

T. D. 5/ 88 Decision rendered on April 6, 1988

TRANSLATION FROM FRENCH

CANADIAN HUMAN RIGHTS REVIEW TRIBUNAL Canadian Human Rights Act (SC 1976-77, c 33, as amended) REVIEW TRIBUNAL

BETWEEN:

BRAZEAU TRANSPORT INC appellant AND JEAN- LOUIS PELLETIER respondent AND
CLAUDE MARLEAU

in his capacity as Member of the Human Rights Tribunal

BEFORE Pierrette Sinclair, Chairperson
Henriette Guérin, Member
Jacques Chiasson, Member

APPEARANCES

Rolland Forget Counsel for the appellant
Anne Trottier Counsel for the respondent and the Canadian Human Rights
Commission.

>CANADA REVIEW TRIBUNAL PROVINCE OF QUEBEC

BETWEEN: BRAZEAU TRANSPORT INC appellant

AND JEAN- LOUIS PELLETIER

respondent AND CLAUDE MARLEAU

in his capacity as Member of the Human Rights Tribunal

BEFORE Pierrette Sinclair, Chairperson Henriette Guérin, Member Jacques Chiasson, Member

DECISION

I - APPOINTMENT OF THE TRIBUNAL On March 30, 1987, the President of the Human Rights Tribunal Panel appointed the present tribunal to hear the appeal by the appellant, Brazeau Transport Inc, from a judgment rendered by Mr Claude D Marleau on February 20, 1987 in favour of the respondent, Jean- Louis Pelletier.

The appeal was heard in Montreal on September 1, 1987 before Mrs Henriette Guérin, Mr Jacques Chiasson and Mrs Pierrette Sinclair.

> 3 The review tribunal hears the appeal on any question of law or fact or mixed law and fact pursuant to subsection 42.1(4) of the Canadian Human Rights Act (SC 1976-77, c 33, as amended) and can either a) dismiss the appeal or b) allow it and render its own decision or make its own orders, in accordance with subsection 42.1(6) of this same Act.

II - THE FACTS Mr Jean- Louis Pelletier filed a complaint in February 1982 alleging that he had been refused employment on the basis of age, a ground prohibited under the Act.

The tribunal of original jurisdiction examined the evidence regarding the facts under dispute and concluded that the appellant, Brazeau Transport Inc, had engaged in a discriminatory practice with respect to the respondent, Jean- Louis Pelletier, by refusing to hire him because of his age, in violation of section 7 of the Canadian Human Rights Act, and that its refusal was not based on bona fide occupational requirements as provided for in section 14 of the Act.

The appellant based its appeal on three grounds. First, it argued that the delays between the filing of the complaint and the decision had been prejudicial to the appellant and had caused the tribunal to lose jurisdiction. Although the appellant's counsel did raise the question of these delays, and the problems they had caused the appellant, in his representations to the tribunal, he did not argue that the tribunal had no jurisdiction over the matter, which leads us to conclude that this ground for appeal was abandoned. Thus, the review tribunal is not obliged to decide whether or not the appeal was the appropriate means of raising this question.

The appellant's second ground for appeal was that the original tribunal > 4 had made several errors in law and errors in interpreting the facts. The appellant asked the review tribunal to intervene on the ground that the judge of first jurisdiction had made a flagrant, major error in law by refusing to consider the testimony given by the Director of Human Resources of the Groupe Transport Brazeau regarding the company's hiring policy during a period prior to his taking up his duties.

The review tribunal, having examined the judgment of first jurisdiction, transcripts, testimony and the pertinent jurisprudence, and having heard the arguments of each side's counsel, concludes that the first judge had not erred manifestly or obviously in his consideration of the evidence. Consequently, the review tribunal has no reason to intervene and render its own decision in place of the decision made by the judge of first jurisdiction. 1

In our view, even if the original judge had considered this evidence, the result of the debate would not have been different. Once the discriminatory practice had been proven, Brazeau Transport could have submitted evidence that its refusal of employment had been based on bona fide occupational requirements, in accordance with paragraph 14(a) of the Act. However, the appellant company cannot claim that its policy of hiring from within was a bona fide occupational requirement related to age. The objective criterion of what constitutes a bona fide occupational requirement was established by the Supreme Court in the Ontario Human Rights Commission v Etobicoke decision. McIntyre J defined a bona fide occupational requirement in the following manner:

Once a complainant has established before a board of inquiry 1 *Guillaume Kibale v Transport Canada* 8 CHRR, D/ 640, June 1987. > 5

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. 2

Thus, the tribunal is of the opinion that even if the hiring policy for the period in question had been considered, this evidence would not have justified intervention on the part of the present tribunal.

Moreover, we would like to point out that there is an apparent contradiction between the appellant's allegation that the only ground for its refusal was its policy of hiring from within and the fact that it was seeking outside

candidates through newspaper advertisements. In addition, even though the appellant claims that the decision to hire was made by the regional director in Toronto, the evidence shows that the branch manager took actions that would lead one to believe that he had the authority to hire: seeking outside candidates, having meetings and discussions with the respondent, and sending him for a medical examination. These actions on the part of the branch manager bound Brazeau Transport Inc.

2 *Ontario Human Rights Commission and Bruce Dunlop and Harold E Hall and Vincent Gray v The Borough of Etobicoke* [1982] 1 SCR 202, page 208. See also *Ontario Human Rights Commission and O'Malley v Simpson Sears Ltd* [1985] 2 SCR 536 and *Bhinder and the The Canadian Human Rights Commission v Canadian National Railway Company* [1985] 2 SCR 561.

> 6 Thus, the review tribunal upholds the previous decision that the complainant had been discriminated against on a prohibited ground.

III - DAMAGES The appellant's third ground for appeal was that the original tribunal had made several errors in setting damages.

The tribunal's power to award damages is derived from sections 41 and 42 of the Act. The review tribunal agrees with the judge of first jurisdiction that the complainant must be compensated. However, in our view the period for which compensation was awarded does not appear to be justified.

The review tribunal believes that the complainant was entitled to a reasonable period of time to find another job. The tribunal also holds that in such circumstances an individual must make reasonable efforts to find employment and thus mitigate damages. 3

In our view, under these particular circumstances one year was a reasonable period of time for Mr Pelletier to find a new job, given his previous experience and skills.

3 Torres v Royalty Kitchenware Ltd, 3 CHRR, D/ 858, paragraph 7735 et seq. > 7 The review tribunal awards Mr Pelletier total compensation of \$16,900.00. From this amount, \$1,831.52 is deducted. This sum represents the complainant's earnings during the period of time in question. In the tribunal's view, under the circumstances the sum of \$15,068.48 is fair compensation and redress for the discrimination that the complainant suffered.

Furthermore, this tribunal does not believe it has reason to intervene regarding the previous decision concerning the complainant's suffering in respect of feelings or self- respect, and upholds the decision made by the judge of first jurisdiction to award \$2,500.00 as compensation. These

damages, provided for in subsection 41(3) of the Act, were awarded by the first tribunal on the basis of the evidence. Although the amount of the award was high, bearing in mind the representations made by the appellant's counsel, we believe these damages are not sufficiently exaggerated to warrant intervention.

FOR THESE REASONS, THE REVIEW TRIBUNAL: UPHOLDS the judgment of first jurisdiction regarding discrimination, and modifies the amount of damages awarded in that it;

ORDERS the appellant, Brazeau Transport Inc, to pay the respondent, Mr Jean- Louis Pelletier, the sum of \$15,068.48 as compensation, with interest calculated from February 18, 1982 at the legal rate, pursuant to subsection 41(2) of the Canadian Human Rights Act; and

> 8 UPHOLDS the judgment of first jurisdiction by ordering the appellant, Brazeau Transport Inc, to pay the respondent, Mr Jean- Louis Pelletier, the sum of two thousand and five hundred dollars (\$ 2,500.00) as compensation for suffering in respect of feelings or self- respect, pursuant to paragraph 41(3)(b) of the Canadian Human Rights Act.

IN WITNESS WHEREOF WE HAVE AFFIXED OUR SIGNATURES IN: Montreal, this tenth day of March 1988 [signed]

Mrs Henriette Guérin, Member Sept- Iles, this fifteen day of March 1988 [signed]

Mr Jacques Chiasson, Member Montreal, this tenth day of March 1988 [signed]

Mrs Pierrette Sinclair, President