T. D. 1/ 86 IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT S. C. 1976- 1977, c. 33, as amended;

AND IN THE MATTER of the appeal filed under Section 42.1 (2) of the Canadian Human Rights Act by Greyhound Lines of Canada Ltd. and Eastern Canadian Greyhound Lines Ltd., dated November 14, 1984, and the cross- appeal of the Canadian Human Rights Commission and Frank E. McCreary dated November 14, 1984, against a Human Rights Tribunal decision pronounced on October 16, 1984

BETWEEN:

GREYHOUND LINES OF CANADA LTD. AND EASTERN CANADIAN GREYHOUND LINES LTD. Appellant - AND

CANADIAN HUMAN RIGHTS COMMISSION AND FRANK E. MCCREARY Respondent

Decision of the Review Tribunal

BEFORE: M. LOIS DYER CHAIRPERSON

RUSSELL STEWARD MEMBER JACK LONDON MEMBER

TRIBUNAL OFFICER MICHAEL GLYNN

Appearances: François Lemieux and K. Scott McLean for the Appellant

George Hunter and David Aylen, for the Respondents

HEARD: IN OTTAWA JUNE 3, 4, 24, 25 and 26, 1985.

>The Facts

The facts of this case, briefly stated, are that Frank McCreary made an application to Eastern Canadian Greyhound Lines Ltd. to enter the new driver training program in the spring of 1980. The application was rejected because Mr. McCreary was 37 years of age and for other reasons not in dispute in this case. The Company had a policy of not hiring new drivers over the age of 35.

Mr. McCreary filed a complaint with the Canadian Human Rights Commission, which was investigated and substantiated under the provisions of the Canadian Human Rights Act. A Tribunal was appointed in 1983, to hear the matter of whether s. 7 and 10 of the said Act had been controverted. Mr. Kerr, the Tribunal, rendered his decision on October 16, 1984.

The matter before this Review Tribunal is an appeal taken by the Respondents, Greyhound Lines of Canada Ltd., and Eastern Canadian Greyhound Lines Ltd. (the Appellants, for the purpose of this decision) from a decision rendered by Robert W. Kerr, who, sitting as a Tribunal appointed

under Section 390) of the Canadian Human Rights Act, declared that the policy of the Respondents not to hire any person over the age of 35 as a bus driver was a discriminatory practice contrary to sections 7 and 10 of the Canadian Human Rights Act. In addition Mr. Kerr ordered Eastern Canadian Greyhound Lines to

offer the Complainant, Frank McCreary the next available position in its driver training program with the same opportunity for employment if he successfully completes the program as is enjoyed by other persons with comparable success, subject to the Complainant, Mr. McCreary, meeting normal and uniformly applied qualifications for employment as a bus driver, including vision requirements. Mr. Kerr ordered Eastern Canadian Greyhound Lines Ltd. to give the Complainant at least six months notice prior to the date he is expected to commence training. Finally, Mr. Kerr also ordered Eastern Canadian Greyhound Lines Ltd. pay the Complainant, Mr. McCreary, the sum of $1,500.00 as compensation in respect of injury to his feelings and self-respect.

> - 2 GROUNDS OF APPEAL Counsel for Greyhound Lines of Canada Ltd. and Eastern Canadian Greyhound Lines Ltd. presented the following grounds for Appeal: that the Human Rights Tribunal erred in fact and in law in a) failing to find that the Respondents' age policy constituted a bona fide occupational requirement within the meaning of the Canadian Human Rights Act, and b) in defining the age range against which such a finding on the evidence was made; c) in law, in the application of the bona fide occupational requirement test; and in its statement of the legal principals applied; d) and that the Tribunal failed to give due consideration to all the evidence before it and to accurately assess the meaning and effect of the evidence before it.

GROUNDS FOR CROSS- APPEAL Counsel for the Commission and Frank McCreary (the Respondent) for the purpose of this decision presented the following grounds for Cross- Appeal: that the Human Rights Tribunal erred in fact and in law in not ordering Mr. McCreary be reinstated with the seniority position to which he was deprived; in failing to award Mr. McCreary compensation for lost wages and expenses; in failing to award Mr. McCreary $5,000.00 as special compensation; in failing to order that Mr. McCreary be given the opportunity to qualify for employment with Greyhound Lines of Canada Ltd." and erred in law in failing to Order that the Appellants cease any discriminatory practice.

In the course of the hearing, Counsel for the Respondents withdrew the second ground of Cross-Appeal and no argument was heard on that point. No new evidence was heard by the Review Tribunal. Although Counsel made reference to the bona fides of the Appellant Company, it was not at issue. Both parties agreed that safety is the essence of the bus transportation business.

In the course of writing the decision, the Review Tribunal became aware of the recent decision of the Federal Court of Appeal in the case of Alistair MacBain and Sidney N.

> - 3 Lederman et al., Federal Court of Appeal (unreported) A- 996- 84, October 7, 1985. Because of the possibility of an appeal from this decision, for efficiency and for the protection of all interested parties in this matter, the Review Tribunal determined it should conclude its work.

PRELIMINARY MATTERS At the commencement of the Review Tribunal proceedings, Counsel for the Respondents urged the Review Tribunal to consider five issues before proceeding to the merits of the Appeal and Cross- Appeal. These issues were considered and responded to by way of reply to the following questions:

1. In considering proceedings under Section 42.1 of the Act, is the Review Tribunal obligated to conduct itself in such a manner that palpable or manifest error be established in the decision of first instance, having regard to the reasons and the record of the Tribunal of first instance, as a prerequisite to making any decision or order under Section 42.1 (6)(b)?

2. If the answer to question No. 1 is in the affirmative, how should the parties be directed to proceed in the presentation of argument?

3. Is the issue in question No. 1 of sufficient weight that the Review Tribunal ought properly to consider and determine it as a preliminary issue?

4. If the answer to No. 3 is in the affirmative, should the Review Tribunal proceed with the hearing of the appeal or cross- appeal forthwith or await judicial review of the decision on the preliminary issue?

5. In lieu of questions 1 through 4, ought the Review Tribunal to initiate a reference to the Federal Court of Appeal pursuant to Section 28(4) of the Federal Court Act?

> - 4 The Review Tribunal heard the argument of both Counsel on these questions, considered the matter and delivered the following decision.

In response to question 3 posed by Mr. Hunter, and because the parties both requested determination of the preliminary issue, we will now do so.

To questions 4 and 2, we respond that we will proceed with the hearing on the merits.

As to question number 5, subject to further motion and arguments at the pleasure of Counsel, we do not see the arguments raised to be specific enough to come within the sort of matter contemplated by Section 28(4) of The Federal Court Act, and we make reference to the cases RE Public Service Staff Relations Board, (1973) 38 D. L. R. (3d) 437, and RE Martin's Service Station (1974) 44 D. L. R. (3d) 99.

Now, dealing with question number 1 as posed by Mr. Hunter, it is our view that the construction of Section 42.1 urged upon us by both Mr. Hunter and Mr. McLean is unduly narrow. In our view, the appropriate construction is the following: this is clearly not a trial de novo in the sense of beginning anew with the reception of evidence, except in the unusual circumstances suggested in Section 42.1 (5).

It is an appeal from the decision of the Tribunal heard on the basis of the record which includes the decision and reasons therefor of Mr. Kerr.

Therefore, the burden on the Appellant is to show that the ultimate

decision reached by Mr. Kerr, that is that there was discrimination without bona fide occupational requirement, was wrong. The error may be demonstrated by showing a mistake of law or mistake or misappreciation by the Tribunal of the facts or the inferences to be drawn therefrom or that the Tribunal failed to take into account certain facts or evidence. Particularly at this stage of the proceedings, before any specific argument has been heard, we cannot or should not usurp the function of Counsel by directing or advising the

> - 5 Appellants on how their burden should be discharged. The Act does not itself obviously limit the scope of the presentations to be made. Moreover, it clearly provides in Section 42.1, sub 6 (b) that if the appeal is allowed, we are entitled to make such order as the Tribunal should have made; that is, we may substitute our judgment for that of the Tribunal.

We referred to Carson et al versus Air Canada, (1984), 5 CHRR D/ 1857, at tab number 7 at paragraphs 15, 932 through 15, 936, which includes a reference to the Butterill case ((1981), 3 CHRR D/ 1043) and as well the case of Ontario Human Rights Commission et al v. Borough of Etobicoke SCC 132 D. L. R. (3d) 14, at tab 11, page 22, the paragraph commencing 'The majority of the Divisional Court', the full paragraph.

We do not believe that a prerequisite to that substitution of judgment need be a finding of manifest or palpable error in the reasons of the Tribunal. We note that it was our view that the remarks of Chief Justice Thurlow in the Brennan case (Brennan v. Canada and Robichaud (1995) 57 NR 116 (Fed. C. of A.)), particularly in light of his comments in Butterill, fall short of the considered statement that a Review Tribunal may only substitute its decision if it finds palpable or manifest error; nor are we convinced that the words "palpable" or "manifest" add much to the meaning of "error" in this context.

Rather, to substitute we must find clear error in the conclusions drawn by the Tribunal; that is, was discrimination present and was there a bona fide occupational requirement that justified it? To reverse or amend, we must assure ourselves on a balance of probabilities that our appreciation of the law and facts is different enough from that of the Tribunal that the ultimate decision ought to be different.

However, in assessing those facts and the appropriate conclusions to be drawn we must not only honour the findings and conclusions of the Tribunal as part of the record but must defer to it, though not absolutely, on those matters on which the Tribunal was advantaged by seeing and hearing the viva voce testimony; that is, on findings of

> - 6 credibility. Having done so, however, we may depart from the findings of the Tribunal where in our judgment the evidence and/ or law require us so to do.

Mr. Hunter also argues that we ought now to direct the Appellants at the outset to particularize their allegations of errors on the part of the Tribunal so that he can know how to prepare. To be frank, we would have appreciated more specificity in the Notice of Appeal and we observe that the Notice does not even contain a request to us for a remedy. Perhaps counsel

might wish to address this issue at some point. However, we do not feel that the degree of generality of the Notice of Appeal is such as to warrant our directing further particulars. They will become apparent in the course of argument. Moreover we are of the view that the Appellants should be given wide latitude in choosing their strategy and the basis of argument, subject to limits of cogency, relevance and the law of diminishing returns. These remarks apply mutatis mutandis to the Cross- Appellants as well.

The Law and Application of the Bona Fide Occupational Requirement (BFOR) Sections 3, 7, 10 and 14(a) of the Canadian Human Rights Act set out the statutory provisions relevant to this case, which deals with age and an age of hire policy as a prohibited ground of discrimination and whether a bona fide occupational requirement can be established in relation to that age. The provisions were set out at p. 10 of the reasons of Mr. Kerr.

Neither party disputed that the Appellant company had an age of hire policy for new bus drivers, which was age 35 and neither disputed that this amounted to differential treatment under the Canadian Human Rights Act.

The Review Tribunal adopts the statements of law concerning initial burden of proof and the shifting of that burden if a party intends to rely on s. 14(a), the bona fide occupational requirement, as outlined at p. 11 and 12 of the decision of Mr. Kerr. He relied appropriately on Carson et al v. Air Canada (1983), 5 C. H. R. R. D/ 1857 (Review Tribunal),

> - 7 at D/ 1863, D/ 1864, D1858; and Re C. N. R. and Canadian Human Rights Commission (1983), 147 D. L. R. (3d) 312 (Fed. C. A.), at 315, 333, and Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 132 D. L. R. (3d) 14, at p. 19- 20.

The Review Tribunal was directed to consider both the case of Arritt v. Grisell, (1977) 567 F. 2d 1267 (U. S. Ct. of A., 4th Circuit) and the judgment of Mahoney, J. in the Federal Court of Appeal decision in Air Canada v. Carson et al. unreported, but decided February 15, 1985. It should be noted that the Federal Court decision was not rendered when Mr. Kerr came to his decision.

At p. 3, Mahoney, J. says: "As to equating Arritt with Etobicoke, the latter case which dealt with the mandatory retirement of firemen at the age 60, is the leading Canadian authority on age discrimination as a bona fide occupational requirement."

In this judgment at p. 4 and 5, Mahoney, J. went on to say "That the 'bfoq' was adopted in good faith is doubtless implicit in the first branch of the Arritt test,... I have no difficulty agreeing that it is similar in substance to the subjective element of the Etobicoke test. Without deciding what factors might be required to be proved in meeting the objective branch of the Etobicoke test in another case, it seems to me the second branch of the Arritt test is quite apt here."

It should be noted that the Arritt case shifted the U. S. standard from the tests noted in Hodgson v. Greyhound Lines, 449 F. 2d 859 (7 Cir 1974) to the two- pronged test formulated in Usery v. Tamiami Trail Tours, 531 F. 2d 224 (5

Cir 1976). As in the Air Canada case, Counsel for the Appellant argued that the tests of the Greyhound case were equivalent to those of the Etobicoke case. Mahoney, J. makes a point on this matter at p. 6 when he says:

> - 8- "While the Supreme Court (in Etobicoke) has certainly not disapproved of the Greyhound test, it has not, as Air Canada suggests, endorsed it."

Mr. Justice Mahoney, at p. 6 and 7, sets out the rule Air Canada is obliged to follow:

"We are not, here, as Air Canada argued, dealing with a Review Tribunal which has substituted its assessment of safety on the flight deck for that of Air Canada. Rather, we are dealing with a discriminatory practice which Air Canada has adopted as a result of its assessment of risk to safety of its pilots age. Air Canada is obliged by law to prove, on a balance of probabilities, its practice to be a bona fide occupational requirement. Etobicoke states the test in general terms... In the present case, I think it is entirely consistent with Etobicoke to ask Air Canada to prove that it would be impossible or impractical for it to hire new pilots older than 27 and to deal with its safety concerns as they age on an individual basis."

At p. 11 of his decision, Mahoney, J. concluded by saying that Air Canada failed to establish credible linkage between safety risks and maximum age of hire policy and so failed to prove that its policy was a bona fide occupational requirement based on its safety concerns.

This Review Tribunal is bound to follow the rationale of both the Air Canada case and the Etobicoke tests as being current law in Canada. Mr. Kerr's decision is not at variance with this.

Mr. Kerr relied on the two- pronged objective test re bona fide occupational requirement set out at p. 12 of his decision, the test of McIntyre, J. in Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 132 D. L. R. (3d) 14 at p. 19 and 20. The importance of the applicability of this test was recently reconfirmed by Mahoney, J. in Air Canada. The Review Tribunal was not pursuaded that Mr. Kerr erred in his reliance on the law or his application of the law.

> - 9 Although, as Mr. Kerr did, the Review Tribunal believed that American jurisprudence should be relied upon for guidance or illustration, it was referred to and considered in some cases.

The importance of the Tamiami Trail Tours case has already been illustrated. The matter of Murname v. American Airlines Inc. (1981) 667 F. 2d 98 was cited in support of the Tamiami case, upon which it relied and for the importance of the factual basis of safety considerations when "bfoq" is being argued; particularly the first prong of the objective test, as in the case at hand. The case of Smallwood v. United Airlines, Inc. (1981) 661 F. 2d 303 followed the tests set out in Arritt. Arritt, as has already been shown, is similar to the Etobicoke tests and follows the Tamiami approach, as opposed to

Hodgson v. Greyhound Lines, Inc. (1974) 499 F. 2d 859. The recent case of City of Wauwatusa v. Orzel (1983) 697 f. 2d 743 is a decision of the 7th Circuit, U. S. Court of Appeal, the same

Court which adjudicated Hodgson in 1974. It is clear that Orzel at p. 753, adopted the standard set out in the Tamiami case.

Defining the Age Range At p. 29 his decision, Mr. Kerr says:

"The next important question is whether age in the range involved in the Respondents' rationale is relevant to the driver's ability to cope with stress. Since the rationale involves ensuring that drivers hired up to age 35 will have the 10 to 15 years seniority needed to be sure of a regular run under the seniority system before the impact of age on their ability to cope with stress is significant, the relevant age range is 45 to 50."

Mr. Kerr, in his decision, reviews the evidence of the Appellant company employees and expert witnesses, put forth to support the proposition that the Eastern Canadian Greyhound age of hire policy of 35 is a bona fide occupational requirement. The Review Tribunal reviewed this evidence in great detail with Counsel. Much emphasis was put on

> - 10- the stress of working the spare board system and the impacts that might have on family harmony. The medical witnesses offered their views on the ability to cope with these stressors and the impact of aging at age 35.

Counsel for the Appellant tried valiantly to persuade the Review Tribunal that Mr. Kerr erred in fact by not making the necessary linkage between operational evidence and medical evidence led. The Review Tribunal is of the view that that linkage was the very source of the logic which led him to the conclusion that the critical age was between 45 to 50 years, not 35 years. If the stress of the spare board system, as was contended, grew more difficult to tolerate after age 35, and if it took 10 to 15 years to work one's way out of the spare board system, then Mr. Kerr concluded, the important age range to examine was 45- 50.

The medical evidence led centered on whether age 35 was significant in terms of physiological well- being or decline. Mr. Kerr preferred the evidence of the medical doctors called by the Respondent Complainants who indicated that age 35 was not significant in terms of declines in physiological well- being, that every individual differs in their aging process because of individual stress factors and modifiers, and that chronological age is not necessarily synonymous with functional age.

The Review Tribunal reviewed the evidence, medical and operational. It is not prepared to substitute its findings for those of Mr. Kerr. There is logic to the conclusion on critical age reached by Mr. Kerr and we do not find he erred in so stating. The Appellant Company did not prove, on the balance of probabilities, the effect stressors would have on bus drivers driving the spare board beyond age 35. They did not do this to the satisfaction of Mr. Kerr nor to this Review Tribunal. The importance of this cannot be overlooked. If safety is the primary concern of the business and the rationale for the restricted age of hire policy, then clearly it must be shown that the policy actually provides maximum safety. It is difficult to come to this conclusion on the evidence, when it was stated that some drivers

over age 35 purposely choose to drive the spare board at certain peak times for the additional income.

> - 11 The Review Tribunal remembered the words of McIntyre, J. in the Etobicoke case, at P. 23, when he said

"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 fire- fighting is a 'young man's game'. ... evidence was, ... in my view, properly described as "impressionistic", and were of insufficient weight."

Weight to the Evidence of the Medical Witnesses Counsel for the Appellant presented arguments urging the Review Tribunal to find error in the weight given to the expert testimony of the medical witnesses by Mr. Kerr. The Review Tribunal finds support in the evidence for the preferences noted by Mr. Kerr. The curricula of the Doctors and their expertise qualified the practitioners as experts. This qualification was not challenged by either Counsel.

The Review Tribunal would like to note, however, that Dr. Brandaleone's testimony, because of his close ties in the last twenty years as a consultant to a bus company, gave his testimony a self-serving aspect the Review Tribunal was not able to ignore. The absence of empirical research was noted and would have strengthened the argument of either side, had it been available.

The Review Tribunal found compelling certain operational evidence given by Company witnesses. To summarize, it was noted that, with one exception in the North, Greyhound had never hired a driver for a permanent position over 35; Greyhound had not conducted any research or studies to validate their view of the age 35 policy; the two Greyhound Companies did not have any full- time physicians on staff; both Greyhound companies follow the same policies; the sole basis and rationale for the policy asserted in Canada is the direction of the U. S. parent Company; no company officials had any information

> - 12 giving the specific character traits that lead to a tolerance to the impacts of the spare board and age; the U. S. parent Company relied heavily on the Hodgson case for its rationale of the age policy; no procedures had been developed to assess drivers for the impacts of stressors; other bus companies in Canada had higher or no age of hire restrictions; Greyhound would consider hiring over 35 if their needs could not be met within the 24 to 35 age range.

In conclusion, the Review Tribunal has not been pursuaded on any ground of appeal and they are dismissed. The Appellant Company did not discharge the onus on it to prove the bona fide occupational requirement of the age 35 hire policy.

Cross/ Appeal The Review Tribunal heard argument on whether Mr. Kerr erred in not going further than simply ordering Mr. McCreary be enabled to take up the next training opportunity. It was urged on us that the order under s. 41(2)(b) of the Canadian Human Rights Act should have gone on to entitle him to reinstatement with seniority.

There is an essential fallacy to this point of view. Mr. McCreary's application to the training opportunity, not a job, was denied. It would be beyond the jurisdiction of this Review Tribunal and the original Tribunal to restore to Mr. McCreary an opportunity he had not yet won. Mr. McCreary was denied the opportunity to enter and pass the Eastern Canadian Greyhound Lines Ltd. training program. That right was restored to him in the order of Mr. Kerr and will not be enlarged by this Review Tribunal.

The Review Tribunal was also asked to find an error in fact and in law and award the Respondent Complainant $5,000.00 as special compensation. The Review Tribunal considered the argument of Counsel, especially that of Counsel for Mr. McCreary who recommended an award in the range of $3,000.00. The Review Tribunal was sympathetic to these arguments and in the circumstances of this case find that Mr. Kerr did err. The Review Tribunal will substitute an award of $2,000.00 for that of $1,500.00.

> - 13 The Review Tribunal was petitioned to find that Mr. Kerr erred in fact and in law in failing to include in its Order that the Respondent Complainant be given the opportunity to qualify for employment with Greyhound Lines of Canada Ltd. We are not persuaded of the merit of this argument. Mr. McCreary approached Eastern Canadian Greyhound Lines in the usual way and was denied by that Company of the opportunity to enter their training program. It is not pertinent that he would have been interested in openings in the other Company. Mr. Kerr did not err in limiting his order for the training opportunity to Eastern Canadian Greyhound Lines Ltd. only.

Finally, the Review Tribunal was asked to find that Mr. Kerr had erred in law in failing to Order pursuant to section 10 and 42(2)(a) that the Respondent cease any discriminatory practice. The Review Tribunal recognizes that it is customary that such an Order be given when a finding of discriminatory practice has been made. There is no compelling rationale for why Mr. Kerr failed to do so, and in the absence of this, the Review Tribunal is of the view that Mr. Kerr erred in this respect. It may, by extension and goodwill, follow that a company may cease such practice. However, it is unusual that the Order not be made as it is enforceable then and does not rely upon the honor or goodwill of others. Certainty and full redress for the Respondent Complainant requires this Review Tribunal to find an error in this aspect of Mr. Kerr's decision, and to amend his order.

Conclusion The Appeal is dismissed. Ground three of the Cross- Appeal is allowed in part, and ground five of the Cross- Appeal is allowed. An Order is attached.

M. Lois Dyer, Chairperson

Russell Steward, Member Jack London, Member > ORDER IT IS DECLARED that the policy of the Appellant Company not to hire any person over the age of 35 as a bus driver is a discriminatory practice contrary to section 10 of the Canadian Human Rights Act;

IT IS ORDERED that the ORDER of the Tribunal, Robert W. Kerr, dated the 16th day of October 1984 be upheld save for the following amendments:

IT IS ORDERED that the Appellant Eastern Canadian Greyhound Lines Ltd. pay the Respondent Complainant Frank McCreary the sum of $2,000.00 as compensation in respect of injury to his feelings and self- respect; and

IT IS ORDERED that the Appellant Eastern Canadian Greyhound Lines Ltd. cease the discriminatory practice of not hiring any person over the age of 35 as a bus driver.

Dated this 30th day of December, 1985. M. Lois Dyer, Chairperson Russell Steward, Member Jack London, Member