T.D. 6/95
Decision rendered on February 28, 1995

CANADIAN HUMAN RIGHTS ACT
R.S.C.(1985), Chap. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DONALD JARDINE

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Appellant

-and-

OTTAWA-CARLETON REGIONAL TRANSIT COMMISSION

Respondent

DECISION OF THE REVIEW TRIBUNAL

TRIBUNAL: Keith C. Norton, Q.C., B.A., LL.B, Chairperson
Anne L. Mactavish, Member
Lloyd Stanford, Member

APPEARANCES: Odette Lalumière, Counsel for the Canadian Human Rights Commission
Paul Webber, Counsel for the Respondent

DATES AND LOCATION
OF HEARING: February 28, 1994
August 30, 1994
Ottawa, Ontario

1. Introduction

This is an appeal by the Canadian Human Rights Commission (the Appellant) from an order of a Human Rights Tribunal (the Tribunal), dated June 30, 1993 and issued September 1, 1993, which dismissed the Complaint of the Complainant against the Ottawa-Carleton Regional Transit Commission (the Respondent hereafter referred to as OC Transpo).

The facts in this matter were not seriously in dispute before the original Tribunal, and are briefly summarized below.

The Complainant was born on May 27, 1925. He was employed by the Respondent, or a predecessor company for a period during the late 1940s. During this time, he drove street cars and buses. The Complainant subsequently worked as a driver for a company described as Voyageur Colonial, or Colonial Coach, as well as for the Toronto Transit Commission.

In the mid-1950s, the Complainant began working as a television cameraman, and continued to work as a cameraman until 1985, when he took early retirement from the House of Commons.

On April 16, 1985 the Complainant made application to the Respondent for employment as a bus driver. He was 59 at the time of his application.

At the request of the Respondent, he underwent a complete physical examination by an independent physician involving, amongst other things, an electrocardiogram, a stress test, and a 24 hour heart monitor test. At the time of his application, the Complainant was advised that there was a "waiting list" for positions, and the Complainant was not surprised when he did not hear anything for some time.

While waiting to hear further from OC Transpo, he secured employment as a school-bus driver with Charterways in the fall of 1986. However, he spent his winters in Florida (October to April) throughout this period.

In November of 1986, the Complainant spoke with a Mr. Gratton at OC Transpo. In the course of this discussion, Mr. Gratton informed the Complainant that, as he was now over the age of 60, he was too old to be considered for employment as a bus driver. This was subsequently confirmed by letter dated November 7, 1986 from Simone Tessier, Director, Personnel Administration Department, OC Transpo. As a consequence, the Complainant filed the complaint which is the subject matter of these proceedings.

The Complaint was filed under sections 7 and 10 of the Canadian Human Rights Act S.C. 1976-77, C.33 (the Act)as amended, alleging discrimination by the Respondent on the prohibited ground of age.

The parties agreed that this was a prima facie case of direct discrimination, thus shifting the onus to the Respondent to show, on the balance of probabilities, that the policy against hiring new bus drivers over the age of sixty years is a bona fide occupational requirement (a B.F.O.R.) as set out in the Act, s. 15(a).

The Tribunal so found that the policy is a B.F.O.R.

The Appellant now appeals on the following grounds:

i) that the Tribunal erred in law in respect of the interpretation of the bona fide occupational requirement standard;

ii) that the Tribunal erred in law in respect of the evidence which is required in order to establish a bona fide occupational requirement;

iii) that the Tribunal erred in law in respect of the cost and safety elements of the bona fide occupational requirement;

iv) that the Tribunal erred in law in its application of the law to the evidence before the Tribunal.

The Appellant brought an application to introduce new expert evidence before the Review Tribunal. This application was heard as a preliminary motion on Monday, February 28, 1994 and was denied for the reasons stated on the record of the proceedings of that date.

2. Issues

(1) What is the scope of this review?

(2) Did the Tribunal correctly interpret the B.F.O.R. standard?

(3) Did the Tribunal err in law in respect of the evidence required in order to establish a B.F.O.R.?

(4) Was there an error in respect of the cost and safety elements of the B.F.O.R.?

(5) Was there an error in the application of the law to the evidence before the Tribunal?

3. Analysis

(1) The scope of this review.

In the Supreme Court of Canada decision in Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, (Kathy K), in reviewing a decision of the Federal Court of Appeal which set aside the judgment at the trial level apparently ignoring various findings of fact made by the trial judge and substituting its own appreciation of the "balance of probability", Ritchie J. states at page 806,

"I think that under such circumstances the accepted approach of a court of appeal is to test the findings made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability."

Further, in Brennan v. the Queen, [1984] 2 F.C. 799 (C.A.), (Brennan), at page 819, Thurlow C.J. states in the majority decision,

"It is no doubt true that in a situation of this kind where no evidence in addition to that before the Human Rights Tribunal was before the Review Tribunal the latter should, in accordance with the well-known principles adopted and applied in Stein et al. v. The Ship "Kathy K" ([1976] 2 S.C.R. 802; 62 D.L.R. (3d)1) accord due respect for the view of the facts taken by the Human Rights Tribunal and, in particular, for the advantage in assessing credibility which he had in having seen and heard the witnesses. But, that said, it was still the duty of the Review Tribunal to examine the evidence and substitute its view of the facts if persuaded that there was palpable or manifest error in the view taken by the Human Rights Tribunal."

And finally, in the Federal Court decision in Cashin v. Canadian Broadcasting Corporation, [1988] 3 F.C. 494, (Cashin), Mahoney J. states, at p. 501:

"The first respondent argued that, whether the Review Tribunal heard additional evidence or not, its power to render the decision "that, in its opinion, the Tribunal appealed from should have rendered" [subsection 42.1(6)] enabled it effectively to conduct a hearing de novo. However, in addition to the authority of the Robichaud case, such an interpretation should not, it seems to me, be given to section 42.1 unless it is the clear intention of Parliament, since the bias of the law runs strongly in favour of fact-finding by the tribunal which heard the witnesses. Parliament's intention, as I read it, appears in fact to be that the hearing should be treated as de novo only if the Review Tribunal receives additional evidence or testimony. Otherwise, it should be bound by the Kathy K principle.

The findings of the adjudicator must therefore stand unless she committed some palpable and overriding error."

This Review Tribunal, having reviewed the evidence contained in the transcripts of the original proceedings and in the exhibits, and having reviewed the decision of the Tribunal, finds no palpable and overriding error in the findings of fact.

Therefore, since we received no additional evidence or testimony, we find, based upon the above case law, that the findings of fact of the Tribunal must stand and this review is restricted to the application of the law.

(2) Did the Tribunal correctly interpret the B.F.O.R. standard?

It was argued by the Appellant that the Tribunal did err in the interpretation of the B.F.O.R. standard. In particular, it was argued that the statement on page 11 of the decision that, "McIntyre J. clearly indicates in the Etobicoke case that there is no "rule" concerning either the nature of or the sufficiency of the evidence required to satisfy the establishment of a bona fide occupational requirement." was an erroneous interpretation of what McIntyre J. stated.

In The Ontario Human Rights Commission v. The Borough of Etobicoke [1982] 1 S.C.R. 202, (Etobicoke) at page 212, McIntyre J. states:

> "It would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of sixty-five under the provisions of s. 4(6) of the Code. In the final analysis the board of inquiry, subject always to the rights of appeal under s. 14d of the Code, must be the judge of such matters. In dealing with the questions of a mandatory retirement age it would seem that evidence as to the duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties would be imperative. Many factors whould (sic) be involved and it would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the work place, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported. ...Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to adduce evidence upon this subject."

While it is correct that the Tribunal's attempt to paraphrase McIntyre J. by saying there is no "rule" is not precisely the wording used by McIntyre J., it surely captures the essence and meaning of what he said. If one reviews the way in which the Tribunal member applies this to the evidence in her decision, one finds that she follows essentially the approach suggested by McIntyre J.

She clearly did, as set out by McIntyre J. examine the evidence of the nature of the duties to be performed, the conditions existing in the workplace for older beginning drivers without the seniority to be selective in their assignments and the effect of these conditions upon the older beginning drivers as reflected in the statistical data before her and the

opinions expressed in the reports of the two doctors.

Furthermore, the evidence before her with respect to the higher risk of accidents among older beginning drivers was sufficient to validate the concern regarding the danger to public safety.

Thus, the Review Tribunal finds that the Tribunal did not err in the interpretation of the B.F.O.R. standard.

(3) Did the Tribunal err in law in respect of the evidence required in order to establish a B.F.O.R.?

The Appellant argued that the Tribunal erred in finding, based upon impressionistic evidence, that the subjective element of the test in Etobicoke was met and further that she erred in finding, based on insufficient evidence that the objective element was satisfied.

It was further argued that in considering risk the Tribunal erred in applying too low a standard - any real risk - rather than the standard of sufficient risk set out in Etobicoke.

A further argument was advanced that the Tribunal erred in law in deciding that there were no less drastic means or alternatives and thus the rule was a B.F.O.R.

Finally, it was argued that the Tribunal erred in law in finding that there was no way of doing individualized testing.

In Etobicoke, McIntyre J. sets out the test in the now familiar words at p. 208:

"To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code." (our emphasis)

Thus, he states the subjective element of the test.

The Tribunal, after hearing and reviewing the evidence of several witnesses with long experience in working with the Respondent, concludes at page 21 of the decision:

"...These employees all expressed the company's belief that persons over the age of sixty could not be considered for a job with the company as a new bus operator (our emphasis). That belief was presented by all in an honest and straight-forward manner.

Most succinctly, Mr. Houle indicated that OC Transpo's primary concern is the safety of the public and included in that "public" the bus operators themselves, whose "safety" included both physical and mental well-being, especially during the beginning years of a stressful career.

Additionally, he indicated that OC Transpo was concerned with the cost factors of training older new operators who would remain with the company for a shorter period of time than would the average new employee, and who might well be expensive for the company in terms of lost paid time due to disability, early retirement, or illness."

The Tribunal draws the conclusion from this in continuing:
"OC Transpo, then, had the impression that there should be an age limitation for the hiring of new bus operators. This was an impression, honestly believed, that older persons hired as new bus operators could not do that job safely and economically."

Finally, on the same page, the Tribunal finds:
"That evidence clearly addresses positively the issue of the subjective branch of the accepted test for a bona fide occupational requirement which will allow for such differential treatment."

Despite the Tribunal's statement above that, "This was an impression, honestly believed that older persons hired as new bus operators could not do that job safely and economically", it is clear from the context and almost all other references that the Tribunal is speaking of older new drivers. (our emphasis)

It might be an unfortunate choice of words to refer to the belief expressed as an "impression", but when one reviews the evidence and the context in which the word is used, it is clear that the evidence of the experienced individuals was more than a mere impression and is better expressed, in the words of the Tribunal at page 21, and quoted fully above

as a belief "presented by all in an honest and straight-forward manner". (our emphasis)

Although the Tribunal chose not to adopt the precise words of McIntyre J., the Review Tribunal finds that she did not err in law in concluding that the evidence met the requirements of the subjective element of the test in Etobicoke.

McIntyre J. continues, at page 208, to address the objective elements of the test:

"In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned."

He later continued at page 209:

"In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause."

Finally, on the question of public safety, he says at page 209:

"In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a bona

fide occupational qualification and requirement has
been shown the board of inquiry and the court must
consider whether the evidence adduced justifies the
conclusion that there is sufficient risk of employee
failure in those over the mandatory retirement age to
warrant the early retirement in the interests of safety
of the employee, his fellow employees and the public at
large."

The Tribunal in reviewing the evidence in the decision was clearly impressed with the "nature of employment concerned" as identified in Etobicoke. The nature of the employment in this case is not limited to the

act of driving a bus under stressful conditions transporting large numbers of people over city streets, heavily populated at times by pedestrians, but is further complicated by the additional demands upon new drivers without the seniority to be selective in the work they do or the hours they work or the number of days they must work in a cycle without time off.

All of this was highlighted in the review of evidence at page 14 of the decision.

Although in the case under review it was repeatedly emphasized that the primary concern was safety, there was evidence presented on the issue of cost or the economic concern.

The Appellant in argument seemed to focus only upon the cost of training and the amortization of that cost. Clearly, that is a cost that might be recovered or, if not, for an organization the size of the Respondent, would not be an unbearable burden.

However, the Appellant ignored the other costs brought out in the evidence and considered by the Tribunal.

At page 25 of the decision, the Tribunal states:

"The tables involving absence from work indicate that
Mr. Jardine would, immediately upon his hiring, fall
into the category of drivers with the highest average
number of absences from work. That, added to his
training costs and the company's statistics regarding
early retirement amongst persons hired as new bus
drivers at age 50 and over, would give the company

pause to question the economic viability of hiring a
person at or over the age of 60."

In fact, if one regards the information in the chart at TAB 5 of the Respondents Book of Documents regarding time loss among employees over the age of 61 it becomes evident that the average including those on Worker's Compensation, Long Term Disability and sickness is 113.3 days - approaching half a year of working days per employee per year in this age category.

Clearly, when one looks at this, combined with the stressful working conditions for new drivers, this does become an important consideration in assessing economic concerns regarding the hiring of new drivers over the age of 60.

However, the Review Tribunal is satisfied that, given the nature of this employment, the safety element is the more important consideration as stated in evidence by the Respondent.

Our review of the medical evidence, the statistics regarding avoidable accidents and the evidence of what is possibly stress related illness among older drivers leads us to conclude that the Tribunal did not err in finding that the objective prong of the test was met.

In fact, although based on limited statistics, the tables indicate that the older beginning driver who has been on the job one year or more has, on average, more than six times the number of accidents of the experienced older driver.

This Review Tribunal after reviewing the evidence and the decision, is satisfied that there was no error in law with respect to the assessment of risk. Although the Tribunal did, we find, go too far in attributing identical findings to both doctors, she was still essentially correct in her findings and in the application of the law in the end where she concludes at page 25:

"...it addresses the issue of public safety most
specifically to prove, on a balance of probabilities,
that there is sufficient risk involved in hiring new
bus operators at or over the age of 60 to allow for
their differential treatment."

The Appellant also argued that, if the Respondent might consider an applicant over the age of 60 who had had continuous, immediate bus driving

experience in a similar urban setting as suggested by one witness (although there was no evidence that this had ever been done) then that indicated that a less drastic measure existed, and that there was an alternative to the rule.

In this context, it is difficult to envisage what the alternative might be other than to look further at an applicant with such recent experience, since the statistical evidence does indicate that such drivers with long experience have a low accident rate, at least in a situation where they have seniority and can select their work.

However, in the case of Mr. Jardine, the Tribunal, after hearing the evidence, made a specific finding that his experience in driving buses did not put him in this category but rather in the category of a new bus driver requiring full training and, of course, being without seniority. (see page 26 of decision)

Therefore, the Review Tribunal finds that, even if the consideration of an applicant with immediate long term experience under similar circumstances were to be considered a less drastic measure, it would not apply in this case.

Counsel then argued that the Tribunal made an error in law in finding that there was no way of doing individual testing. In support of that argument she stated that some literature talked about the use of a road test or a driving simulator.

Dr. D.M. Grinnel, M.D., FRCPC, a specialist in Physical Medicine and Rehabilitation, based upon her personal professional expertise and an extensive review of literature on older drivers, concluded at page 6 of her opinion letter at TAB 3 of the Respondent's Book of Medical Evidence, Exhibit R-2, as follows:

"Based on my own experience and a review of the literature it is my opinion that, while as a group, drivers over the age of 55 pose an increased safety risk which continues to escalate with age, in the absence of a specific, currently existing condition which precludes the granting of a class 2 drivers licence there is no currently available assessment method which would enable an employer to accurately predict which individual between the age of 60-65 poses an unacceptable risk as a bus driver. It is also my

opinion that the conditions imposed by union rules with
respect to seniority are likely to create increased
risk of accident occurrence in this age group. Again,
in the context of currently available assessment
methods, I know of no way of identifying which
individual would pose an increased risk under such
conditions." (our emphasis)

This evidence was admitted at the first hearing on consent and counsel did not require that Dr. Grinnel be called to testify and be cross-examined nor was any contradictory expert evidence called in reply. Consequently, the only professional medical opinion on the matter of predictive testing

was that of Dr. Grinnel.

The Review Tribunal finds that the Tribunal did not make an error in law when it accepted the uncontroverted evidence before it on the subject of predictive testing namely, that "individual risk potentials cannot be pinpointed using current assessment methods". (page 23, Decision of Tribunal)

(4) Was there an error in respect of the cost and safety element of the B.F.O.R.?

The Review Tribunal dealt with this matter earlier in considering the test in Etobicoke and considered whether the evidence in this case was sufficient to meet both the subjective and the objective test.

We find that there was no error in respect of the cost and safety elements of the B.F.O.R. on the part of the original Tribunal.

(5) Was there an error in the application of the law to the evidence before the Tribunal?

After a review of the decision and an extensive review of the law and evidence, the Review Tribunal finds no error on the part of the Tribunal in the application of the law to the evidence.

4. Order

This Review Tribunal dismisses the Appeal in this matter for the reasons stated above.

Dated at Ottawa, Ontario, this day of January, 1995.

Keith C. Norton, Q.C., Chairperson

Anne L. Mactavish, Member

Lloyd Stanford, Member
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