

Decision Rendered November 29, 1988

HUMAN RIGHTS TRIBUNAL IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT S. C. 1976- 77, c. 33, as amended

AND IN THE MATTER OF a complaint filed pursuant To Section 32(1) of the Canadian Human Rights Act by Kaye MacInnis against Canadian National Railway Company

BETWEEN:

KAYE MACINNIS Complainant

AND:

CANADIAN NATIONAL RAILWAY COMPANY Respondent

TRIBUNAL: Michael G. Baker Chairperson

DECISION OF TRIBUNAL

APPEARANCES: Ms. Anne Trotier and René Duval, Esq. Counsel for the Canadian Human Rights Commission
John P. Schiller, Esq. Ms. Celia J. Melanson Counsel for the Respondent

DATE AND PLACE OF September 16 and 17, 1987 HEARING: January 13, 14 and 15, 1988

Halifax, Nova Scotia

DECISION

1. Appointment of the Tribunal

On the 27th day of March, 1987, Sidney N. Lederman, Q. C., the president of the Human Rights Tribunal Panel appointed Michael G. Baker as a Human Rights Tribunal to inquire into the complaint filed by Kaye MacInnis dated the 18th day of May, 1984, against Canadian National Express (Canadian National Railway Company) pursuant to Section 39(1. 1) of the CANADIAN HUMAN RIGHTS ACT hereinafter called "the Act". The said Tribunal was appointed to determine whether the action complained of by Kaye MacInnis constitutes a discriminatory practice on the ground of sex in a matter related to employment under Sections 7 and 10 of the Act.

The said Tribunal held hearings on September 16 and 17, 1987, at Halifax, Nova Scotia at which time Counsel for the Canadian National Railway Company hereinafter called "the Respondent" raised certain preliminary issues. These preliminary issues were argued by Counsel for the Respondent and Counsel for Kaye MacInnis hereinafter called "the Complainant" and the Canadian Human Rights Commission hereinafter called "the Commission".

Counsel for the Respondent and Counsel for the Complainant and the Commission presented written arguments to the said Tribunal concerning these preliminary issues raised by the Respondent. After considering the arguments raised by Counsel for the parties at the hearing on September 16 and 17, 1987 and the written arguments submitted by Counsel for the parties the said Tribunal decided to dismiss the preliminary issues raised by the Respondent and ordered the matter to proceed. The hearing resumed at Halifax, Nova Scotia, on January 13, 1988, and continued on January 14 and 15, 1988. Following the conclusion of the hearings, Counsel for the parties submitted written arguments.

2. Complaint

The Complaint filed by the Complainant against the Respondent, dated the 18th day of May, 1984, alleges as follows:

"My position at the CN Servo- Centre was abolished, and by virtue of my seniority I chose to displace the man holding the position of Senior Administration Clerk in the Express Centre. The men who were delegated to train me did not want a woman in the position and failed to give me proper instruction. At the end of my training period I was tested for the job by the men whose positions would be adversely affected by my appointment, and failed. Men holding similar and comparable positions at this and other Express offices were not similarly tested during their candidature. I allege that I have been discriminated against contrary to Section 7 and 10 of the Canadian Human Rights Act." The said Tribunal has considered the complaint under Sections 7 and 10 of the Act 7 and 10 of the Act.

3. Facts

The Complainant worked for the Respondent from 1963 to 1966, and again from 1970 until the present. During the periods of employment with the Respondent the Complainant has worked as a Clerk/ Stenographer, a Customer Service worker on Demurrage, a Crew Clerk, a Senior Administrative Clerk Trainee and lastly as a part- time Janitor and Transportation Labourer.

During the three years prior to the events which are the subject matter of this complaint, the Complainant worked as a Crew Clerk. In 1983 her position as the CN Servo- Centre was abolished and she decided to train to displace the person holding the position of Senior Administrative Clerk at the Respondent's CN Express Office in Stellarton, Nova Scotia.

The Senior Administrative Clerk position involved components of three other job functions, namely; rate biller, customer service clerk and senior administrative clerk. At the time the Complainant decided to train for the Senior Administrative Clerk position she had no prior experience with the duties of the Senior Administrative Clerk and in fact according to her own evidence she lacked supervisory experience, computer experience and accounting experience. She commenced training for the position of Senior Administrative Clerk on June 13, 1983.

The Complainant trained for the position of Senior Administrative Clerk from June 13, 1983 until October 7, 1983. This period of training was interrupted by vacation time taken by the Complainant. During the period of training for the position of Senior Administrative Clerk, the Complainant was given instruction by Mr. Michael MacNeil (the Senior Administrative Clerk at the time), Mr. David Anderson (the ratebiller) and by Mr. Alison Diamond, who was filling in for Mr. MacNeil while he was on vacation(and also for the customer service clerk, Mr. Mel Moore). From the evidence it is clear that towards the end of the training period, the Complainant was given a test on ratebilling which was designed by her immediate supervisor, Mr. Donald Vosburgh, assisted by Mr. Anderson. Following the completion of this test by the Complainant and following a telephone call by Mr. Anderson to the regional office in Moncton, New Brunswick, Mr. Vosburgh telephoned the Complainant at home to indicate that she had been disqualified from filling the position of Senior Administrative Clerk. At the time the Complainant received notice that she had been disqualified from filling the position of Senior Administrative Clerk, she was home on sick leave, which according to the evidence of the Complainant was because she was feeling the emotional strain of her work environment.

The Complainant did not work again for the Respondent until March, 1984, when she resumed her employment as a part- time janitor and transportation labourer.

4. The Law

The relevant sections of the Act applicable to this case are as follows:

"2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.:

"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."

"4. A discriminatory practice, as described in sections 5 to 13.1, may be the subject of a complaint under Part III and

anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 41 and 42."

"7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

"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."

4. Conclusion

Following a careful review of the evidence of the complainant, I have come to the conclusion that the Complainant genuinely believes that: (a) she would have been treated differently if she were a man and/ or (b) the system of training provided to her discriminated or tended to discriminate against her because she was a woman. However, after reviewing the evidence of the Complainant and all of the other witnesses, I have come to the conclusion that her belief is, in fact, not correct.

To appreciate the facts of this case one must be familiar with the provisions of Agreement 5.1 between the Canadian National Railway Company and the Canadian Brotherhood of Railway, Transport and General Workers and in particular Section 13.6 and 16.1, which provide as follows:

"13.6 A senior employee allowed to displace a junior employee shall receive a full explanation of the duties of the position and must demonstrate his ability to perform the work within a reasonable probationary period up to 30 working days, the length of time dependent upon the character of the work. Any extension of time beyond 30 working days shall be locally arranged. The provisions of Article 12.17 may be applied in cases when an employee is not allowed to displace."

"16.1 Employees shall be encouraged to learn the duties of other positions and every opportunity shall be afforded them to learn the work of such positions in their own time, and during the regular working hours when it will not unduly interfere with the performance of their regularly assigned duties. The supervisory officer may for this purpose arrange with the interested employees to exchange positions for temporary periods without affecting the rates of pay of the employees concerned. The Local Chairman of the Brotherhood will be informed when employees exchange positions in accordance with this Article."

The Complainant indicated that she had never known any railway employee who did not get the job he or she attempted to train to receive. However, the evidence indicates that Gerny Phinney, Jack Spencer and Evan Langille had all attempted to displace the person holding the position of Senior Administrative Clerk and failed. This is probably attributable to the complexity of this position and the number of job functions that the holder must be familiar with in order to fill this position. The fact that men had in the past attempted to displace the person holding the position of Senior Administrative Clerk indicates to me that there was nothing necessarily out of the ordinary in the Complainant's disqualification.

With respect to the question of the amount of time given to the Complainant to train for the position of Senior Administrative Clerk, the evidence of Mr. Walter Agnew, a labour relations officer employed by the Respondent, indicates that the ordinary practice of time Respondent is to allow six weeks for training. In the case at hand, the Complainant was in fact given longer to train, which also indicates that there was in fact no effort being made to discriminate against the Complainant. I also accept Mr. Agnew's evidence that "it would be impossible for anyone without extensive experience in that operation (Senior Administrative Clerk) to qualify in six weeks. You'd have to learn every job in the office to be able to fulfill the duties" p. 289. Clearly the Complainant lacked extensive experience. Considering this fact, the nature of the functions with which the Senior Administrative Clerk needs to be familiar, the fact that the Complainant's previous work experience was not very similar, and the fact that the

Complainant did not do any after hours studying, I have come to the conclusion that the decision by the Respondent not to allow the Complainant to displace Mr. MacNeil was genuinely based on her on- the job performance.

Another question raised by the Complainant concerned the test which >Page nine was given to her on the ratebiller's function. it appears from the evidence that the Complainant was not the first person to have been offered a test on this function since Mr. Jack Spencer had been offered the opportunity of taking a similar test which was declined. Furthermore, there is no evidence that the test was designed to trick or deceive the Complainant or that it was unfair or incorrectly marked. In fact, I accept the evidence of Mr. Donald Vosburgh that the test was a fair one and that the test was, in fact, reviewed by Mr. Gary Steeves, Employee Relations Manager with the Respondent in Moncton, who determined it was fair, as well. Certainly, it is unfortunate that the test was not available in evidence but I see no reason to impute any sinister motive from this fact.

Another concern of the Complainant was the training she received. Upon reviewing the evidence, I have reached the conclusion that the training given to the Complainant by Mr. Diamond and Mr. MacNeil was unquestionably adequate. There is no evidence that they did not do their best to train the Complainant properly. As well, the Complainant never alluded to any inadequacy in training by these gentlemen.

It is the Complainant's position that she was not given adequate training by Mr. David Anderson (the ratebiller) with respect to his function. This is a more difficult question since Mr. Anderson had quite a bit to lose if the Complainant were successful in obtaining the Senior Administrative Clerk position since he might have been displaced by Mr. Michael MacNeil.

This would have meant that Mr. Anderson would have been transferred to a non- clerical job "cleaning track". However, I am satisfied with Mr. Anderson's evidence that he did not withhold anything from the Complainant and that he trained her to the best of his abilities. p. 452 Furthermore, if there were any difficulties in this regard, which I am satisfied there were not, such difficulties would have been as a result of Mr. Anderson's concern with respect to his being displaced and not because of the Complainant's sex.

At this point I should add that I believe that as the Complainant's training for the position of Senior Administrative Clerk progressed tension likely did increase in the office and that the Complainant was likely correct in sensing this situation. However, I am convinced that the tension was a natural result of the displacement provisions in the collective agreement hereinbefore referred to and that no discrimination was practiced and no discriminatory remarks were made against the Complainant. This tension had nothing to do with the Complainant's sex.

In closing, I should add that I have considered the evidence of Mr. Garfield Sutherland and I have concluded that I cannot accept his recollection of the conversations he allegedly had with Mr. David Anderson (p. 214- 215) and Mr. Anderson's father, Philip (Ted) Anderson (p. 215). Instead, I prefer the evidence of Mr. David Anderson and Mr. Philip Anderson (by way of Statutory Declaration). Consequently, I have come to the conclusion that Mr. Sutherland is mistaken in his recollection about these two conversations.

For all the foregoing reasons I have decided that the complaint of Kaye MacInnis (Katherine Janet MacInnis) dated the 18th day of May, 1984, is not substantiated and do hereby direct that it be dismissed.

Dated at Chester, Nova Scotia, this 31st day of October, 1988.

MICHAEL G. BAKER CHAIRPERSON OF HUMAN RIGHTS TRIBUNAL