application Form with respect to suspension of permit and that he either misunderstood the question on the Application Form or forgot about his permit suspension.

Complainant did not work from July 1986 to May 1988 and has been the recipient of Welfare payments until the time of the Hearing of the present case. Complainant filed a grievance with the Commission's Union against his dismissal but the grievance, as of the time of the present Hearing, had yet to be heard.

John Crosby, Canpar's Linehaul Supervisor, denied having told the Complainant that Canpar doesn't "hire drunks" (Deposition p. 131). He recalled that the Complainant's Abstract contained a license suspension (DWI) and other minor infractions (Deposition p. 130) and informed Complainant that his record did not make him suitable for a job with Canpar. Mr. Crosby did not deny that he may have alluded to the fact that having had his license suspended for driving under the influence of liquor did not render him suitable for employment with Canpar.

Mr. Crosby further testified the he had never encountered a situation when an Applicant's Abstract for a chauffeur's job contained a DWI offense.

Mr. Crosby testified that, on the average, he rejected 50% of the applicants for chauffeur employment. Of these, the Complainant was the only one whose Driving Record contained a DWI (Driving While Intoxicated) and

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that he would never hire an applicant with a bad Abstract (Deposition p. 134). Mr. Crosby concluded his evidence by stating that the Company's policy was to seek professional drivers; courteous, safe and responsible drivers, which he did not deem Complainant to be.

Three other witnesses were heard on behalf of the Respondent, namely, Mr. Ron Norris, Respondent's Linehaul Supervisor for the Province of Ontario for the past 6 years and whose responsibilities in the Province of Ontario were similar to those handled by Mr. Crosby in Quebec. Mr. Norris's evidence corroborated that of Mr. Crosby to the effect that the driver's Abstract played an important role in the hiring process in that, "the driver's Abstract is probably one of the biggest things. It gives you an indication of driving history" (Deposition p. 230). Moreover, Mr. Norris testified that the Respondent had a policy with respect to employees who may have an alcohol problem and that its rehabilitation program, in effect, indicated that the Respondent had amongst its employees persons affected by an alcohol problem.

David J. Bennett, who had served as a Human Resources Officer for Canpar between 1985 and 1988 also testified to the importance of the Driver's Abstract which was a required part of the hiring process. Mr. Bennett testified that the Abstract was one factor used to determine the suitability of any applicant for a driving position. He deemed it to be an essential record

Mr. Bennett further

of an individual's past driving behaviour testified:

"All these factors combined means that the Canpar driver was not simply an average Joe who could drive a car. It was an individual that required

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a level of responsibility and a level of maturity to do all this at the same time." (Deposition p. 269).

Finally, Mr. Bennett testified as follows:

"A. Safety was I think one of the most important issues with Management, from the supervisors right through to the General Manager and right through to the President of CP Trucks and it was heavily stressed with the drivers and warehouse men, for example, through morning meetings prior the start of their things and constant safety reminders and safety training, through any variety of these sort of things." (Dep. p. 270)

The third witness on behalf of Respondent was Mr. Roger Soucy, a Manager for Kingsway Transport in Montreal for the past 3 years and prior to that, associated with Guilbeault Transport for 14 years, having responsibility of hiring of chauffeurs, surveillance of transport and merchandise, accidents and related matters. Mr. Soucy testified as to the importance of the Driver's Abstract and what it indicate or represented as regards his competency or qualifications. Mr. Soucy testified:

"With respect to most of the employees hires by Kingsway, the driver's abstract is very important, as you might expect. If the employee is the type to speed, has committed hit-and-run offences, has a tendency to drink

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or is pulled over too many times for speeding ... today there are four people killed every day in Quebec in automobile related incidents. If you listened to the Montreal morning traffic reports you would know that ninety per cent of the time, a truck driver is involved in an accident with another vehicle. You never hear otherwise.

Professional drivers must therefore set an example. A truck driver hauling a 45,000-lb load of equipment and merchandise must be able to think clearly and must have a good record." (Deposition p. 289)

Not one but two different representatives of the Regie de l'assurance automobile du Quebec were heard as witnesses, primarily for the purpose of establishing Complainant's actual Driving Record, his Abstract, since its inception. There was some confusion as to the completeness or accuracy of these Records but on the basis of 3 separate documents produced at the

Hearings, namely Exhibits R-2; T-2; and HRC-4, it was established in evidence that Complainant's Driving Record was affected by the following suspensions or revocations of Permit, namely:

i) February 4, 1986 to May 3, 1985 -

3 month suspension of license; \$300.00 fine and 2 demerit points, as a result of a guilty plea to a charge of Driving While Intoxicated;

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ii) October 24, 1988 to October 23, 1989 -

1 year suspension of license following conviction under Section 238.5 of the Criminal Code. (Failure or refusal to provide sample);

iii) November 25, 1989 to December 31, 1989 -

1 month suspension of license due to non-payment of a fine relating to driving infraction, imposed by a Joliette Court.

Moreover, Complainant's Driving Record contained the following additional infractions, namely:

1) January 18, 1988 to June 9, 1989 -

2 demerit points for having exceeded the speed limit by 15 - 29 km;

2) February 18, 1988 to August 23, 1988 1 demerit

point for having exceeded the speed limit by 1 - 14 km;

3) March 28, 1988 to September 7, 1988 3 demerit

points for having gone through a red light.

Finally, the Tribunal heard evidence made with respect to an accident in which the Complainant had been involved with his truck on or about July 27, 1986, although the Complainant denied that the accident was due to his fault.

The Tribunal notes that at the time the Complainant applied for his job at Canpar, the only infraction or suspension

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of permit recorded in his Abstract was the first one hereinabove set out.

The subsequent infractions and suspensions were obviously not then in existence or known to the Respondent. The Tribunal therefore only considered the subsequent infractions and suspensions as further evidence of a recurrence of Complainant's poor driving habits or skills, his lack of professionalism as a chauffeur, and his disregard for the safety factor in discharging his responsibility as a chauffeur.

The Tribunal is convinced that in having rejected the Complainant's Application for Employment as a chauffeur, Respondent was motivated solely by its desire and need to maintain its existing policies in which safety and safety standards are the primary concern both as regards the interest of the Respondent Company and the public generally.

It was on the basis of the Complainant's poor or inferior Driving Abstract that the Respondent's Representatives in charge of hiring judged the Complainant to be a poor risk as regards his qualifications to serve as a chauffeur for Respondent Company and, of course, subsequent developments proved such judgment to be correct. However, irrespective of the subsequent infractions and suspensions, the Respondent's judgment insofar as having regarded the Complainant as a poor risk, still stands.

The evidence to the effect that the Respondent rejects about one-half of all applicants who apply for jobs as chauffeur will, in itself, suffice to demonstrate that the Respondent's policy of applying rigid standards in its employment hiring practises is geared to its policy of maintaining its high safety standards and cannot in any way or manner be misconstrued as a discriminatory practise. After all, the essence of safety and

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safety standards as far as its driving staff is concerned begins with and is surely dependent upon the competence of its drivers and their qualifications.

This was also reflected in the evidence of Respondent's witnesses who testified that they would be quite reluctant to hire as a chauffeur any

applicant whose Driving Record indicated a License Suspension resulting from Driving While Intoxicated, such as was the case with the Complainant.

The Tribunal therefore declares that, on this ground alone, that in having rejected the Complainant's Application for Employment as a chauffeur, the Respondent did not act in a discriminatory manner and it therefore concludes that the Complaint herein is not well founded and should be dismissed.

Although the comment attributed by the Complainant to Mr. John Crosby to the effect that, "we don't hire drunks here" was categorically denied by Mr. Crosby, it may nevertheless have created, in the Complainant's mind, a false impression that he was being discriminated against on a ground which he perceived to be alcohol-related when his Application for Employment was rejected. However, the evidence is rather to the effect that the alleged alcohol factor played no significant role whatsoever in the rejection of the Complainant's Application for Employment as a chauffeur but was merely indicative that Complainant did not meet Respondent's standards. The Tribunal therefore does not find it necessary or advisable to deal with the law as reflected in Article 15(a) of the "ACT" insofar as it relates to the employer having to discharge the burden of establishing the existence of a bona fide occupational requirement, given that

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the Tribunal has concluded that the rejection of the Complainant's Application for Employment as a chauffeur did not constitute a discriminatory act or practise.

In having exercised its discretion as an employer in giving preference to more competent applicants than the Complainant, the Respondent was in fact acting as a good corporate citizen for which it and other employers of its kind ought to be commended rather than being subjected to a charge of discrimination under the "ACT". In acting as it did, the Respondent, far from acting in a discriminatory manner, was merely exercising good common sense.

The Tribunal therefore concludes that no prima facie case of discrimination has been made out by the Complainant and the present Complaint is therefore dismissed.

DATED at Montreal this 17th day one 1991

WILLIAM I. MILLER - Q.C., Chairman

ROSE FORTIN, Member

HENRIETTE GUERIN, Member