

T. D. 17/ 88

Decision Rendered on December 7, 1988

THE CANADIAN HUMAN RIGHTS ACT HUMAN RIGHTS TRIBUNAL

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT S. C. 1976- 77, C. 33 AS
AMENDED AND IN THE MATTER OF A COMPLAINT

BETWEEN:

RUSSELL G. KEARNS Complainant

AND:

P. DICKSON TRUCKING LIMITED Respondent

REASONS FOR JUDGEMENT

BEFORE: DALE BRUCE HARDER, Chairman

R. DUVAL Counsel for the Canadian Human Rights Commission

T. G. LEWIS Counsel for the Brazeau Transport Group

HEARING DATES: January 27th, 1988, August 31st, 1988, and October 11th, 1988 (Version
français à suivre)

(French version to follow)

JUDGEMENT

This Tribunal was appointed on the 8th day of June, 1987 pursuant to Section 39 of the Canadian Human Rights Act, hereinafter referred to as "the Act", to inquire into a complaint of Russell G. Kearns, dated 21st of September against P. Dickson Trucking Ltd. and to determine whether the action complained of constitutes a discriminatory practise on the grounds of age and a matter related to employment under Section 7A of the Act.

There was a preliminary determination in this hearing. Brazeau Transport applied for determination on whether or not the Brazeau Transport group was a proper party to this action.

In the first hearing, there was much confusion as to who Mr. Lewis was representing - in that the specific corporate name could not be identified accurately for the Tribunal. As there are various corporate names for the entity known to the Complainant as Brazeau Transport, the Tribunal held that the various corporate names that the Complainant knew his employer by shall stand as the names in the decision.

The Tribunal ordered on the 28th day of June, 1988 that the preliminary question be answered in the following way:

- a) That Brazeau Transport Inc., otherwise known as Brazeau Transport International Inc. or Brazeau West or whatever the correct name for the corporate entity referred to in the evidence as Brazeau may be called, was the employer of the complainant Russell Kearns and a proper party to this action.
- b) That Reimer Express Lines was not a proper party to this action. As a result of the preliminary determination the Brazeau Corporate Group was joined with P. Dickson Trucking Ltd. as co-respondent in this action.

The Complainant alleges the following: "I have been employed as a salesperson with P. Dickson Trucking Ltd. since 1976. I was performing very well in this function. I am 69 years of age and when asked some six months ago about my retirement plans by the company, I indicated I would like to work for another 18 months. Some four months ago, the company hired a young salesperson, and recently asked me if I would retire. I said no and my employment was terminated effective 31 August 84. The reason given for my dismissal was that my sales territory offered the least amount of potential. However, I believe that my territory could have been expanded and that other salespersons benefited from accounts which I had developed. I therefore believe that my age was the basis for my dismissal and that by refusing to continue to employ me, P. Dickson Trucking Ltd. acted in contravention of Section 7 (a) of the Canadian Human Rights Act."

It must be noted that Mr. Lewis on behalf of the Brazeau Transport Group did not call any evidence as he was unable to locate his witnesses, even when given an adjournment for that purpose. Mr. Lewis relied on cross-examination of the complainant and of the investigator from the Human Rights Commission.

FACTS

The Complainant, Russell Kearns, was by evidence the best salesman at P. Dickson Trucking. It was the job of Russell Kearns to sell the services of the trucking company. He was not only very successful, but he also had a very good personal relationship with all of his customers. Problems developed within the corporate structure of the Respondents that affected the Complainant's customers. The Brazeau Group is a national company stretched out across Canada. The Brazeau employees that did the billings and compiled the rate sheets were in eastern Canada. They consistently made mistakes, much to the irritation of Mr. Kearns' customers. His customers complained about these mistakes in billings. Some customers began to use other freight companies. Mr. Kearns eventually re-signed most of the dissatisfied customers. The non-returning customers said their using other freight companies had nothing to do with Mr. Kearns but was because of the billing errors made in Toronto.

From the evidence it is clear that there were no complaints, at any time, by anyone about Mr. Kearns' performance.

In 1983 Mr. Kearns' salary was \$30,182.00 as evidenced from his tax return. In the later part of 1984, there was a meeting between Mr. Kearns and his manager, Mr. Harrod. There was some discussion at this meeting on whether or not Mr. Kearns was going to retire early. Nothing seemed to come of the meeting. There are some implications, perhaps, to be drawn from the meeting but there was no request by the company that he retire early nor was there any suggestion that he was going to be fired. One fact that can be gleaned from the lunch meeting with Mr. Harrod was that Mr. Kearns intended to work until he was 70. His birthday is September 21st. He was nearly 69 when terminated.

There was no question that Mr. Kearns was a valuable asset to Brazeau. Mr. Harrod said to him, "Russ, you are my best salesman". There is no evidence of just cause for dismissal. Mr. Kearns was not terminated because of a shortage of work.

Mr. Kearns was terminated by letter on August 15th, 1984, effective August 31st, 1984. As well as being a letter of termination, the letter was the source of some pain as it contained a notation put on it by either, Mr. Harrod, the Complainant's immediate supervisor, or by Mr. Serge Gagnon, another supervisor. The notation read: "Read it and weep". The remark is gratuitous and cruel.

Mr. Lewis, counsel for Brazeau Transport, attempted to establish that Mr. Kearns was fired, not because of age, but because his territory offered less potential - in that it was already producing very close to maximum revenue.

In direct examination on this point Mr. Kearns stated that the issue of his territory's potential had never been raised before his termination, either by Mr. Harrod or by Mr. Clement, another supervisor. The evidence indicates that this issue of the lack of potential in the area serviced by Mr. Kearns was raised by the Company after the Company decided to terminate Mr. Kearns. The first time Mr. Kearns heard about this "lack of potential" problem was in his letter of termination. It is apparent that the Company was grabbing air, looking for a non-existent reason to fire Mr. Kearns when they relied on this "lack of potential" justification for termination. The Company then hired a younger man to sell the services of the Company and gave this same new employee part of Mr. Kearns' sales territory.

Mr. Lewis has failed to demonstrate any just cause why Mr. Kearns was dismissed.

Paul Leroux, a former investigator, for the Canadian Human Rights Commission gave evidence to the Tribunal on the possible reason for Mr. Kearns' termination. He interviewed Mr. Harrod in a series of 30 question and answers all written out and signed by Mr. Harrod, the Vancouver Sales Manager for P. Dickson Trucking. Paul Leroux's evidence is that Mr. Kearns was terminated because of his age.

From the transcript Paul Leroux says: Q. 27 "Was Mr. Kearns' age the main factor in his layoff, or only one of the factors, or not a factor at all". The answer: "It was one of the factors but not a major one". Mr. Harrod acknowledges the question and answer by saying at the end of a paragraph that stated: "I have read the previous seven pages and they accurately represent my answer to the question. I have made a copy for my self".

Mr. Lewis, counsel for Brazeau, failed to undercut this evidence.

THE LAW

Before discussing the arguments made by counsel it is best to produce the relevant legislation.

Section 3 (1) of the Canadian Human Rights Act states: 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.

Section 7 of the Act states: 7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or (b) the course of employment to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 14 (a) of the Act states:

14. It is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relations to any employment is established by an employer to be based on a bona fide occupational requirement;

These are the statutory provisions which apply to the parties in the present dispute. The Tribunal must consider these sections of the Act determining whether or not there has been discrimination on the basis of age.

Referring to the Ontario Human Rights Commission v. Borough of Etobicoke ruling, ([1982] 1 S. C. R. 202), (3 C. H. R. R. D/ 3039), Counsel for the Commission argued that the burden on the Commission was to establish the prima facie evidence of discrimination, and that, if such evidence was established, the burden was reversed, and it was then up to the respondent to show that there had been no discrimination.

The Tribunal shares the view of counsel for the Commission, and, in light of the evidence, finds that the Commission has discharged the chief burden on it by establishing a prima facie case of discrimination on the basis of age against Russell Kearns.

The Tribunal is satisfied, on the balance of probabilities, that:

- a) That Mr. Kearns was the most successful salesman for Brazeau Transport out of Mr. Harrod's office;
- b) That Mr. Kearns had no notice of any complaints about his performance on the job;
- c) Russell Kearns was terminated from Brazeau Transport on August 31st, 1984; and
- d) That this termination was based solely on age.

It follows that the burden is now on the respondent, Brazeau Transport and P. Dickson Trucking. The Tribunal must, in light of the evidence laid before it, determine whether the respondent's defence has the elements needed to discharge that burden.

We must note that the respondent, Brazeau Transport, did not call any evidence. They relied on cross-examination of the Complainant and a former investigator to the Canadian Human Rights Commission.

At page 208 of the Ontario Human Rights Commission v. Borough of Etobicoke, McIntyre J. wrote:

Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.

The principle was upheld in the Ontario Human Rights Commission v. Simpsons- Sears Ltd., and in Bhinder v. Canadian National Railway Company. The principle set out in the cases above applies to this case.

Thus, the burden is on the respondent to show that termination of Russell Kearns was because of a bona fide occupational requirement. Mr. Lewis, counsel for Brazeau Transport, did not make the bona fide occupational requirement argument. He did attempt to establish however, that the reason Mr. Kearns was fired was that the sales area that Mr. Kearns was responsible for lacked the potential for growth. As there was no evidence introduced on this economic performance argument by Mr. Lewis, his argument must fail.

The Tribunal cannot accept the respondent's argument that he has shown through cross-examination, that the lack of potential was the true reason for termination of Russell Kearns. Mr. Lewis had ample time and had the enormous resources of a national Canadian company and still could not call any evidence.

REMEDY:

A. Compensation for loss of income.

Mr. Kearns, in his testimony indicated his loss of income was \$30,182.00. He also indicated that as a result of termination he had some severe cash problems and had to cash in his R. R. S. P. s, and pay tax on those R. R. S. P. monies, just to continuing living. Russel Kearns also depended on his Canada Pension during 1985. The sudden loss of his job has caused Mr. Kearns considerable hardship.

On top of that he has had to wait nearly four years to hear the results of this case. He was an exceptional salesman. He was a very straightforward employee and there is no evidence at all for any reason for his dismissal other than the decision by the Company that he was too old for the job.

The Tribunal finds that the employer terminated Russell Kearns because he was sixty- nine years old. The actions of the employer constitute a discriminatory practice as set out in Section 3(1) of the Act.

Sections 41 and 42 of the Act set out the powers of the Tribunal to award damages. These sections give the Tribunal considerable leeway in correcting discriminatory situations and compensating the victims of discrimination.

Section 2 of the Act indicates the Act is remedial; it is to "extend the present laws in Canada to give effect..... to the principal that every individual should have equal opportunity."

B. Section 41 (3) of the Canadian Human Rights Act reads as follows: "In addition to any order that the Tribunal may make pursuant to subsection 2, if the Tribunal finds that (a) a person is engaging or has engaged in a discriminatory practice willfully or recklessly or (b) if the victim of the discriminatory practice has suffered in respect of feelings of self- respect or as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, as not exceeding \$5,000.00 as the Tribunal may determine." The Complainant was a hard working and productive employee. The employer dismissed the Complainant simply because he was old. In Jean- Louis Pelletier v. Brazeau Transport Inc. there was a similar complaint. The Tribunal in that case order Brazeau Transport to pay Mr. Pelletier \$58,020.88 for partial compensation and wage loss and \$2,500.00 for other damages.

The counsel for the commission, Mr. Duval, has urged that the same figure of \$2,500.00 for damages be used in this case. Mr. Lewis made no submission on the quantum of damages.

On the basis of the evidence, specifically the cruel notation "read and weep", the Tribunal finds that the Complainant suffered in respect of feelings of self- respect as a result of discriminatory practice and awards him \$2,500.00 in special damages for hurt feelings.

Mr. Kearns did try to mitigate his loss. To his credit he tried several other sales jobs.

In 1984 he earned \$612.96 on commissions and had expenses of \$1,014.35 leaving a net loss. In 1985 he earned \$6,839.60 in commissions and had expenses of \$4,081.00 leaving an income of \$2,758.54.

Mr. Kearns could have enjoyed thirteen more months of employment at P. Dickson Trucking had he not been terminated.

He earned \$30,182.00 from twelve months in 1983 as an employee. He is eligible for thirteen months' salary, that being \$32,695.00. He earned \$2,758.54 after termination. His income loss is \$32,695.00 minus \$2,758.54 leaving an balance of \$29,937.46. He also lost a \$400.00 per month

car allowance. This loss was indirectly attributable to his termination and is in the amount of \$5,200.00. For income loss Mr. Kearns is entitled to \$29,937.41 of wage loss plus \$5,200.00 car allowance for a total income loss of \$35,137.46 plus interest from the date of termination which is set at August 31st, 1984.

THIS TRIBUNAL ORDERS that the corporate Respondents, known by the following names: the Brazeau Group, Brazeau Transport Inc., Brazeau West, A & H Express Lines (Canada) Ltd., P. Dickson Trucking Ltd., and Brazeau Transport (International) Inc. pay to the Complainant compensation in the sum of:

- a) \$2,500.00 special damages;
- b) \$35,137.46 for income loss;
- c) plus interest at the Registrar's rate from August 31st, 1984 to November 28th 1988.

SIGNED IN the City of Kelowna, Province of British Columbia this 30th day of November 1988.

DALE BRUCE HARDER