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T.D. 4/84
Decision rendered on
February 28, 1984

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-1977, c. 33, as amended;

AND IN THE MATTER OF the appeal filed under
Sections 7(a) and 10 of the Canadian Human Rights
Act by Patricia Bennett MacPherson, dated July 30,
1980, against White Pass and Yukon Corporation
Limited.

BETWEEN:
PATRICIA BENNETT MacPHERSON,
Complainant,
- and -
WHITE PASS AND YUKON ROUTE
CORPORATION LIMITED,

Respondent.

BEFORE: FRANK D. JONES Chairman
TRIBUNAL OFFICER
M. Burstall

APPEARANCES:
MR. RUSSELL JURIAN SZ Representing the Complainant
MS. PATRICIA JANZEN Representing the Respondent

HEARD: August 10, 1983, Whitehorse, Yukon.

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This Hearing was held in Whitehorse and was a result of a complaint
levied against the White Pass and Yukon Route Corporation Limited by Trish
Bennett which stated

"I applied for a transfer to another part of rail division,
(because I was as high as I could get. Head Waitress) I should
have got it before someone outside of the company did. But I was
refused first, because the work was too heavy. I asked to be given
a two week trial period and I'd quit if I couldn't handle it. Mr.
Dickson said he'd think on it. Two days later he called & said no
because the company had the choice to employ who they wanted."

The Canadian Human Rights Act reads as follows:

"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 states as follows:

"7. It is a discriminatory practice, directly or indirectly,

(a) To refuse to employ or continue to employ any individual,
...
on a prohibited ground of discrimination."

Section 10 reads as follows:

"10. It is a discriminatory practice for an employer, employee organization or organization of employers
(a) To establish or pursue a policy or practice, or
(b) To enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

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Bennett complained that the White Pass and Yukon Route Corporation Limited discriminated against her on the grounds of sex when she applied for the position of Hostler.

The duties of Hostler are set out as follows:

1. Check oil levels in governors, compressors & engines.
2. Check water levels and temperatures in engines.
3. Maintain constant surveillance to ensure R.P.M.'s are at proper level and all other gauges are functioning in idling locomotives.
4. Sweep and collect up garbage in all locomotives and coaches daily.
5. Clean windows of locomotives and coaches inside and outside.
6. Fill and distribute water containers to each locomotive and coach.
7. Move locomotives into position for fuelling.
8. Fuel locomotives and add coolant as necessary.
9. Check journal boxes on coaches and flat cars daily.
10. Add oil to journal boxes requiring servicing.
11. Change brass in journals as required.
12. Make repairs to brake rigging as required.

13. Replace broken air lines and air hoses as required.

14. Place oil drums on stands as required.

15. Assist on yard derailments as required.

I am satisfied on the evidence that Miss Bennett (who later became Mrs. McPherson) could satisfactorily carry out all of the duties listed above.

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The real question in my mind is when the interview took place between Mrs. McPherson and Mr. Dickson, who was the gentleman in charge of hiring for these positions, was there a prejudice on the part of Mr. Dickson, or the company for whom he worked, against the hiring of women for that particular position.

It was urged upon this Tribunal by Mr. Juriansz, who represented the Canadian Human Rights Commission, in his very able argument that there are very subtle ways in which a perpetuation of a discriminatory practice can be maintained. I agree. Nevertheless, it is wrong to say that everytime a male is hired instead of a female for a particular position, one should always suspect a discriminatory policy. Facts must be adduced which lead to the conclusion that such discriminatory policy exists, or such discrimination exists in an individual. At the very least, facts must exist wherein an obvious inference can be drawn that such discrimination is evident.

FACTS

Mrs. McPherson was born and raised in Nova Scotia. Mr. Neil

McPherson, who had known Patricia Bennett McPherson (nee Bennett) since their early childhood in Nova Scotia, had obtained employment as a Hostler with the White Pass and Yukon Route Corporation Limited. He suggested to Patricia Bennett that she come to the Yukon Territory, which she did,

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- 4 and

obtained employment as a waitress in Bennett, B.C., which was at that time a railroad eating stop wherein train crews had their meals and tourists could also have their meals. Mr. McPherson was living in Whitehorse. Miss Bennett and Mr. McPherson were married in October, 1980.

Mrs. Bennett McPherson did a very satisfactory job of her duties in Bennett and was eventually promoted to Chief Waitress.

Periodically, when her shift time would allow, she would come to Whitehorse to see her then fiance, and oft-times would spend time with him while he was on his shift working as a Hostler.

Mrs. Bennett McPherson became aware of a position of Hostler which was to become open in the Spring of 1980. Mrs. Bennett McPherson filled out an application which was dated March 21, 1980 for the position of Hostler. Mrs. Bennett McPherson indicated in her testimony (pages 80 and 82) that she did a considerable amount of preparation for an interview which she wished to have with Mr. Bill Dickson, who was the man empowered to fill the Hostler

positions. Mrs. Bennett McPherson indicated that when she was in Whitehorse she got in touch with Mr. Dickson and had a talk with him in his office and he indicated that he would consider her for the position. Prior to going back to Bennett Lake on her regular work shift, Mrs. Bennett

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- 5 McPherson

again got in touch with Mr. Dickson who indicated that he had not selected anybody for the Hostler job (transcript, page 86).

We then have some conflict in testimony between Mr. Dickson and Mrs. Bennett McPherson. Mrs. Bennett McPherson indicated that when she arrived at her job in Bennett, approximately three hours after having the second conversation with Mr. Dickson, she was told that Mr. Dickson had phoned and she telephoned him back and Mr. Dickson informed her that she did not get the job. When she asked why, Mr. Dickson informed her that the work was too heavy for her and after protestations from Mrs. Bennett McPherson to the effect that this would not be the case, Mr. Dickson indicated that he would reconsider and let her know in a couple of days.

Subsequently, Mrs. Bennett McPherson received a call from her fiance who said that Mr. Dickson had called him into Mr. Dickson's office and, as the transcript indicated,

"more or less want to know if there'd be no hard feelings if I got the job. So, I guess his mind was made up."

What I believe Mrs. Bennett McPherson meant to say was would there be any hard feelings on Mr. McPherson's part if she did not get the job.

Mrs. Bennett McPherson then stated (transcript, page 87) that Mr. Dickson phoned her back and told her that she wouldn't get the job and she, at that time, indicated to

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- 6 Mr.

Dickson she felt she wasn't hired because she was a woman, and Mr.

Dickson indicated (transcript, page 88) that this was not the case.

Mr. Dickson's evidence, on the other hand, indicated that basically there was one interview with Mrs. Bennett McPherson. Initially he indicated that it was half an hour, but on cross-examination there was some doubt as to the exact time spent at the interview.

There were two Hostler positions open for the Spring of 1980. Mr. Dickson indicated the following qualifications were paramount in his mind

"Q. What qualifications and experience are you interested in in applicants for the position of hostler?

A. Well, basically, first and foremost, we look for someone who has had previous experience as a trainman. In the event of unavailability of this type of applicant, we look for someone who's had experience in the operation and basic maintenance of heavy duty equipment. This will ensure familiarization with the complications of operating a heavy vehicle with a minimum of problem and hazard.

Q. What other aptitudes are demonstrated by an applicant who's had --

A. A mechanical --

Q. -- experience?

A. A mechanical aptitude is an asset, with a working knowledge of motors and compressors and governors, and also of the air lines, especially the braking system to determine the braking limits of a heavily loaded unit.

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Q. Will you hire someone to the hostler position who's had no previous rail experience?

A. We do, at times, when we need a hostler, and there's no obvious applicant available at that particular time.

Q. So, have you hired hostlers who have had no previous real trainman experience?

A. We have had, yes.

Q. And have you -- would you hire as a hostler a person with no heavy equipment experience?

A. Only when it comes down to a matter of necessity, whether we need a hostler and there's no other applications or people available at that particular time. Usually this would be toward the end of the summer or something like that when it's just a matter of putting a man on to act as a watchman more than anything else." (transcript, page 152 and 153)

Four persons were considered. One of these individuals was Mr. Don Dickson, the son of Mr. Dickson, who was in charge of hiring. The evidence was that Mr. Dickson promised his son a job in January, long before the application of Mrs. Bennet McPherson and, as I observed at the Hearing, I believe was a case of nepotism which should not be condoned but is not a case of sex discrimination. Mr. Dickson Sr.'s testimony was

"Well, he asked me if I could find work for him after the school year, and I promised him, this was around the first of the year, I promised him that I would have a hostler's position for him when this hiring started on this particular area.

Q. When did you make that promise?

A. It was in January of 1980." (transcript, page 157)

Another applicant was Mr. Robert Krewey who had a similar work background to that of Mrs. Bennett McPherson in that he was a waiter at Bennett. Mr. Dickson, Sr. indicated that his qualifications and work record did not indicate further pursuance

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his application. Mr. Dickson, Sr. also indicated that he ranked Mrs. Bennett McPherson ahead of Mr. Krewey.

A third applicant was Mr. Mike Lieghtle. His qualifications were set out on page 158 of the transcript as follows:

"Q. And what qualifications did he have that interested you?

A. Well, he operated front-end loaders, heavy duty front-end loaders; he's operated trucks and he was involved in the operation of an air track rail, which includes an air compressor with diesel or gasoline power to run the compressor. He also had a blasting ticket which is an added attraction since we only have one person on the railroad with the blasting ticket, and it's always handy to have someone around who we can fall back on in case of an emergency.

Q. Okay. Did you check his work record with his previous employer?

A. Yes, I talked to Whitehorse Copper; they were-- gave him a very favourable recommendation."

The fourth applicant was Mrs. Bennett McPherson. In speaking of her qualifications, Mr. Dickson Sr. stated at page 159 of the transcript

"Q. What did her application indicate about her employment record?

A. The application indicates that basically employment in the catering industry with some work in the Whitehorse General Hospital. There's no reference to heavy equipment operation, except for her note that she had been working on her father's farm and also that she spent some time in the roundhouse with Neil MacPherson."

It became evident at the Hearing that Mrs. Bennett

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- 9 McPherson,

during her youth and her time on her parents' farm, had extensive experience with machinery. On pages 69 through 77 evidence was brought out that Mrs. Bennett McPherson operated at least three different types of tractors, was experienced in operating balers and mowers and general repairs of various other machinery. It is my opinion that at the time of her interview with Mr. Dickson Sr. this experience was not brought to his attention. On page 138 of the transcript

"THE CHAIRMAN: Did you in any of those bring bring up your -- the testimony that you've given with respect to your farm experience?

A. Well, not to the extent that I've given it here."

Under a very vigorous cross-examination by Mr. Juriansz, Mr. Dickson Sr. stated at page 185 of the transcript

"Q. Well, if you're working on a farm, you may not be getting paid formally, but it's work, isn't it? It's exposure to heavy

machinery?

A. Well, I suppose if she'd have pushed a little further on that,

I would have got a little more information, but she never volunteered any.

Q. Well, I find it strange that she didn't volunteer. You told us she was an aggressive woman earlier?

A. I, subsequent to our interview, I find that rather strange, too."

I am satisfied that Mr. Dickson Sr. was unaware of the experience Mrs. Bennett McPherson had with machinery during her youth and at the time she was living on the farm.

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In his argument, Mr. Juriansz invited me to infer that Mr. Dickson Sr. did not press for any details of Mrs. Bennett McPherson's experience on the farm because of a bias against females. I declined to do this. It was brought out in testimony that Mrs. Bennett McPherson was "an aggressive woman" and, in my opinion, would have emphasized such experience had she felt it important to the interview. She was experienced as to the job description and knowing what was needed with respect to the job by observing her fiance and, in my opinion, there is no evidence to retrospectively suggest that there was some nefarious reason on the part of Mr. Dickson Sr. that he did not ask detailed questions as to her farm experience. His testimony was that he was primarily interested in her working experience. In my opinion, there is an onus on an interviewee to put all of the pertinent facts in his or her knowledge before the individual doing the interviewing when applying for a job. This all the more so, when the interviewee is as familiar with the job as was Mrs. Bennett McPherson.

Mr. Juriansz also invited an inference of discrimination to be drawn from the inconclusiveness as to the time spent by Mr. Dickson with Mrs. Bennett McPherson which ranged from ten to fifteen minutes to one-half hour. Nowhere in the transcript do I find any indication by anyone that the time allotted for the interview was not adequate. There was no allegation of this in Mrs. Bennett McPherson's testimony, and in my opinion, ample time was given to her to bring out any

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- 11 submission

she wished to make to Mr. Dickson Sr. as to why she should be hired.

It was brought out in testimony that White Pass and Yukon Route Corporation Limited have never had a woman Hostler, but later in the transcript, it was attested that Mrs. Bennett McPherson was the first and only woman applicant for the job. Therefore, the fact that no women have held the position does not show any company policy or pattern of discriminating against women for this particular job as there has only been one lady applicant for the job.

CONCLUSION

I find, therefore, that there is no direct evidence as to any discrimination with respect to women in relation to the job of Hostler by White Pass and Yukon Route Corporation Limited. I also am of the opinion that there is no evidence to infer such discrimination and indeed the direct evidence is contrary to such an inference.

Having found that there is no evidence to support or infer any discrimination, I would add in reply to Mr. Juriansz's argument at page 255 wherein he states:

"Now, quite apart from the specifics, which I ask you to infer an overt attitude to make it more difficult for women, perhaps on a subconscious level but an attitude that just infers that women can't do this job, it's too heavy for them, and if they apply, well this is a problem we have and we'll sort of sit on the application form until the problem is solved somehow by somebody else applying for a different job and we'll say, hey, apply for this job and we'll solve our problem."

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my opinion, I am bound by the Federal Court of Appeal in Canadian National Railway Company v. Canadian Human Rights Commission and K.S. Bhinder wherein the majority find that only discrimination where there is intention to discriminate or differential treatment is prohibited under the Canadian Human Rights Act. This decision is under appeal to the Supreme Court of Canada but until it is overruled, I view it as the law of Canada.

Therefore I would dismiss the complaint.

DATED this 22 day of February, 1984 at Edmonton, Alberta.

Frank D. Jones

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