TRANSLATION FROM FRENCH

TD 3/ 85 Decision rendered on May 31, 1985

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

BRIAN VILLENEUVE, Complainant; -

and BELL CANADA, Respondent.

BEFORE:

Nicole DUVAL HESLER, Chairman

APPEARANCES: RENE DUVAL, Counsel for the Complainant and the Canadian Human Rights Commission;

LINE THIBAULT, Counsel for the Respondent > 1

DECISION The complaint before this Tribunal was filed by the complainant on May 7, 1984 pursuant to Section 7 of the Canadian Human Rights Act. The Complainant alleges that the Respondent discriminated against him in an employment matter because of a physical handicap.

The Tribunal was appointed on July 31, 1984. The investigation was conducted in Ottawa on August 13 and 14, and October 1 and 2, 1984. The document appointing the Tribunal was filed as Exhibit C- 1.

The Tribunal first disposed of a preliminary objection raised by the Respondent, Bell Canada, under Section 33 of the Canadian Human Rights Act, alleging in substance that Mr Villeneuve, the Complainant, should be required to exhaust all grievance and other procedures available to him under the collective agreement before the complaint could be heard by the Tribunal. This preliminary objection was overruled on the grounds that Section 33 gives the Commission administrative discretion to deal with or to refuse to deal with complaints. It does not give the Tribunal the discretion to agree or to

refuse to hear a complaint. The Tribunal also pointed out that it had no jurisdiction to order Mr Villeneuve to proceed with arbitration first, its only jurisdiction (conferred on it by Exhibit C- 1) being to hear the complaint. This position is supported by the Human Rights Tribunal

> 2 decision in the case of Local 916, Energy and Chemical Workers v Atomic Energy of Canada Limited (Decision of Preliminary Matters - Human Rights Tribunal, February 24, 1984).

The Act does not require that the parties exhaust grievance or review procedures prior to laying a complaint. (p. 8)

... We conclude that there is no evidence that the Commission exercised its discretion improperly under section 33 or 36. If we were to find that a Union must exhaust grievance procedures or pursue their rights under the Canada Labour Code before the Commission could accept a complaint from them, we would be severely restricting the rights of Union members to remedies provided by statutes such as the Canadian Human Rights Act. We do not feel that this was the intent of the legislation which purpose is stated in broad terms in Section 2 of the Act. Such fair, large and liberal interpretation as is reserved for remedial statutes in the Interpretation Act, Section 11, precludes this restricted approach.

... In all of these arguments the fundamental question arises whether a Tribunal appointed under the Act has jurisdiction to examine or second- guess the exercise by the Commission of its statutory authority. (p. 10)

> 3 The Tribunal concluded that, although the Canadian Human Rights Commission does not have absolute discretion,

it is not using its discretion unreasonably when it fails to suggest that other recourses be exhausted first.

ORAL EVIDENCE The first witness called, Denis Fournier, Materielman I with Bell Canada and union representative on the Health and Safety Committee, described the duties of a Materielman I, II and III, performed at an equipment distribution centre inside the garage, where a number of offices are also located. Three- quarters of the time, the job is a sedentary one.

Materielman I: checks daily truck loads, assigns tasks, is responsible for reports on equipment orders (by computer), answers telephone calls concerning complaints or irregularities, checks the appropriate documents and verifies the storage of parts;

Materielman II: fills the orders from the previous day by getting the items requested; with the assistance of one or more employees, unloads the

equipment from the truck, > 4 using a hand cart or forklift (all equipment is on pallets). The job requires between two and two and one half hours of manual labour; the remainder of the day is spent on sedentary tasks; Materielman III: assists the Materielman II in his duties. Works in the cable storage area; fills out forms (he must account for all incoming and outgoing materiel for which he is responsible).

According to Mr Fournier, the proportion of manual labour and office work is the same for a Materielman III and a Materielman II. When questioned about the weight of the cable reels, he pointed out that no items were lifted manually in the cable storage area, and that all the work could be done using a forklift. He was not contradicted on this point.

The first expert witness called was Dr Lauréat Tremblay, a urologist. He described the Complainant's medical condition - varicocele - as a congenital defect occurring in 10% to 17% of the male population and forming a swelling of the veins of the spermatic cord. If the swelling occurs on the left side, symptoms usually appear between the ages of 20 and 25. Many cases of varicocele on the left side remain

> 5 asymptomatic. In fact, only 30% to 35% of those affected complain of the condition. The symptoms include pain in the general area. In the majority of cases, the pain is mild and the patient requires no treatment other than reassurance. However, a job requiring someone with this condition to remain standing in the same position, such as that of a soldier or policeman, will intensify the pain and render an operation necessary. Dr Tremblay categorically stated that there is no reason why those afflicted with varicocele should avoid standing, provided that they move about. He said he had recommended that the patient discontinue his job as a splicer [trans] "because he had to stand on a pole for long periods of time, with a belt that further decreased circulation; I imagine that the pain was such that he would lose consciousness" (Transcriptions, Volume I, page 59). Dr Tremblay operated on Mr Villeneuve in April 1981, removing two varicose veins. As a result of the operation, the varicocele condition disappeared. Dr Tremblay conducted a series of post- operative examinations of the complainant, the last of which was on June 25, 1981. Dr Tremblay described his patient's condition at that time:

[Translation] "... The patient was not experiencing any problems or pain; he could play golf and was working part-time. His job at that time did not involve climbing poles and he worked only on the ground, where he could walk around.

> 6 As long as he could move about, he could exert himself without any pain.

The patient does not have a hernia ... ... When I saw him again, I advised him not to return to any job which could cause ... because he was beginning to show symptoms of varicocele on the right side and if these varicose veins have been there for a certain period of time, he will ... if they become blocked in the groin, it will cause a derivation on the other side of the scrotum and varicocele will develop on the right side.

That is why I recommended that he change jobs. I told him that if he wanted to avoid having an operation on the right side eventually, he should try to change jobs so that the condition would not recur. (Transcriptions, Volume I, pp 62-63).

Dr Tremblay clearly stated that he did not see any reason why Mr Villeneuve could not perform the duties of a

Materielman I, II or III. During cross- examination, counsel for Bell Canada attempted to make the witness admit that lifting heavy objects would be inadvisable because it would increase intra- abdominal pressure; however, Dr Tremblay's explanation was as follows:

If I were to try to lift thirty- five pounds, I would feel the strain because my muscles are not developed, but for someone who is used to doing that kind of work, thirty- five pounds would not pose any problem. It would not increase his intra- abdominal pressure. (Transcriptions, Volume I, p 88)

> 7 When questioned by the Tribunal, Dr Tremblay stated that being seated would not be inadvisable for a patient suffering from varicocele.

Having produced his complaint (Exhibit C- 2) and explained that he had been employed by Bell Canada from March 1977 until his dismissal on September 29, 1981, Mr Villeneuve confirmed that Dr Tremblay's recommendation was to [Trans] "stop climbing poles, and not to remain on them for any length of time" (Transcriptions, Volume I, p 134). He therefore tried to change jobs within Bell Canada and produced a request for transfer dated February 11, 1981 (Exhibit C- 3) for the position of Materielman I. The Complainant stated that he was given an interview at Special Services and that he had filed four transfer applications to various positions, namely tester, materielman, Special Services and central office clerk. Only the transfer request for the position of materielman is the object of this complaint.

Michel Pitre, investigator for the Canadian Human Rights Commission, described his October 1983 interview with Mr Gannon, Manager - Materiel, at Bell Canada for the Western Quebec region. His conversations with Mr Gannon and other Bell Canada representatives dealt with

> 8 the position of Materielman III. The Complainant was supposedly refused this position because of his varicocele. Reading the notes from his interview with Mr Gannon, Mr Pitre recounted the following conversation:

Mr Villeneuve was referred to him by Mrs Bureau - he believes it was Mrs Bureau. He obtains information on the individual, evaluates whether he is was capable of doing the work. On the basis of the information on hand and medical restrictions, decided that he could not do the job. Medical restrictions provided by the Employment Centre. He was given a file. (Transcriptions, Volume II, p 167)

He states categorically that Mr Gannon spoke to him about a request for a Materielman III position. Mr Pitre maintained his testimony despite repeated questions from counsel for Bell Canada, who attempted to make him admit that the complainant had not been considered because he had not applied for the position of Materielman III. He conceded that the Complainant had not submitted an application for this position, but insisted that he had been considered for the position. He thought, although he was not positive, that the position of Materielman III was an entry-level position leading to Materielman II, and finally Materielman I.

> 9 Mrs Madeleine Bureau, who was Manager of the Hull Employment Centre in September 1981, explained that the role of this centre was to find jobs for employees who request transfers within the company. She explained the use of the transfer application form. She confirmed the complainant's testimony concerning the transfer applications he had submitted. As for the position of Materielman I, she stated that there had been no opening at that time, but she recalled that there had been an opening for a Materielman III at about the same time. She acknowledged that Mr Villeneuve had been considered for that position. Around the end of August, the position was filled by another candidate who had completed a transfer application form.

Lina Bernier, the second witness for Bell Canada, was Manager of the Employment Centre in Quebec City and met the Complainant in September 1981 while replacing Mrs Bureau, who was on annual leave. She said that she had considered Mr Villeneuve for the position of Materielman III, though unofficially; [trans] "that is, there was no request on file from the employee for the position of Materielman III." (Transcriptions, Volume II, p 199) However, Mr Villeneuve at no time indicated to her that he would refuse

> 10 the job. She therefore gave his name to the department and inquired as to whether he could perform the duties of the position. She also informed Mr Villeneuve of other positions which were open and, although he would have had to accept a considerable decrease in salary, he told her that if he had no other choice, he would accept one of them. The only position he refused was that of a building maintenance (janitorial work). She explained that [trans] "he had

enjoyed his job as a technician from the start; however, it is fairly difficult to find a technician's position which does not require climbing ladders or any great physical exertion." (Transcriptions, Volume II, p 204)

The next witness was Michel Bélanger, Manager of an Equipment Distribution Centre. He summarized the duties of a Materielman I, II and II. His testimony did not contradict in any significant respect that of the union representative, except with respect to the amount of time spent by

Materielmen II and III on materiel handling. According to him, it is preferable, though not necessary, to be a Materielman III before becoming a Materielman I.

Ronald Gannon, foreman of the Materiel Service in Hull, was the next witness for Bell Canada. He stated that a full-time Materielman position had become available around

> 11 September 1981 and that Mr Villeneuve had been considered for that position. He admitted having considered Mr Villeneuve's ability to carry out the tasks of a Materielman III in the following terms:

[Translation] Yes. I believe that even if his request was not for the position of Materielman III, that if there had been a future request, in view of certain restrictions which he seemed to have, he would not have been accepted for the position, to the best of my knowledge. (Transcriptions, Volume II, p 225)

During cross- examination, Mr Gannon gave the following answers to questions posed by Counsel for the Commission:

[Translation] Q. And these restrictions were medical restrictions, were they not? A. Yes. Q. They were medical restrictions relating to a state of health or

medical condition known as varicocele. Are you familiar with this term, sir?

A. Yes. Q. Varicose veins. A. Yes, yes. Q. And you decided that, because of this medical condition, he could

not perform the duties of the position. Is that correct? A. Not because of the condition as such. Q. Because of the restrictions? A. If I remember correctly, the file seemed to indicate that he could

not work standing up for long periods of time. That is how I viewed the situation.

Q. Then, it is a restriction caused by his condition? > 12

A. Yes, that's what I remember having noted. Q. Where did you get that information, sir? A. Sorry. I did not understand your question. Q. Where did you learn about these restrictions? Was it in writing?

Did someone tell you? A. I believe someone told me. Q. Who could have told you that? A. It was ... I believe it was information that was in his file, which

had been pointed out to me by the Employment Centre. (Transcriptions, Volume II, pp 230 and 231) Mr Gannon added that it had occurred on occasion that a person who had not made a specific request for a transfer to a given position had been considered for it. He explained that, in general, when he was referring to a candidate, he was speaking of a "legitimate" candidate. He stated, however, that it was possible to consider a person for a job in case that person should decide to modify his application and become a candidate. Even if Mr Villeneuve had done so, Mr Gannon felt that he could not have been given the position. He repeated that the restriction, to the best of his knowledge, was that Mr Villenueve could not work standing up for long periods of time (Transcriptions, Volume II, p 237) and that, for this reason, he refused to consider the Complainant for the job.

> 13 The next witness was Dr Richard Pilon, staff physician at Bell Canada. He examines employees upon their return to work and imposes temporary job restrictions when required to facilitate their recovery. Restrictions on an employee's work are sometimes permanent. His recommendation report was filed as Exhibit R- 5. He explained the medical restriction which prevented Mr Villeneuve from continuing in his position as a splicer:

[Translation] It was because he could not remain standing in a stationary position for a long period of time. (Underlining added by the Tribunal) (Transcriptions, Volume II, p 248)

Mr Richard Simon, another witness called by Bell Canada, current foreman in the Materiel Service for the Hull and Gatineau regions, also explained the duties of a Materielman II. With respect to the time spent on administrative tasks, he tended to support the version of the union representative rather than that of Mr Bélanger.

Dr Pierre Racine, urologist, also called by Bell Canada, did not, in substance, contradict Dr Tremblay. In fact, after stressing the point that varicocele was due to a problem in the blood flow problem attributable to gravity, he essentially confirmed the statistics and symptoms

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14 described by Dr Tremblay. However, he stated that any exercise or manual labour could increase the distension of the veins involved and cause long- term symptoms. During cross- examination, he acknowledged that a person who has suffered from a left side varicocele does not necessarily develop the condition on the right side. He mentioned the possibility of using mechanical compensation to prevent increased swelling of the pampiniform plexus. He admitted that the best treatment was the operation which Mr Villeneuve had undergone. If the operation is performed properly, the varicose veins disappear and there is no further need for the restrictions which apply when the condition is present.

A third urologist was called as a witness by the Complainant. Dr Louis Coulonval confirmed that a properly performed operation would prevent the recurrence of a varicocele. He more or less repeated the same statistics as the two previous urologists called to the stand. He was in full agreement with Dr Tremblay that the only position which was inadvisable was an immobile standing position; a standing position where the patient was active or moving posed no problem. He went on to say that someone suffering from painful varicocele which had not been surgically treated, or from a recurrence of the condition owing to a failed operation, could not perform the tasks of a Materielman II or III.

> 15 Finally, evidence of moral prejudice was adduced which need not be reviewed here.

DOCUMENTARY EVIDENCE: Exhibit C- 2 shows that nowhere in his complaint does the Complainant, Brian Villeneuve, identify a specific job as having been denied him by Bell Canada. His complaint is worded as follows:

I, Brian Villeneuve, have reasonable grounds to believe that Bell Canada has engaged in a discriminatory practice by dismissing me because of my physical handicap, which occurred on the job. Bell Canada refused me employment in other departments where I could perform the duties required of the positions. This is contrary to the provisions of sections 3 and 7 of Part I of the Canadian Human Rights Act.

It is irrefutable that the complainant was dismissed and that he was no longer able to perform his original duties. The question is whether Bell Canada illegitimately refused him a job in another department where he could have performed the required duties.

Some of the other relevant documents submitted include: > 16

Exhibit C- 4, a certificate from Dr Pilon stating that the employee was capable of regular full- time work and that the only restriction was against climbing (there was no mention of exertion, stooping or driving); this restriction was indicated as being probably permanent;

The report of the attending physician, Dr Tremblay, dated January 20, 1981, before the operation which he performed on the complainant. The report gives a diagnosis of left orchialgia, probably secondary to a varicocele, with the following comment:

[Translation] I believe that the fact that the patient works in an immobile standing position is a major factor in his symptoms. (Exhibit R- 3) (Underlining added by the Tribunal);

Another report by Dr Pilon (Exhibit R- 5) dated August 17, 1981. We deem the following comments to be of particular

relevance:

[Translation] Since that time, the same urological problem has begun to develop on the right side and, after discussion with his physician, it appears that Brian can no longer climb poles.

The physical examination revealed that varicocele is beginning on the right, and that the left is sensitive.

Since Brian works on a pole or a ladder more than 80 per cent of the time, he can no

> 17 longer fulfil the physical requirements of a splicer position. I therefore recommend that the company try to transfer Brian to another position in which he will no longer be required to climb poles.

It is seen readily that that report mentions no restrictions to a job requiring walking or some degree of physical exertion.

The relevant provisions of the Canadian Human Rights Act are Section 3(1), which outlines the prohibited grounds of discrimination, including disability or physical handicap, and Section 7, which states that it is a discriminatory practice to refuse directly or indirectly to employ or continue to employ any individual or, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. However, if the employer establishes that the practice of which it is accused is based on a bona fide occupational requirement, the practice cannot be considered discriminatory (Section 14). The initial burden is on the complainant to prove, on the balance of probabilities, that the respondent engaged in a discriminatory practice.

> 18 The Complainant has discharged that burden of proof. The Tribunal attaches little importance to the fact that one of his official job transfer applications was for the position of Materielman I. The fact remains that the respondent refused to consider him for a position of Materielman III on the grounds of restrictions which it felt due to his perceived physical handicap. The Tribunal acknowledges that the employer was not obliged, under the

circumstances, to find another job for the Complainant, who was no longer capable of fulfilling his duties as a splicer. Nevertheless, having undertaken to do so and having taken steps in that direction, it should have refrained from any discriminatory practices in its chosen course of action. Mr Gannon clearly considered that Mr Villeneuve could be an official candidate for the position of Materielman III. All that was required was for the complainant to fill out a form. This opportunity was denied him because those in charge at Bell Canada decided that Mr Villeneuve's physical handicap would have prevented him from occupying the position of Materielman III.

This Tribunal supports an interpretation of the Act based on the doctrine of remedy construction. It shares the opinion of Black ((1980) 1 CHRR, C/ 1, From Intent to Effect: New Standards in Human Rights), when stating that Parliament intended to eliminate the barriers facing members

> 19 of a disadvantaged group. It is therefore logical to judge behaviour in terms of its effects rather than of its motivation; dismissing a complaint on a technicality of the type raised by the Respondent would not be in keeping with the intention of Parliament. The same approach was followed by other human rights tribunals in cases where similar arguments were presented. To give but one example, the Tribunal refers to the case of Sandiford v Base Communications Ltd and Jenkins (Saskatchewan Human Rights Commission, 84 CLLC 17,024).

The Act defines "disability" as "any previous or existing mental or physical disability ..." (section 20). There is no doubt that Mr Villeneuve's condition constituted a physical handicap and that the employer refused him the opportunity to become a candidate for one of the Materielman positions because of the restrictions it associated with the disability.

The Tribunal cites as authorities on this point the cases of James Anderson v Atlantic Pilotage Authority (Human Rights Tribunal, Decision TD- 7/ 82), in which it was maintained that a heart attack constitutes a disability within the meaning of section 20 of the Act, and of Clément Labelle and Denis Claveau v Air Canada (Human Rights Tribunal,

> 20 Decision TD- 1/ 83) in which the condition of spondylosis, even asymptomatic, was considered to fall within the

meaning of the Act.

Counsel for Bell Canada pointed out during the hearing that, in view of the Complainant's claim that his physical handicap had been fully corrected by the operation which he had undergone, the complaint before the tribunal was not based on physical handicap. This point was not developed during the argument, but the Tribunal feels that it is useful to quote from Mtre Marie- Claire Lefebvre's decision in the case of Valère Brideau v Air Canada (Human Rights Tribunal, Decision TD- 3/ 83):

In Foucault it was decided that what matters is not the physical handicap but the "perception" the employer has of the future employee's physical condition. In the instant case the complainant, Mr. Valère Brideau, was "perceived" by Air Canada as having air bubbles on his lungs, and therefore as having a physical handicap, though the condition

did not exist. (page 4) This Tribunal, also bearing in mind the words of Black in his article above mentioned, adopts a similar reasoning: the Act is designed to ensure equal opportunity of employment. Actions must therefore be analysed in terms of their effects.

> 21 Even if the Respondent did engage in a discriminatory practice according to the principles outlined above, it may be able to justify that practice, in particular under Section 14(a), which reads as follows:

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

It is therefore up to the employer to prove, once again according to the balance of the probabilities, that it has acted in accordance with a bona fide occupational requirement. Called upon to interpret a similar provision in the Ontario legislature, the McIntyre J, of the Supreme Court of Canada, defined a bona fide occupational requirement as follows:

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. In addition it must be

> 22 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. (Ontario Human Rights Commission & al. -vs- Borough of Etobicoke, 1982 132 DLR 14, pp. 19 and 20.)

The employer must meet both aspects of this definition of bona fide occupational requirement. The first aspect is subjective. The employer must have acted in the sincere belief that the requirement (or, in this case, the restriction) which it imposed was a bona fide occupational requirement. This Tribunal unhesitatingly believes that the Respondent meets this subjective aspect of the bona fide occupational requirement test. As for the second, objective aspect, the Tribunal must be convinced that the requirement (or, in this case, the restriction) was job- related and reasonably necessary. I am convinced that this is not so. I endorse the comments of Mr Kerr in the case of Frank E McCreary v Greyhound Lines of Canada Ltd et al (Human Rights Tribunal, Decision TD 11/ 84) on page 24:

This involves two sub- issues in the circumstances of this case. First, does the evidence support the Respondents' rationale for this policy on

a factual basis? Secondly, > 23

does the rationale, if factually supported, lead to the legal conclusion that the requirement "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 restrictions which Bell Canada associated with the Complainant's condition did not meet the objective criteria

defined above.

Finally, must the complainant, in proving that discrimination took place, also establish the intent to engage in a discriminatory practice? The question will be definitively resolved when the Supreme Court renders its decision in the appeal of a decision of the Federal Court in the Bhinder case (Bhinder v Canadian National Railways, 1st instance: (1981) 2 CHRR D/ 546; on appeal: 4 CHRR D/ 1404).

This Tribunal agrees with the Commission that the granting by the Supreme Court of leave to appeal the decision in the Bhinder case restores to the lower courts all the latitude and discretion that the rule of stare decisis might have removed with respect to assessing the applicable case law. Pending that ruling, this Tribunal maintains the position which it has already

> 24 adopted in the cases of Denis Marcotte v Rio Algom Limited ((1984) 5 CHRR D/ 2010) and in Action Travail des Femmes v Canadian National ((1984) CHRR D/ 2327) - namely that the Parliament of Canada, in adopting the Canadian Human Rights Act, intended to eliminate all barriers set up to discriminate against disadvantaged groups whether intentionally or unintentionally. Many types of unintentional discrimination based on stereotypes or prejudices deeply rooted in our society could continue because of the impossibility to prove that a discriminatory practice was intentional. This Tribunal, therefore, does not require the complainant to establish Bell Canada's intent in this respect.

The evidence reveals that there was, in this case, no bona fide occupational requirement. There was never any mention of job restrictions for Mr Villeneuve other than that of standing motionless for some time. Moreover, his varicocele had been corrected by his operation. It was as a precautionary and preventive measure that the claimant was advised not to remain in a stationary standing position for long periods of time. The job of Materielman III would not have required him to do so. It is obvious that the members of the Respondent's staff who were involved in the decision misinterpreted the medical information and restrictions in the Complainant's file

> 25 and applied an overly severe test, with the result that Mr Villeneuve was denied a job opportunity on discriminatory grounds.

Counsel for the Commission stated in its argument that there appeared to have been a general assumption about Mr Villeneuve's physical problems, and that no attempt had been made to evaluate his personal ability to perform the duties of the position. This point is worth making. The Tribunal shares the opinion that the Act calls for a personal evaluation of the individual performing the job. This point of view was very aptly stated by Ms. Susan Mackasey Ashley in the case of Michael Ward v CN Express (Human Rights Tribunal, Decision TD 1/ 82):

The burden is on the employer to show that its physical requirement is rationally based and is not founded on unwarranted assumptions or stereotypes, i. e. that "it is supported in fact and reason". I have concluded that the employer assumed that applicants lacking digits on a hand would be unable to perform the job, and that this policy does not take into account the exceptional individual, such as Michael Ward, who has demonstrated that he can do the job despite his disability.

It may be true that many people > 26

missing digits on one hand would be unable to do this job. But Michael Ward has demonstrated that he has the skills (from his previous employment and experience), the motivation, the physical strength, and the ability in his two hands, to do what these other people cannot. Minimum physical standards may be a good guideline for employers. However, persons who do not reach the minimum should not be excluded absolutely. (pp 46- 47)

All the specialists heard at the hearing, with the exception of Dr Tremblay, who was not asked the question, agreed that the operation which Mr Villeneuve underwent is used as a preventive measure in the British armed forces and in a number of police forces. Are we to believe that Mr Villeneuve could be a soldier but not a Materielman II or III? As for the right varicocele, which never developed, it could be treated in the same way as the left. This Tribunal finds it unnecessary to spend more time on this point, especially since it is convinced that the possibility of a right side varicocele developing in no way influenced the employer in its decision to dismiss Mr Villeneuve.

Counsel for Bell Canada contended that the problem really centered on the number of days of absence of Mr

Villeneuve. The Tribunal presumes that Counsel was referring to the fourth paragraph of Exhibit

> 27 R- 5, namely Dr Pilon's report dated August 17, 1981, which reads as follows:

[Translation] Over the last year, he was absent on seven occasions, including one absence of nineteen days for a urological operation. In addition, he had to visit his doctor and his dentist, for a total of twenty- four days of leave.

That same report concludes that it would be advisable to transfer the the Complainant [Trans] "to another job in which he would no longer have to climb poles", not to dismiss him. Moreover, it is obvious that the large number of days of absence reported by Dr Pilon is related to the operation which Mr Villenueve underwent. In September 1981, there was no reason to believe that this rate of absenteism would continue; the Tribunal does not, therefore accept this contention.

Counsel for Bell Canada also pointed out that, at the time Mr Villeneuve was being considered for the position of Materielman III, another employee had requested a transfer to that position. However, evidence was also made that that other employee was not given the position, which was not filled until a later date. We therefore feel that this argument is no ground for exoneration of the Respondent.

> 28 Counsel for Bell Canada argued as well that the present case does not lie within the scope of Section 7 of the Act, since the employer did not:

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

Bell Canada's position is that the refusal to employ or to continue to employ an individual refers only to the refusal to hire a person, not the refusal to give him a specific job. The discussion is somewhat academic, since this is a case of outright dismissal. I cannot support this view, which seems to demonstrate a far too restrictive interpretation of the Act and does not respect the statutory principles of interpretation outlined in section 11 of the Interpretation Act (RSC 1970, c I- 23):

11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

> 29 Counsel for the Respondent also argued that Bell Canada would have violated the collective agreement if it had considered Mr Villeneuve when another candidate had formally applied for the job in question. In the Tribunal's opinion, to maintain this point of view would dehumanize labour relations and accomplish the opposite of their primary objective. It was clearly established that Mr Villeneuve could have applied for the position of Materielman III at any time, but that he was not given the opportunity to do so in view of the stand taken by Mr Gannon. The Tribunal does not believe that, by acknowledging that the complainant was adversely differentiated against because of Respondent's refusal to consider him for a position which he had not yet officially requested, it is rendering a decision forcing the Respondent to discriminate against its other employees, particularly in view of the fact that the position was filled only at a somewhat later date and by someone other than the candidate who had applied for it.

Bell Canada contended that the Tribunal should render its decision only on the basis of what the employer's representatives knew or understood at the

time about Mr Villeneuve's condition. In doing so, I would be ignoring the objective aspect of the bona fide occupational requirement, and the Tribunal cannot support this point of view. Bell Canada also contended that, by

> 30 upholding the complaint, the Tribunal will force the employer not only to look for, but also to find another position for an employee who has become handicapped. With all due respect, this view obscures the real problem. The discriminatory practice consisted in the fact that, having agreed to accommodate the employee and to try to transfer him to another position when it was not legally obliged to do so, the Respondent then denied a transfer to the complainant on a prohibited ground of discrimination. In view of Bell's initiative to find a suitable position for Mr Villeneuve, I am not requiring it to set up a special program (within the meaning of Section 15(1)) in deciding that, once it undertook to transfer the employee, it should have acted without discriminating against him on a prohibited ground.

Bell Canada also invoked the provisions of Section 10.07 of the collective agreement. Subsection (b) of that Section reads as follows:

(b) Candidates to job openings must be selected in the following order: (i) 912B applicants, (ii) other persons. However, the Tribunal points out that Subsection (f) of the same Section provides that:

> 31 (f) Notwithstanding the provisions of Subsection 10.07(b), the Company may place employees in the following order:

(i) where transfers are required because of health or physical handicap. Although the Tribunal was not given any arbitration decisions which dealt with the interpretation of the above provisions, they seem very clear and Bell Canada cannot use them to avoid its obligations under the Act. Moreover, even if it could do so, this Tribunal is of the opinion that the provisions of the Act, which are of public order, cannot be avoided because of compliance with the provisions of a collective agreement:

When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.

...

Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually

> 32 agree to suspend its operation and thereby put oneself beyond the reach of its protection.

Insurance Corporation of British Columbia v Robert C Heerspink and Director, Human Rights Code, ([1982] 2 RCS 145, pp 157- 158)

Having concluded that the Complainant was dismissed on a prohibited ground of discrimination, this Tribunal must now deal with the issue of compensation.

Admissions were produced, establishing that the Complainant received $21,000 in Workmen's compensation benefits from the Commission de santé et sécurité au travail. However, because the Bureau de révision overruled the initial decision of the benefits officer, Mr Villeneuve must reimburse that amount. Moreover, by reason of the decision of the Bureau de révision, he was declared retroactively eligible for unemployment insurance and received $7,000 in UI benefits. He has appealed the decision of the Bureau de révision and, if the Commission des affaires sociales allows his appeal, he will not be required to repay the $21,000 but only the $7,000 received from the Unemployment Insurance Commission. It should be noted that the employer is directly responsible to the authorities concerned for

> 33 repayment of the unemployment insurance benefits, but not of the reimbursement of Workmen's compensation benefits. The Tribunal will take this factor into account.

The salary of a Materielman III, from September 29, 1981 to October 3, 1984 would amount to $67,371.50. For the thirty- three weeks after October 3, 1984, the Tribunal will allocate a weekly salary of $487.75, since there was no proof of a forthcoming salary increase and since the collective agreement (Exhibit R- 8) was of no assistance in clarifying this point because it expired on November 30, 1984.

Decision and Order For the above reasons, the Tribunal: 1. Finds that Bell Canada, though not willfully nor recklessly within

the meaning of Section 41(3) a), has engaged in a discriminatory practice under the Canadian Human Rights Act by dismissing the Complainant on the grounds of his physical handicap, contrary to the provisions of Section 7 of the said

Act, and that this practice was not based on a bona fide occupational requirement within the meaning of Section 14 of the said Act;

> 34

2. Orders Bell Canada to reimburse to the Complainant, Brian Villeneuve, subject of course to any applicable income tax legislation, an amount of $83,467.25, representing lost wages caused by its discriminatory practice; no interest is allowed given that the money would have been acquired by the Complainant gradually and that he would have had used it to meet his living expenses and that there was no evidence adduced on the interest which the Complainant might have earned on a saved portion of his salary;

3. Allows Bell Canada to withhold from the above amount an amount of $7,000 representing the unemployment insurance benefits which it may be called on to reimburse until the date of a hearing or a settlement with the Unemployment Insurance Commission, and to then repay to the said Commission or to the Complainant, as the case may be, the said amount of $7,000, without interest;

4. Awards the complainant a compensation in the amount of $2,000 for damages in respect of feelings and self- respect, in accordance with Section

> 35 41(3) b) of the Canadian Human Rights Act; 5. Orders Bell Canada to offer the Complainant a position of

Materielman III, as soon as such a position becomes available.

Signed in Montreal, Quebec this 22nd day of May 1985

(signed) Nicole Duval Hesler