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Decision Rendered January 19, 1988

THE CANADIAN HUMAN RIGHTS ACT (S. C. 1976- 77, C. 33, as amended)

HUMAN RIGHTS TRIBUNAL BETWEEN:

PHIL FRANÇOIS Complainant

AND:

CANADIAN PACIFIC LIMITED (CP RAIL) Respondent

DECISION OF THE TRIBUNAL

BEFORE: KEVIN W. HOPE APPEARANCES:

Anne Trotier and René Duval, Counsel for the Canadian Human Rights Commission

Marc Shannon and Michael McLearn, Counsel for Canadian Pacific Limited

> JUDGMENT

INTRODUCTION:

This matter involves a complaint by Mr. Phil Francois against his employer, Canadian Pacific Railway, which may be briefly summarized as follows:

a) abolishment of his position as storeman being adverse differentiation because of race and colour contrary to Section 7(b) of the Canadian Human Rights Act* (CHRA);

b) locking of his work area being discriminatory and constituting harassment contrary to Section 13.1(c) CHRA; and,

c) destruction of his personal property with black paint being discriminatory and constituting harassment contrary to Section 13.1(c) CHRA.

His complaint dated April 22, 1985 was filed with the Canadian Human Rights Commission (CHRC). This Tribunal was appointed, following an investigation, pursuant to subsection 39(1.1) CHRA.

Other incidents alleged to have occurred in the evidence of Mr. Francois are not specifically complained of in the aforementioned document, but have been considered as part of the context or environment out of which his complaint has arisen.

I will start with a review of the facts which are relevant to the issues at hand and give my findings. I will then briefly discuss the law and apply it to my findings of fact.

FINDINGS:

I would like to deal first with the abolishment of the Complainant's position (item 'a' above). Mr. Francois alleges that this constituted adverse differentiation on the basis of his race and colour contrary to Section 7(b) CHRA.

Mr. Francois worked the afternoon shift (4 - 12 o'clock p. m.) at the Alyth Stores, Calgary until his position was abolished on December 31, 1984. He then exercised his seniority rights and moved to a similar position at the Ogden Stores in Calgary, thereby "bumping" a more junior employee from that position.

Mr. Sayer, manager of materials, Pacific Region, testified that on January 1, 1985 a 5 percent increase in wages was to take effect, yet his budget was to remain the same as in 1984 thereby necessitating a reduction in staff. A total of 5 shifts were eliminated as a result, one of which was that worked by the Complainant. He felt that this shift would be eliminated with the least disruption because refrigerator cars were not being repaired at that time of the day, minimizing the need for parts from the Stores.

In any event, Mr. Sayer testified that the employees who worked the shifts before and after Mr. Francois had more seniority than he and would in all likelihood have "bumped" Mr. Francois had their positions been eliminated instead. This was borne out by the fact that when the afternoon shift was later reinstated and the night shift dropped (again because of scheduling of refrigerator car repairs) the night shift employee prevailed in his bid for the afternoon shift because of seniority over the Complainant.

* SC c. 33 as amended I found Mr. Sayer to be credible and I accept his testimony as truthful and accurate in this regard. I am therefore satisfied that there was no discrimination against the Complainant with respect to the elimination of his position at Alyth Stores.

Next, I will deal with a second ground of complaint-- the locked doors (item 'b'). Mr. Francois alleges that certain doors were bolted from the inside on occasion when he started his shift at the Alyth Stores. This he alleged constituted harassment contrary to Section 13.1(c) CHRA.

The 'Stores' contain inventory of various materials required by the shop employees for the maintenance and repair of railway equipment. All materials

issued by the Stores are to be accounted for and storemen, such as the Complainant, are employed to control and protect the materials. In this system, free access from the shop to the Stores cannot be permitted and therefore only storemen have keys to the storeroom.

There was a considerable amount of evidence given to show that Mr. Francois frequently arrived late for his shift when working at the Alyth Stores. This is not disputed by Mr. Francois. It was also acknowledged by Mr. Francois that the storeroom doors were only found locked on

occasions when he was late for work. On these occasions only certain doors were bolted from the inside and he had keys to gain access to the Stores through another nearby entrance.

Mr. Sayer testified that the Stores could not be left unlocked and unattended. He indicated that previously the company's policy was to have Store employees wait until the next shift arrived even if this meant paying overtime wages where the succeeding shift arrived late. Payment of overtime was later eliminated by management and storemen were then instructed to lock up and leave whenever storemen for the next shift were late to arrive.

Mr. Sayer testified that the Complainant was often late resulting in 58 hours of overtime being paid until the company's policy was changed.

I again accept Mr. Sayer's evidence in this regard. I find that the doors were locked when Mr. Francois arrived late not to discriminate against him, but to protect the Stores after storemen were instructed to leave rather than remain and receive overtime pay. This is simply a matter of common sense and could not reasonably be interpreted as discriminatory when all storemen including Mr. Francois had keys which allowed easy access to their workplace even when arriving late.

The last item of complaint, the black paint incident, requires more detailed study and in particular a consideration of the entire context or working environment in which it occurred. Mr. Francois alleges, and there is no contrary evidence, that on April 30, 1984, his locker and its contents had been vandalized with black paint. This he alleges, constituted harassment on the basis of a prohibited ground of discrimination (race or colour) contrary to Section 13.1(c) CHRA.

Mr. Francois worked the afternoon shift at Alyth Stores during the period of time in question, which was preceeded by the day shift manned by Mr. Lyth and Mr. Lovejoy. Mr. Lyth continues to be employed by the Respondent and he gave evidence at the hearing. Mr. Lovejoy has left the Respondent's employ and his present whereabouts is unknown. The immediate supervisor of all three storemen was Mr. Drews who has since retired. He was not called to give evidence.

It is clear from the evidence that there existed a considerable amount of friction or conflict between Mr. Francois and Messrs. Lyth and Lovejoy. Mr. Francois testified that Mr. Lyth and Mr. Lovejoy would call him "Black Boy" and "Big Black Dude". He in turn called the others "White Boy". Mr. Lyth confirmed that name calling occurred frequently, although each stated that the other initiated the exchanges.

In addition to name calling, two other noteable incidents occurred shortly prior to the black paint incident. Both were attributed to Mr. Lyth and Mr. Lovejoy. A black blanket was left for the Complainant, according to Mr. Lyth for the purposes of helping Mr. Francois to sleep on the job. Also, a banana and steel wool were fashioned in the shape of a penis and left by Mr. Lyth and Mr. Lovejoy for the Complainant. Mr. Lyth indicated that this was intended as a joke. There was some indication that there may have been written notes accompanying both the banana and the blanket, however, I am only able to make a positive finding with respect to the blanket. Mr.

Grigg, Canadian Pacific Investigator, testified that a note attached to the blanket stated something to the effect of "here is your blanket Black Boy".

In the testimony of Mr. Lyth, he made a point of raising his dissatisfaction with Mr. Francois' job performance including lateness, sleeping on the job and creating a backlog of work for the others. These are stated as his reasons for disliking the Complainant and not race or colour. Mr. Lyth denied any involvement in the black paint incident and there was no evidence given to implicate him. Mr. Lyth indicated that he had complained to Mr. Drews about Mr. Francois' performance and that he felt that he was given "more chances than usual" and should have been dealt with in a "tougher manner" regarding his lateness.

Following the black paint incident, Mr. Drews was told by his superior, Mr. Sayer, to make enquiries to determine who was responsible for it. Mr. Sayer testified that Mr. Drews was upset with the incident and this is confirmed by the testimony of Mr. Grigg. Mr. Drews apparently was unable to establish who was responsible for the black paint.

Mr. Sayer indicated that the black paint incident was then reported to the C. P. Police for investigation. Mr. Grigg met with Mr. Sayer in this regard.

Mr. Grigg conducted a thorough investigation of the matter in his role as C. P. Police Investigator. He testified, and I accept that he spent approximately 30 to 40 hours on the investigation. Unfortunately he was unable to find the perpetrators. He stated that criminal charges would have been laid had he established who was responsible for the black paint incident.

Mr. Francois testified that Mr. Grigg had told him that he knew who the culprits were, but this is not borne out by the complaint filed by Mr. Francois or by the testimony of Mr. Grigg which I accept. It may be that Mr. Grigg had some suspicions as to the identity of the perpetrators as I am sure Mr. Francois himself would have had. However, I am satisfied that Mr. Grigg did not have sufficient proof to warrant laying charges and that the investigation was taken seriously by Mr. Grigg and the C. P. R.

During his investigation, Mr. Grigg discovered both the banana and the black blanket incidents. These were attributed to Messrs. Lyth and Lovejoy who admitted their involvement. Both were warned by Mr. Grigg that their actions brought them close to criminal charges and that such behaviour would not be tolerated by the company in the future.

I believe that Mr. Grigg was a truthfull witness and that his handling of the matter was reasonable in the circumstances.

As discussed earlier, one cannot look at the black paint incident in isolation, but must consider it in the context of the Complainant's work environment at Alyth Stores.

The testimony of Mr. Lyth regarding name calling is indicative of a less than satisfactory work environment. I find that his actions and behavior were of a racist and discriminatory nature. Mr.

Lyth's demeanor at the hearing was somewhat flippant and unrepentant. He does not appear to have taken his own actions seriously.

When asked why he called the Complainant "Big Black Dude", he replied that Mr. Francois was "big and black". This explanation is neither acceptable or funny-- it is simply racist and discriminatory. Dissatisfaction with the Complainant's work performance cannot justify racial slurs of this nature.

Similarly, I find that the black blanket and accompanying note were of a discriminatory nature. Would Mr. Lyth have treated a white employee with the Complainant's work record in the same fashion? Would he have called him "White Boy"? Would he have given him a white blanket? I think not. These actions show that Mr. Lyth differentiated on the basis of Mr. Francois' colour when such differentiation was not called for.

Regarding the banana incident, there was insufficient evidence to show that it was of a discriminatory or racist nature. However, such determination is not necessary in the circumstances and I will simply state that Mr. Lyth's "joke" was in poor taste.

I also point out that terms used by the Complainant including "White Boy" are discriminatory and cannot be justified regardless of who started the name calling. Racial discrimination by one cannot justify that by the other. Further, provocation is not a defence to discrimination in the CHRA.

I find that Mr. Francois' explanation of his fiancee describing Mr. Drews as an "old white man" is unsatisfactory. He suggests that this is simply a method of describing or distinguishing him. The point is that a distinction on the basis of colour is being made when no distinction is necessary-- this goes to the root of discrimination and racism.

It was suggested by the Respondent that terms such as "Black Boy" are simply "shop talk" and acceptable in this type of environment. If such name calling is commonplace, it shouldn't be. That is why we require the CHRA to prevent it.

It was also suggested that "Black Boy" is no different than nicknames such as "shorty" or "stretch". This I cannot accept and I would simply point out that height is not a prohibited ground of discrimination in the CHRA; colour is.

The question was put by the Respondent in oral argument: Can one dislike a coloured person for reasons other than his colour? The answer is yes and I accept that. However, dislike for another reason, whether it be job performance or otherwise, does not justify acts of discrimination such as the name calling and the blanket incident which have occurred here.

It is suggested that the Complainant was either paranoid or himself a racist. I agree that the Complainant has overreacted in certain instances and has seen things as discriminatory which in fact were not. The locked doors previously discussed are an example of this.

I also agree that Mr. Francois has himself shown that he is guilty of racial slurs. However, his own paranoia or acts of discrimination cannot justify acts of discrimination against him-- neither are defences under the CHRA.

In view of my findings with respect to the name calling and the black blanket incidents, I must conclude that the black paint incident is also an act of discrimination on the basis of Mr. Francois' colour and race. Although black paint was readily available in the Stores and shop, the fact that it was used is consistent with the name calling and black blanket theme-- focusing on Mr. Francois' colour. I find that it was reasonable in the circumstances that Mr. Francois would perceive this as a racial attack.

I accept Mr. Francois' evidence that he found his locker in its vandalized state and reject the notion the he himself might have put the black paint into it.

Although no perpetrator was ever identified with respect to this incident, such identity is not necessary for the purpose of establishing that the Complainant has been harassed on a prohibited ground of discrimination contrary to Section 13.1(c) CHRA.

APPLICATION OF THE LAW: I was referred by the Respondent to a decision of a Board of Inquiry under the Ontario Human Rights Code in Sam Nimako v. Canadian National Hotel (1987) 8 CHHR p. D/ 3985. This case involved a black employee who when dismissed by his employer alleged racial discrimination. After a lengthy review of the facts, the Board dismissed the complaint stating that:

"Nimako was unwilling to accept responsibility for his own faults, and branding as racist everyone who had anything to do with his various disciplines was simply an ex post fact excuse totally at odds with reality"* [* p. D/ 4007]

I would point out that in the Nimako decision it was determined that a racial slur had occurred only once, that it was made in a fit of anger and in the Complainant's absence. At page D/ 4005, the Board discusses the expression "fucking black bastard" as follows:

"The words were provoked not by Mr. Nimako's colour, but by his conduct ... The implication was not that he was a "bastard" because he was black, but that he was a "bastard" who happened to be black. It would run counter to common sense, surely, to suggest that anyone who utters such an expression in such circumstances is therefore racially prejudiced...".

I respectfully disagree with this line of reasoning. This would suggest to me that one can use any name you wish including racial slurs so long as you have other reasons or provocation for doing so. Such reasons or provocation would become a "license" to discriminate. I cannot agree that this argument has a place in our society. Surely there are more appropriate methods of dealing with anger and discipline in the workplace.

To apply this line of reasoning to the facts of the present case, it seems to me that the black blanket and even the black paint incidents would be acceptable if the perpetrators were angry

with the Complainant for performance related reasons. I cannot accept that this is a reasonable interpretation of the legislation that we are dealing with, namely the CHRA.

I will now turn to the CHRA itself and consider the meaning of Section 48(5) and (6). It seems to me that the acts of Mr. Lyth and Mr. Lovejoy cannot be said to be the acts of the Respondent itself in the absence of some principal of "vicarious liability".

Although there is little evidence as to the involvement of Mr. Drews in the entire course of events, I feel that he too could not be said to be 'the Company' without the help of legislation 'deeming' it to be so.

Section 48(5) of the CHRA is a statutory form of vicarious liability. It states that:

"(5) Subject to subsection (6), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization."

Section 48(6) provides a 3 pronged test for an exception to the statutory liability imposed by Section 48(5) as follows:

"(6) An act or omission shall not, by virtue of subsection (5), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof."

I was referred to a recent decision of the Supreme Court of Canada in Bonnie Robichaud and The Canadian Human Rights Commission v. Her Majesty the Queen as Represented By the Treasury Board [1987] SCR 303.

This case dealt with an employer's liability for the acts of an employee, however it is stated at page 317 that Section 48(5) and (6) CHRA were enacted subsequent to the activities complained of and their effect was not considered. I therefore have no guidance from this decision with respect to Section 48(5) and (6).

It is worthy of note however, that in the Robichaud decision (where the employer was held liable for the actions of an employee) it was established that the employer had no clearly defined policy against sexual harassment which had been communicated to its employees. Further, when complaints were brought to management, no investigation was conducted and the Complainant was transferred to a less desirable position where her duties were curtailed. The identity of the employee who was later held to be guilty of sexual harassment was known to the employer and he was not disfavoured or monitored to avoid intimidation of other employees who were witnesses to the events in question.

I feel that these facts in the Robichaud case clearly distinguish it from the facts of the case at hand. I will deal with this in more detail later in my examination of Section 48(6) CHRA.

With respect to subsection 48(5) it appears that liability attaches to an employer only with respect to "any act or omission committed by an officer, a director, an employee or an agent of..."(the employer). Here the matter which I have found to be discriminatory is the black paint incident. There is no proof as to who committed it. Therefore, it cannot be said with certainty that it was an act of an officer, director, employee or agent of the Respondent. Even if the vicarious liability provision of Section 48(5) were met, we must ask whether the Respondent is exempted from liability by subsection 48(6) of the Act.

Subsection 48(6) contains 3 basic elements to be satisfied by an employer to avoid the liability under Section 48(5). They are:

1) that the employer did not consent to the commission of the act or omission complained of;

2) that the employer exercised all due diligence to prevent the act or omission from being committed; and,

3) that the employer exercised all due diligence subsequently to mitigate or avoid the effect of the act or omission.

In the present case the "act" which we are concerned with is the black paint incident. Had I found that the Respondent knew who had perpetrated this discriminatory act of harassment, my decision would depend primarily upon what steps it had taken subsequently to punish the guilty party or parties. However, I am satisfied with the evidence before me that this is not the case. I am also satisfied with the evidence of Mr. Grigg and others that had the Respondent discovered such identity, it would have caused criminal charges to be laid.

The question then is whether the Respondent has met the 3 requirements or elements of Section 48(6) with respect to the black paint incident.

First, there is no doubt in my mind that the Respondent did not consent to or condone this incident. While not admitting to the discriminatory nature of the act, the Respondent acknowledged throughout that it was reprehensible and unacceptable to the Company. I accept Mr. Grigg's testimony that the Respondent viewed this as criminal behaviour. There is no evidence before me to lead me to the conclusion that the Respondent consented to it.

Secondly, I find that the Respondent exercised all due diligence to prevent acts of discrimination such as this. Unlike the Robichaud case discussed previously, it was established that the Respondent had a clear policy to prevent discrimination on the basis of race or colour as set out in its Employment Guide Book- and in its Code of Business Conduct. I accept the evidence of Mr. Pickup and Mr. Sayer in this regard. The Respondent's policies on discrimination were communicated to its employees and were to be acknowledged in writing from time to time by supervisory personnel. Mr. Sayer testified, and I accept that he attended a seminar in Toronto

regarding human rights. I am satisfied that the Respondent takes its responsiblities seriously in this area.

In considering steps taken by the Respondent to prevent acts of discrimination it is also relevant to consider the Complainant's responsibility to report offences.

Mr. Francois filed a grievance against Mr. Pickup for discrimination when Mr. Pickup raised his voice to say "Francois come here". I accept the testimony of Mr. Waddell that this matter was taken seriously and that standard procedures were followed regarding the investigation and disposition of the complaint. Although the matter was resolved between the Company and the Union, Mr. Pickup was warned about raising his voice in the future when addressing all employees. This I find was reasonable in the circumstances.

The evidence of Mr. Francois shows that he did not give 'fear of discrimination' as an excuse for his lateness when working the afternoon shift at Alyth, but that he had given numerous other reasons. If discrimination was his real reason, he did not indicate this to management even when disciplinary proceedings were taken against him. It seems to me that one cannot legitimately maintain that the Respondent failed to exercise due diligence to avoid acts of discrimination without first putting management on notice that they are occurring.

Thirdly, the Respondent has shown that it has exercised due diligence subsequent to the black paint incident to mitigate or avoid its effect.

The Respondent undertook a thorough investigation which revealed the banana and black blanket incidents although it yielded no conclusion as to the identity of the perpetrators of the black paint incident. Following the investigation, Mr. Lyth and Mr. Lovejoy were reprimanded by Mr. Grigg for their involvement in the black blanket and banana incidents. I feel that the investigation was handled in a responsible fashion by the Respondent.

The Respondent also fully compensated the Complainant for the value of his property loss resulting from the black paint incident. It was acknowledged by Mr. Francois that the Respondent initiated this process.

The effect of the Respondent's actions following the black paint incident are borne out by the apparent fact that similar incidents have not occurred since.

CONCLUSION:

I must conclude therefore, that the Respondent has met the requirements of Section 48(6) CHRA and that it cannot be held liable for the black paint incident complained of.

I would like to make it very clear that this tribunal in no way condones the actions of Mr. Lyth and others including name calling, the black blanket, the banana and the black paint incident. In addition to their racial nature, they are childish and cowardly actions. I must commend management of the Respondent on its policies and practices and I encourage the Respondent to

continue in its efforts to see that its policies in the area of human rights are better understood by all employees.

It is also worthy of mention that Mr. Francois' performance on the job has shown marked improvement according to his own evidence and that of Mr. Waddell. For this I congratulate Mr. Francois as it is evident that he has made a genuine effort to put his problems and disciplinary matters behind him. I am confident that with Mr. Francois' continued efforts to perform at or above Company standards, not only will his job satisfaction improve but he will become recognized as a valued employee by his employer.

I would like to thank Counsel for their capable presentations and courtesy throughout.

The Complainant is accordingly dismissed without costs.

RENDERED at Lloydminster, this 11th day of December, 1987.

Kevin W. Hope Chairperson, Canadian Human Rights Tribunal