

T. D. 7/ 88

Decision rendered on May 17, 1988

TRANSLATION FROM FRENCH

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

CHARLES F. HOLDEN Complainant

and

CANADIAN NATIONAL RAILWAY COMPANY Respondent

BEFORE: Antonio De Michele Chairman

APPEARANCES:

JAMES HENDRY Counsel for the Complainant and the Canadian Human Rights Commission

JACQUES PERRON Counsel for the Respondent

DECISION

1. APPOINTMENT OF THE TRIBUNAL

On October 7, 1986, the President of the Human Rights Tribunal Panel appointed Mr. Casimir Bielski, QC, of Oakville, Ontario, to inquire into the complaint filed by Mr. Charles F. Holden on October 4, 1982 against Canadian National Railway Company, and to determine whether the actions described in the complaint constituted a discriminatory practice on the ground of age in a matter related to employment, pursuant to the Canadian Human Rights Act.

The said Tribunal held hearings on February 16, 17 and 18, 1987, and on April 8, 1987, at Montreal, Quebec.

After the hearings had been terminated and all the evidence had been presented, and before the Tribunal had rendered its decision, Mr. Casimir Bielski, QC, died.

On June 15, 1987, the President of the Human Rights Tribunal Panel appointed the present Tribunal to replace the Tribunal appointed on October 7, 1986, pursuant to subsection 39 (1.1) of the Canadian Human Rights Act, to inquire into the complaint filed by Mr Charles F Holden on October 4, 1982, against Canadian National Railway Company, and to determine whether the actions described in the complaint constituted a discriminatory practice on the ground of age in a matter related to employment, pursuant to the Canadian Human Rights Act.

After the present Tribunal was appointed, a pre-hearing conference was held at Montreal on September 14, 1987, with the complainant, the complainant's counsel, and counsel for the respondent in attendance.

At this conference, the parties and their counsel agreed that the transcript of the stenographic notes of the proceedings heard earlier by Mr. Casimir Bielski, QC, be added in their entirety to the record, as though heard in full before the present Tribunal.

It was also decided, by common consent of the parties and their counsel, that the proceedings would be reopened in order to hear the testimony of Mr. Holden relating to events that had taken place between February 1987 and June 1987.

The Tribunal therefore held additional hearings on November 12 and 13, 1987, at Montreal, to give the parties and their counsel an opportunity to conclude their evidence and present their arguments.

2. COMPLAINT

The complaint alleging discrimination on the ground of age, filed by the complainant, Charles F. Holden, against the respondent, Canadian National Railway Company, was made on October 4, 1982, at Montreal and reads as follows:

"I was forced to take an unnegotiated early retirement from Marketing because of budget cuts which resulted in staff reductions. I allege that the recent staff cuts in Headquarters Marketing were discriminatory in that they all came from the group of employees closest to retirement age. Although my position was cut, my job function remains and is being performed by younger people."

The original Tribunal ruled that this complaint was to be considered under sections 7 and 10 of the Canadian Human Rights Act.

3. FACTS

Mr Charles F. Holden started working for the respondent in January 1941 at the age of eighteen, as a junior clerk.

The complainant worked in the respondent's accounting department until the month of March 1963, when he became a Statistical Development Analyst in the respondent's operations marketing department.

From 1966 to 1980, the complainant rose in the company's ranks to Senior Management, Coordinator for Freight Sales Statistic [sic].

In July 1980, Mr. Cliff Carson suggested to Mr. Holden that he transfer to another department because of a planned closing down of the statistics department, and Mr. Holden was then appointed Senior Financial Planning Officer, Financial Planning Section.

At this time, there were six financial planning officers in the department, each responsible for a specific section.

When the complainant was first evaluated in September 1980, two months after his transfer, it was decided that a more comprehensive and complete appraisal would be carried out at a later date.

This appraisal was done on April 8, 1981, at which time the complainant was Senior Financial Planning Officer.

According to this appraisal, the complainant did not fully meet the requirements of his supervisors in three areas, namely:

1) Weekly situation report 2) Other than freight revenues 3) Key support person to coordinator of financial planning.

The complainant claimed that at the time of this evaluation he was indisposed, as he was suffering from diabetes, which affected his job performance.

In September 1981, the complainant was appointed Financial Planning officer for Grain and Agriculture Products, without any cut in salary or other benefits.

In January 1982, the complainant received a salary increase of 10 per cent.

On February 24, 1982, the complainant was summoned by his supervisor, Mr. Peter Gosman.

According to the complainant, he was informed that he would have to take early retirement as of July 31, 1982, because of staff cuts at the company.

The complainant continued to perform his duties up to the date of his retirement, July 31, 1982.

On October 4, 1982, at Montreal, Mr. Holden completed the complaint form upon which the present case is based.

In his pleadings, the complainant requested the following findings: 1) Substantiating the complaint of Mr. Holden. 2) Requiring CN to cease forcing employees to take early retirement. 3) Awarding Mr. Holden his salary from July 31st, 1982 to June 30th, 1987 (his sixty fifth (65) birthday) less amount earned in that period, is severance benefit of \$15,706.00, pension and old age security amount. 4) Requiring CN to recalculate Mr. Holden pension for a retirement on June 30th, 1987, and to make any necessary adjustments. 5) Awarding Mr. Holden the employment benefit he would have had to June 30th, 1987 and the life insurance policy he would have had thereafter. 6) Awarding Mr. Holden under section 41 (3) (B) compensation for insult and heart feeling in the amount of \$2,500.00. In its pleadings, the respondent rejected purely and simply, wholly and totally, the complaint filed by the complainant on October 4, 1982.

4. CONFLICTING EVIDENCE

The present Tribunal, having reviewed the transcript of the initial proceedings of February 16, 17 and 18, 1987, and April 8, 1987, must confine itself strictly to this transcript and to the exhibits placed on record in support of the respective claims of the parties involved.

There do not appear to be any obvious or major contradictions in the versions of the facts presented by the two sides, up to the point of the complainant's first full appraisal on April 8, 1981. After this date, there is some conflict between the evidence given by the complainant and that given by the respondent.

The crucial period, as far as the present complaint is concerned, for all practical purposes begins on February 24, 1982, when the complainant was called to the office of his supervisor, Mr. Peter Gosman.

In the complainant's own words: "When I went up there he (Peter Gosman) handed me a letter and reading the letter I came to a point where it says that because of the financial situation and what have you, you're gonna have to take an early retirement effective July 31st 1982. (Transcript, Volume 1 at page 84)

Apparently, at this meeting, the possibility of early retirement for the complainant was definitely mentioned, and his immediate supervisor had already requested the information required for this purpose (Exhibit C-7).

Following this meeting, a letter dated March 1, 1982 was sent to the complainant by his immediate supervisor (Exhibit C-8), officially notifying him of the staff reduction and disappearance of his position. This letter is reproduced below:

MARKETING, Montreal, 1 March 1982 PERSONAL Mr. C. F. Holden Financial Planning Officer

CN Rail - Marketing Montreal, Que.

Dear Charles: Refer, please, to our conversation concerning certain changes in our Financial Planning area. During the conversation I informed you that as a result of the requirement for Marketing to reduce operating costs, there will be a combining of job responsibilities in Financial Planning. This will result in the reduction of one position in this section effective July 31, 1982. Again, further to our conversation, it is the intention of the Company that this reduction will take place with your retirement effective that date.

At that time, the Company will provide you with an ex- gratia payment of Fourteen Thousand, Two Hundred and Eighty dollars (\$ 14,280.00) in accordance with the provisions of the Separation Plan for Management and Non- Scheduled Employees. The manner in which this money would be received is one which you may wish to discuss with Mr. A. R. Larkman or his staff. For your information, there are arrangements whereby such monies may be transferred to an R. R. S. P., in order to capitalize on certain advantages.

An up- to- date estimate indicates the amount of your CN pension would be \$1,860.76 per month, and would begin in August 1982. If you chose integration with the Old Age Security, this would provide an additional \$130.55 per month, for a total monthly pension of \$1,991.31. In addition, as you are aware, the amounts do not include the Quebec Pension Plan which becomes payable at age 65.

After your retirement date you will receive a paid- up post- retirement insurance certificate, plus the opportunity to purchase optional term life insurance to age 65 at a group rate. In addition, you may have deducted from your pension cheque your monthly premium for Quebec Blue Cross.

I believe the above covers the major items in sufficient detail to enable you to go ahead with your personal planning. No doubt you will have other questions and these can be discussed with me or Mr. Larkman.

Sincerely, (s) Peter V. Gosman System Manager, Market Development"

The Tribunal also took note of a letter dated March 16, 1982, a copy of which was produced as Exhibit C- 9 in the file. This letter reads as follows:

"16 March 1982 PERSONAL

Mr. P. V. Gosman System Manager, Market Development CN Rail P. O. Box 8100 Montreal, Que.

Dear Peter: Re our meeting of February 24th, and notification to take an early retirement at 60 years of age with an ex- gratia payment of \$14,280., effective July 31, 1982.

I have made an extensive review of my personal and financial commitments (details furnished) and feel any separation allowance short of one year's salary would, at this time, impose a severe financial burden, both in the immediate and short term period of my retirement.

I respectfully request that your letter of notification, dated March 1, 1982 be withdrawn until new financial arrangements are negotiated, or a suitable relocation is made for me in C. N.

Respectfully submitted, Charles Holden c. c.: Mr. A. H. Larkman, Assistant to Vice- President, Personnel & Administration, CN Rail, Montreal."

In the last paragraph of this letter, which was addressed to Mr. Peter Gosman in response to the conversation of February 24, 1982 and Mr. Gosman's letter of March 1, 1982, the complainant expressed himself in clear, precise terms:

"I respectfully request that your letter of notification dated March 1st, 1981, be withdrawn until new financial arrangements are negotiated, or a suitable relocation is made for me in CN".

A second letter from the complainant, dated April 26, 1982 and addressed to Mr. R. E. Lawless, President of CN Rail, requested a meeting in these terms:

"... a meeting for me with Mr. L. L. Atkinson, Human Relation Department, to discuss in detail my financial position (Exhibit C- 9 in the file)".

These two letters are the only documents written by the complainant around the time that the events giving rise to the present case occurred.

Both in his evidence in chief and in the cross- examination, the complainant maintained that his only goal was to continue working for his employer, the respondent in the present case.

After reading the two letters (Exhibits C- 9 in the file) and considering the complainant's testimony, the Tribunal is led to ask the following questions:

Why, in the only written documents which he sent to his supervisors, did the complainant not purely and simply state the points which were the subject of the complaint he filed later, on October 4, 1982?

Why did he instead mention negotiations and financial and other arrangements?

If the complainant's sole purpose was to remain in the respondent's employ, why then did he insist so strongly on negotiating financial arrangements? The letter of March 16, 1982 from the complainant to his supervisor seems clear and straightforward on this point, and appears to state plainly that, failing an agreement regarding financial arrangements, the complainant requests relocation within the company.

"I respectfully request that your letter of notification dated March 1st, 1982, be withdrawn until new financial arrangements are negotiated, or a suitable relocation is made for me in CN (Exhibit C- 9 in the file)."

Why did the complainant not object, purely and simply, to the abolition of his position and the forced early retirement?

In his testimony, the complainant claimed that after his departure from the company, his duties were performed by a younger employee, Mr. E. W. Babcock, and that the latter was still performing his duties in September 1983.

The respondent, for its part, claimed that the employer simply abolished the claimant's position and reorganized the responsibilities of the employees within the department.

The fact that the duties normally performed by the complainant were later performed by a younger employee is not sufficient grounds for the Tribunal to find the complaint substantiated.

We must also cast our minds back to the economic situation prevailing at the time, and more precisely to the major economic crisis then affecting the whole country, and which most companies in existence at that time had to face.

The complainant himself testified, moreover, that it was not unusual for internal staff changes to be made in the department where he worked (Transcript, Volume 1 at page 111).

Furthermore, the complainant also stated that he recalled the economic conditions prevailing at the time his position was abolished.

As for the complainant's claim that the only employees laid off or dismissed by the respondent were those near retirement age, the Tribunal refers to the testimony of Mr. Arthur Henry Tarkman, who was Vice- President, Marketing, Personnel and Administration, for the respondent when the events giving rise to this case occurred. Mr. Larkman testified (at page 352 et seq) that, during the period when he was in this position, the first significant- downsizing began in 1982 owing to the economic situation which had existed across the country since the end of 1981.

Mr. Larkman also testified that, due to these exceptional circumstances, the respondent was forced to cut its administrative staff by 10 per cent during 1982.

The witness also told us that the complainant's case was not unique, since there were 97 positions abolished in the Marketing Group, including Montreal and five other regions; and that these positions were abolished as a result of recommendations made by the immediate supervisors in each department, which were based on individual performances during the year preceding the layoffs. We were also informed that, among the employees laid off, there were some who were much younger than the complainant, and that among the employees who kept their jobs, there were some who were older than the complainant (Transcript, Volume 3, at page 350 et seq).

Despite the fact that the complainant, in his testimony, stressed the point that his one and only objective was reinstatement in his position, the Tribunal notes that, after the complainant stopped working, he systematically and continually refused all offers made by the respondent to hire him as an outside free- lance consultant.

The Tribunal also notes that, throughout the period from July 1982 to June 1987, the complainant systematically rejected all such offers resulting from efforts by the respondent, preferring to become involved in independent business and philanthropic activities.

In the face of this evidence, the Tribunal cannot accept the complainant's claim that his only objective was reinstatement in his position at the respondent company.

4. CONCLUSION

IN VIEW OF all of the evidence on record; and SINCE in his letters of March 16, 1982 and April 26, 1982 (Exhibit C- 9 the file), the complainant seemed to link the termination of his employment simply to a financial question; and

SINCE, in these same letters, the complainant requested his reinstatement at the company only failing a negotiated agreement; and

SINCE these letters directly contradict the evidence given by the complainant; and

SINCE these letters from the complainant are the only written documents contemporary with the events giving rise to the present case; and

SINCE, on June 16, 1982, the complainant finalized his negotiations with his superiors and accepted the negotiated financial arrangements by signing an authorization to transfer a sum of \$15,706.00 to his registered retirement savings plan upon termination of his duties with his employer; and

IN VIEW OF the overall policy adopted by the respondent to deal with the economic conditions prevailing at the time of the events giving rise to the present case; and

SINCE it was demonstrated that positions were abolished on the basis of recommendations made by the immediate supervisors in each department, which in turn were based- on individual employee performances during the year preceding these recommendations and the downsizing;

FOR THESE REASONS, THE TRIBUNAL finds that the complainant's allegation of discrimination against him because of his age is unsubstantiated.

FOR THESE REASONS, THE TRIBUNAL: DISMISSES the complaint, and UPHOLDS the respondent's claim.

Signed at Montreal, this 21st day of April, 1988.

(signed) ANTONIO DE MICHELE Chairman of the Tribunal

STATUTES AND CASES REFERRED TO

1. Canadian Human Rights Act S.C. 1976- 77, c. 33 as amended 1977- 1978 c. 22
2. Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 1 S. C. R. 202 (S. C. C.)
3. Gadowsky v. The School Committee of County of Two Hills (1980, 1 C. H. R. R. 7/ 184 (Alta. Q. B.)
4. Foster Wheeler v. Ontario Human Rights Commission 16 C. C. E. L. 251 (Ontario Divisional Court)
5. R. v. Bushnell Communications Ltd. (1974) 4 O. R. (2d) 288 (C. A.)
6. Sheehan v. Upper Lakes Shipping et al. (1978), 1 F. C. 836 (C. A.)

7. Ontario Human Rights Commission et al. v. Simpson Sears (1985) 2 S. C. R. 536
8. Bhinder v. CNR (1985), 2 R. C. S. 561
9. Winnipeg School Division No. 1 v. Craton (1985), 2 S. C. R. 150
10. Scott v. Foster Wheeler (1985) 7 C. H. R. R. D/ 3193
11. Jack Cewe Ltd. v. Jorgenson, (1980) 1 S. C. R. 812
12. Morrison Knudson Co. Inc. v. B. C. Hydro and Power Authority (1973), 36 D. L. R. 3d 95 (B. C. S. C.)
13. Marilyn Butterill & als v. Via Rail Canada Inc. (Dec. 20, 1980) C. H. R. R. D/ 44 Par. 2031 - 2064
14. Jean- Louis Pelletier v. Brazeau Transport Inc. (June 1987) C. H. R. R. D/ 639 Par, 31955-32022
15. Wilkins v. The Eaton Corporation - 790 Federal 2d, p. 515
16. Re Brown and Waterloo Regional Board of Commissioners of Police - 1985 17 D. L. R. (4th), p. 113
17. Lorenzo Goyetche v. French Pastry Shop Limited - I C. H. R. R. - p. D/ 124
18. Loeb v. Textron Inc. - 600 Federal 2d. 1003.
19. Stoffman v. Vancouver General Hospital - 30 D. L. R. (4th), p. 700
20. Margaret Brown v. Mervyn L. Coles - (1986) B. C. D., p. 1297
21. Harrison c. University of British Columbia - 30 D. L. R. (4th), p. 206
22. White v. Her Majesty The Queen - 1 C. H. R. R. - p. D/ 136
23. Gell v. Canadian Pacific Ltd. - (1987) D. T. E. - no. 87T- 71
24. Jules Décarie v. Les Produits Pétroliers d'Auteuil Inc. - (1986) R. J. Q. p - 2471
25. DeJager v. Ministère de la défense nationaux - (1987) D. T. E. - no. 87T- 237
26. Rosanna Torres v. Royalty Kitchenware Limited and Francesco Guercio (1982) C. H. R. R. - p. D/ 858