T. D. 6/ 88

DECISION RENDERED ON APRIL 29, 1988

DECISION OF THE TRIBUNAL THE CANADIAN HUMAN RIGHTS ACT

IN THE MATTER OF a Complaint filed under Section 7(a) of the Canadian Human Rights Act

BETWEEN:

JAN CORRIGAN Complainant

AND:

PACIFIC WESTERN AIRLINES LTD. Respondent

DECISION OF THE TRIBUNAL

BEFORE: DONALD LEE, Chairperson

APPEARANCES: For the Complainant and the Canadian Human Rights Commission RENE DUVAL and ESTHER SAVARD

For the Respondent, Pacific Western Airlines Ltd. ROSS ELLISON and KEN FREDEEN

Heard in the City of EDMONTON on October 19 and 20, 1987 and February 10, 1988.

1. APPOINTMENT OF THE TRIBUNAL

On June 5, 1987, the President of the Human Rights Tribunal Panel appointed the present Tribunal to inquire into the complaint lodged by Jan Corrigan on September 4, 1985, which complaint was amended on October, 1985.

The complaint as filed concerns an allocation of discrimination on the ground of sex, contrary to the provisions of the Canadian Human Rights Act (SC 1976 - 77, c 33, as amended) and, in particular, Section 7(a) of the Act.

The Complainant alleges that: "I have reasonable grounds to believe that Pacific Western Airlines Ltd. denied me a position of ramp service agent because of my sex (female) in violation of Section 7(a) of the Canadian Human Rights Act. I applied for the position of ramp service agent at Yellowknife, N. W. T. from June 28, 1982 to October 3, 1984. On April 24, 1985, two male art time ramp service agents who were hired in July 1984 became full- time employees of Pacific Western Airlines Ltd. They were replaced by two male part- time ramp service agents. I was advised by one Pacific Western Airlines Ltd. employee that Pacific Western Airlines Ltd. doesn't want women working on the ramp and by another Pacific Western Airlines Ltd. employee that I wouldn't want to work on the ramp."

The hearings of the complaint took place in the City of Edmonton in the Province of Alberta on October 19 and 20, 1987, and February 10, 1988. The notice of appointment of the Tribunal was entered as Exhibit T- 1.

At the mutual suggestion of Counsel, this Tribunal accepted the Proposal that this matter be heard in two separate phases. The first phase would deal with the finding concerning I ability, and in the case of a finding of liability against the Respondent, the second phase would deal with the issue of damages, if necessary.

2. EVIDENCE AND SUBMISSIONS

The Complainant, Jan Corrigan joined the Respondent, Pacific Western Airlines Ltd. on June 1, 1979 as Administration Clerk, which was a full time position at that time.

The Complainant submitted a memo dated June 28, 1982 (Ex. C- 3) to Rose Fleet, then Duty Manager at Yellowknife, advising that she would like to put her bid in for any Customer Service Agent or Ramp Service Agent positions that became available at the Yellowknife station. The positions that became available at that time were all under the bid system, and the Complainant being a non member of the CALEA Union could not bid for the positions unless no one within CALEA bid for them.

Gary Reid was Station Manager of Yellowknife from late July/ early August 1982 to October 1981. Gary Reid testified that he was not aware of the June 28, 1982 memo from the Complainant and had not seen the said memo until it was presented to him during the investigations by the Canadian Human Rights Commission in this matter, although Rose Fleet testified that Gary Reid did through all of the employees' files which would have included the Complainant's, when he became Station Manager at Yellowknife in July/ August 1982.

From approximately December 1982 to August 1983, the Complainant was away from work on maternity leave, and upon her return to work in August 1983, her position as Administration Clerk was changed to part time.

In May 1984, the Complainant received a layoff notice (Ex. R- 2) from Pacific Western Airlines Ltd. advising her that her last day of work was to be June 15, 1984. In August 1984, the Complainant accepted $2,300.00 from Pacific Western Airlines Ltd. as a settlement since she decided to withdraw from the Human Resource Pool, and she signed a waiver releasing Pacific Western from any liability arising out of her employment (Ex. R- 3).

At the end of September 1984, the Complainant was asked by Pacific Western Airlines Ltd. to return to work on a casual basis at the Yellowknife station.

Meanwhile, two temporary Ramp Service Agent positions became available in June 1984, which positions were filled by Andrew Balsan and Steve Anderson who were hired from outside the Company's Union with no previous experience related to the job. Counsel for the Respondent inquired as to why the Complainant did not raise any complaint in June 1984 since the Complainant should know that two new temporary staff were hired as she was still working in

that office until June 15, 1984. The Complainant's explanation was that there were always people coming through their office, and she would not know who exactly every strange face was. Therefore, she said she only learned about the hiring of Andrew Balsan and Steve Anderson in late September 1984 when she returned to work on a casual basis.

The Complainant submitted another memo dated October 3, 1984 to Gary Reid (Ex. C-4), requesting that she be considered for any permanent, temporary, or part time Customer Service Agent or Ramp service Agent positions that may become available. Gary Reid told the Tribunal that he had never seen the October 3, 1984 memo until it was shown to him during the Canadian Human Rights Commission's investigations.

In October 1984, the Complainant spoke to Paul Mansueto, who was first the Cargo Supervisor supervising Ramp Service Agents, and later became Airport Supervisor at Yellowknife from the Fall of 1983 to January 1985. The Complainant testified that she verbally expressed to Paul Mansueto that she was upset for not being offered the temporary positions of Ramp Service Agent that came up in June 1984, and that Paul Mansueto replied that she would not know how to operate a fork lift and that the Company would not want women working on the ramp. However, Paul Mansueto told the Tribunal that he did not recall such a conversation with the Complainant.

Eventually in early 1985, Andrew Balsan and Steve Anderson became full time Ramp Service Agents and that left two temporary part time vacancies again. Greg Rourke and Don Squires were hired for the two temporary part time positions on February 18 and 21, 1985 respectively.

The Complainant stated that in April 1985, she made a verbal complaint to Gary Reid about why she was not being considered for any of the four temporary positions of Ramp Service Agent in June 1984 and February 1985. She further stated that Gary Reid told her that working on the ramp was not for a woman and did she know how to drive a fork lift. Gary Reid testified that he did not recall any conversation about women working on the ramp or the ability of women to drive fork lifts.

The Complaint also stated that she made the same verbal complaint to Ferd Caron, then Cargo Supervisor at Yellowknife, who allegedly asked the Complainant whether she knew how to operate any of the ramp equipment, and apparently stated that it was a hard job for a woman. Ferd Caron testified that he vaguely recalled his conversation with the Complainant in April 1985, in which they had discussed some of the work involved in a Ramp Service Agent position, and that he suggested that the Complainant go to the airport and see what was involved in such a position.

Counsel for the Respondent questioned why the Complainant did not voice her complaint in February 1985 and instead, waited until April 1985 to speak to Ferd Caron and Gary Reid.

Shortly afterwards, the Complainant was offered two Ramp Service Agent positions, one to commence on May 22 and the other May 26, 1985. Eventually the Complainant chose the one that commenced on May 26, 1985. Since all ramp staff are in the Union called CALEA, the Complainant became a member of CALEA and was eligible to bid for any positions that came

up. After approximately two months from May 26, 1985, she put in a bid for a Customer Service Agent position (Ex. R- 4). Counsel for the Respondent questioned the reason why the Complainant chose the position that commenced on May 26, 1985 as that would make her lose her seniority over the person that filled the May 22, 1985 position. Also, Counsel for the Respondent questioned the Complainant's genuine interest in being a Ramp Service Agent since she bid for a Customer Service Agent position two months after she worked as a Ramp Service Agent.

The Complainant submitted a formal complaint dated September 4, 1985 to the Commission (Ex. C- 1) and later submitted an amended complaint dated October 3, 1985 (Ex. C- 2), as stated in (1) above.

Counsel for the Complainant brought in several witnesses who were Pacific Western employees to testify against the Respondent:

(1) Arlen Tedrick, who was a Union Representative and Vice Chairman of the Region in 1984 testified that when he spoke to Ferd Caron shortly after Andrew Balsan and Steve Anderson were hired full time as to why had the Complainant not been considered for Ramp Service Agent, Ferd Caron replied that he did not feel that she could do the job because she was a woman. However, Ferd Caron testified that he did not recall such a conversation. There was some confusion in Arlen Tedrick's testimony concerning the time and date that this conversation took place. Arlen Tedrick also acknowledged that he and Ferd Caron had had a disagreement over "work assignments" in the past.

(2) Terry Bangle who was a Union Representative at the time the alleged discrimination took place, testified that he spoke to Gary Reid after Andrew Balsan and Steve Anderson were hired as temporaries in June 1984, about the Complainant's wish to be a Ramp Service Agent. Terry Bangle said Gary Reid told him that he did not believe that women should be working on the ramp and could he imagine the Complainant driving a fork lift. He further testified that he also spoke to Paul Mansueto about the same matter, and Paul Mansueto replied that women should not be allowed to work on the ramp because they may hurt themselves as the work was more suited to men. However, both Gary Reid and Paul Mansueto told the Tribunal that they could not recall the said conversations. It was also noted that Terry Bangle seemed to have had a considerable number of disciplinary problems with Management.

(3) Alice Wong who has been a Customer Service Agent since June 1979 testified that Gary Reid once said to her, when she complained about why she was not offered to do overtime as a Ramp Service Agent, that he could not imagine her driving the fork lift and unloading the aircraft, and that he guessed he was a male chauvinist pig. Alice Wong told the Tribunal that Gary Reid said it with a big smile on his face and she really did not think Gary Reid was a male chauvinist pig. It was also noted that Alice Wong acknowledged that she was not trained for the function of a Ramp Service Agent and that was probably the reason why she was not offered the overtime.

Counsel for the Respondent's argument included the following points: (1) That the Complainant had always wanted to be a Customer Service Agent with the Company, as opposed to Ramp Service Agent, particularly since the Complainant first wrote to Mr. A. Fulks in a letter dated

January 29, 1982 (Ex. R- 1) when Mr. Fulks was Customer Services Manager in Yellowknife, that she wished to apply for the position of Customer Service Agent.

(2) That there was no logical or practical reason for the Complainant who held a permanent position until May 28, 1984 to resign from that position and take a temporary Ramp Service Agent position in June 1984, when such employment would traditionally end at the end of Summer.

(3) That Gary Reid and Paul Mansueto had always thought that the Complainant was looking for more hours of work after her layoff in June 1984, and were not made aware by the Complainant that she wanted to be a Ramp Service Agent. Further, Gary Reid worked very hard to increase the Complainant's office hours in February 1985.

(4) That the Complainant had numerous occasions to voice her complaint to My Reid after the staffing of temporary Ramp Service Agents in both June 1984 and February 1985 since the Yellowknife station was a small office and they met on a daily basis. However, the Complainant did not make a verbal complaint to Gary Reid until April 1985.

(5) That Gary Reid encouraged Rose Fleet to work at the Airport as Duty Manager, doing many things that would more typically be considered as men's work. He also hired three or four women in Ramp positions.

3. APPLICATION OF THE LAW

The purpose of the Act is to give effect to the principles of equal opportunity for all individuals without hindrance rom, any prohibited grounds of discrimination.

Section 2 of the Act reads: 2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. 1976- 77, c. 33, s. 2; 1980- 81- 82- 83, c. 143, ss. 1, 28.

The Act provides that it is a discriminatory practice for an employer to refuse to employ any individual or to pursue a policy that tends to deprive an individual of any employment opportunities on a prohibited ground of discrimination. Sex is one such prohibited ground. The following sections of the Act are relevant to this issue:

3. (1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

7. it is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

The burden, and order, or proof in discrimination cases involving refusal of employment in Canadian jurisdictions, appears to be that a Complainant must first establish a prima facie case of discrimination. Once that is done, the burden shifts to the Respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. Thereafter, assuming the employer has provided an explanation, the Complainant has the eventual burden of showing that the explanation provided was merely a "pretext" and that the true motivation behind the employer's actions was in fact discriminatory.

"In an employment complaint, the Commission usually establishes a prima facie case by proving:

a) that the complainant was qualified for the particular employment; b) that the complainant was not hired; and, c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the Human Rights complaint subsequently obtained the position.

If these elements are proved, there is an evidentiary onus on the Respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred."

Florence Shakes v. Rex Pak Limited (1982) 3 CHRR D/ 1001 at D/ 1002 Julius Julius Israel v. Canadian Human Rights Commission and Public Service Commission (1983) 4 CHRR D/ 1616

I find that the Complainant was not hired for a position that she was qualified and that males no better qualified than the Complainant was subsequently hired for the position under consideration. Therefore, I find that the Commission has met all three requirements as set forth above to meet its initial burden.

It therefore falls upon the Respondent to provide a reasonable explanation as to why the Complainant was not employed for the position in question.

Essentially, the explanation centered on the reasons that the Respondent was not aware of the Complainant's desire to be a Ramp Service Attendant prior to the Complainant's conversation with Gary Reid in April 1985; that the Respondent had always thought the Complainant wanted to be a Customer Service Agent and at times, had simply wanted more office hours to earn more money; and that the Complainant had not made it obvious or clear to the Respondent about her wish to be a Ramp Service Agent until April 1985, after which the Complainant was offered such a position when the next available one came up in May 1985.

In my opinion, the Complainant did inform the Respondent in writing, of her wish to be a Customer Service Agent, not once but twice, in June 1982 and October 1984 (Ex. C- 3 and C- 4). Whether or not Ramp Service Agent was her first choice or second choice and whether or not it was a logical choice are secondary points because the main consideration is the fact that she did include Ramp Service Agent in her June 1982 and October 1984 memos. She is under no obligation to make it absolutely obvious and clear or to remind Management on a regular basis about her wish. She has made her point by submitting the said two memos to Management. Moreover, she was advised by the Respondent in May 1984 that she was going to be laid off and that her last day of work was June 15, 1984. Therefore, she would most likely be interested in the temporary position of Ramp Service Agent that came up in June 1984, because working as a temporary Ramp Service Agent would likely be better than being laid off. She has also spoken to Paul Mansueto in October 1984, who was someone indirectly involved in the staffing of Ramp Service Agents. She was entitled to be considered for Customer Service Agent or Ramp Service Agent positions when these positions became available.

The Respondent's claim that no one in Management ever recalled seeing the said two memos from the Complainant or ever having had any conversation with the Complainant about the matter herein, are not sufficiently reasonable explanations for their action. The June 28, 1982 and October 3, 1984 memos do exist, and in normal circumstances would certainly have come to the attention of Management. Although one is not expected to practically remember every single letter or memo that goes through the office, a competent Management should have a system in place to ensure that employees' requests for internal transfers or promotions are followed up properly.

There appears to have been a benevolent view held by some members of Management with respect to the Complainant's marital and family problems thereby making it difficult for her to work shift hours as required in the position of Ramp Service Agent, which likely was well placed in their subjective judgment, however subjective views held in good faith are not sufficient to constitute a reasonable explanation on the Respondent's part as to why the Complainant was not hired for the position. For example, one Board of Inquiry, McBean v. Village of Plaster Rock (New Brunswick Board of Inquiry, 1975) at p. 12, cited in Lennon, "Sex Discrimination in Employment: The Nova Scotia Human Rights Act" (1976), 2 Dal. L. J. 5- 91 at p. 601., has suggested that the term "bona fide" as opposed to "reasonable" in the context of occupational qualifications may simply require subjective good faith on the part of the employer. In the article on Sex Discrimination in Employment Lennon comments:

"If the test is a subjective one then it is possible that employment practices based on traditional views about the roles and capacities of

women may not violate the Act as > - 9 long as they are hold honestly and in good faith. Surely, this is not what the legislature intended! Of course, with the increasingly active role being played by women in all areas of the labour force, the good faith with which traditional views are held must become increasingly questionable. In any case, whether the test is objective or subjective, the employer would have to argue that he believed a woman could not do the job, not just that he did not want her to do it, before he could hope to succeed with the defence."

It appears from the evidence that there is no question that the Complainant is capable of performing the duties of a Ramp Service Agent just as competently as the four gentlemen who were hired as temporaries for the same position in June 1984 and February 1985, who themselves were inexperienced in ramp work prior to their hirings.

Sex discrimination is not necessarily a practice that is always overtly displayed. Direct evidence that sex discrimination is deliberately practised was not present in this case. However, the circumstantial evidence that I have described does tend to support the Complainant's case. The extent of the circumstantial evidence required in order to support the Complainant's case has been described as that which:

"must be consistent with the allegation of discrimination and inconsistent with any other rational explanation".

Kennedy v. Mohawk College (1973) Ontario Board of Inquiry (Professor Borons)

The standard of proof however that I believe is preferable under the present circumstances to establish discrimination based on sex is the civil standard of proof, that is, by a preponderance of evidence on a balance of probabilities.

Julius Israel v. C. H. R. C. (Supra) BHINDER v. CNR (1981) 2 C. H. R. R D/ 546; [aff. (1985) 2 S. C. R. 561] In the case of BALBIR BASI v. CANADIAN NATIONAL RAILWAY COMPANY (Feb. 16, 1988) Chairman Richard I. Hornung, Q. C. was persuaded to accept the civil standard of proof in a case with respect to discrimination based on race or colour on the logic employed by B. Vizkelety in her recent book : Proving Discrimination in Canada, (1987) Carswell, where she states at page 142:

"it is suggested that the Kennedy (v. Mohawk College) Standard reflects a criminal as opposed to a civil standard of proof and that, as such, it is too rigid. There is indeed, virtual unanimity that the usual standard of proof in discrimination cases is a civil standard of preponderance. The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard, may therefore be formulated in this manner: an inference of discrimination may he drawn where the evidence offered in support of it such in inference more probable than the other possible inferences or hypotheses."

On the basis of this civil standard of proof, the Tribunal concludes that the Respondent, in having failed or neglected to give due and proper consideration to the Complainant's request for considering her for any vacant positions of Customer Service Agent or Ramp Service Agent, discriminated against the Complainant because of her sex.

DECISION AND ORDER:

For the above reasons, the Tribunal:

DECLARES the Complaint in the present case to be substantiated in that the Respondent, though not wilfully, has nevertheless engaged in a discriminatory practice in contravention of the

Canadian Human Rights Act by having failed, or neglected to consider the Complainant's request for considering her for any Customer Service Agent or Ramp Service Agent positions, the whole in violation of and contrary to the provisions of Section 7 of the Act.

I am retaining jurisdiction to hear evidence and arguments on the issue of damages, in the event Counsel cannot come to agreement. Either party is at liberty to request that the Tribunal reconvene to hear further submissions on this issue.

Dated at the City of Edmonton this 5th day of April, 1988.

Donald Lee, Tribunal Chairman

M03 [20,11]