

T.D. 16/93
Decision rendered September 1, 1993

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DONALD JARDINE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

OTTAWA-CARLETON REGIONAL TRANSIT COMMISSION

Respondent

DECISION

TRIBUNAL: Elizabeth Leighton - Chairman

APPEARANCES: Odette Lalumière for the Canadian Human
Rights Commission

Paul Webber, Q.C. for the Respondent

DATES AND PLACES May 25-26, 1993

OF HEARING: Ottawa, Ontario

FACTS

Two complaints were filed under sections seven and ten of the Canadian Human Rights Act S.C 1976-77, C.33 as amended (hereinafter called the Act) by Donald Jardine, both dated January 6, 1987; both allege discrimination by the Ottawa-Carleton Regional Transit Commission (hereinafter called OC Transpo) based upon age. Each relies upon the same factual situation; therefore, both complaints will be dealt with together.

Donald Jardine gave evidence that he was born in Ottawa, Ontario on May 27, 1925, continued to live and be educated there until the War years. He returned to Ottawa upon his discharge from active combat duty with the RCAF in August, 1945. After that discharge, he was employed by the Canadian government in a number of different capacities. Throughout this post-War period, which he admitted was confused somewhat in his memory, he spent some time working for OC Transpo, or the company that was its predecessor. Although he indicated in his evidence-in-chief that this

employment driving streetcars and buses was during the years 1947 and 1948, it was clear that Mr. Jardine's memory of that period and the pattern of his employment then was confused. He had indicated on his 1985 application to Oc Transpo that this employment with OC Transpo was from 1948 to 1951. He did remember, however, that this period of work with OC Transpo most often involved driving electric streetcars in the downtown area of Ottawa, working split shifts or at nights. This was because he was junior in the system and, consequently, received work rejected by senior drivers at what he remembered as quarterly "booking" sessions.

From the OC Transpo employment, Mr. Jardine moved on to what he described as a more settled job, driving for what he called Voyageur Colonial or Colonial Coach. This gave him a higher salary, even though it involved being away from his home overnight, as he drove highway buses, used for commuter passengers, on a Monday-Friday "split-shift". Again, he found himself low on the seniority ladder in a business which used a "booking" system, based upon employee seniority to assign "runs".

This employment with "Voyageur" lasted until 1953 when Mr. Jardine married and moved to Toronto. There, he found employment as a driver with the Toronto Transit Commission for "two years or so" - probably (extrapolated from his evidence) from 1953-56. Again, as a junior employee in the "booking" system, he drove streetcars in the core area of Toronto, mostly in the evenings, and was eventually able to work his way up to more desirable bus routes.

In the mid-50's, Mr. Jardine left the TTC to join the Canadian

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Broadcasting Corporation in Toronto as a cameraman; he remained with that company for over twenty years, most of them in Ottawa to which he had returned in 1960. He retired early in 1976 or 1977, taking a reduced pension which carried a partial increment based upon the cost-of-living index. That retirement decision was based upon his desire not to have to move from the Ottawa area as well as what he described as his annoyance with the CBC's bilingualism policy.

As a result of his experience with the CBC, he was employed as a cameraman with the House of Commons which had begun to televise parliamentary proceedings. This employment ran from 1977 to February 1985, when Mr. Jardine again took early retirement with a reduced pension - this one fully incremented to the cost-of-living index. This retirement was precipitated by the death of his father-in-law. Mr. Jardine was, perhaps, feeling the first pangs of mortality - he indicated that his reason for retirement was that "if it could happen to [my father-in-law], it could happen to me". Inherent in this succinct statement is the desire to take some time to live more fully. Presumably, that is what Mr. Jardine intended to do. His income tax returns for 1987 through 1990 indicate, as did he in evidence, that, in addition to his pension income, he had managed his money well over the years and would be able to retire comfortably.

Within months, however, Mr. Jardine found that retirement was not what he had thought it would be. He had no social life; in short, he was bored.

Therefore, he drew on his past experience as a bus operator - albeit that experience involved a vastly different world, the world of 1947-57 to which we now look with nostalgia - to make application on April 16, 1985 to OC Transpo. He indicated on that application form that it was for the position of "bus driver". He was 59 when he made his application.

When he first applied, he was told that there was a "waiting list". Therefore, he was not surprised at a considerable wait before he was called for an interview by what he described as a "board". At that time, he may have indicated that he was under his doctor's care for hypertension. For that reason or others (none was given to him), he was asked to have a complete medical examination by an independent physician which involved, amongst other things presumably, taking an electro-cardiogram, a stress test, and a 24-hour heart monitor test. As he heard nothing concerning either the interview or the medical examination, he assumed that all was well and that he would be offered a job with OC Transpo.

He was aware, as time went on, however, that there were driver-trainees working on the OC Transpo routes. Therefore, he approached a Mr. Gratton at OC Transpo and was told that all positions had been filled but more hiring might occur later. His application remained with the company. In the meantime, he was able to secure a term contract with the House of Commons as a cameraman. He also secured employment as a school-bus driver with Charterways in the fall of 1986 to brush up his skills as a bus driver. Throughout this time, he

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spent the winters (October to April) in Florida.

In November of 1986, however, he must have been in Ottawa. He spoke then with Mr. Gratton for a second time concerning his application for employment as a bus driver with OC Transpo. During this conversation, he informed Mr. Gratton that he was over the age of sixty; Mr. Gratton informed him that, consequently, he was too old to be considered for such employment. The written confirmation of that information came in the form of a letter dated November 7, 1986, from Simone Tessier, Director, Personnel Administration Department, OC Transpo. That letter indicated that since Mr. Jardine's application, April, 1985, and its final processing, June, 1986, "the Commission has been reviewing the present hiring policy and seriously considering rejecting all applications from candidates of advanced age due to the initial training cost factor and the few remaining years of service until compulsory retirement age". Once Mr. Jardine's actual age was confirmed during his conversation with Mr. Gratton, "the matter was brought to the attention of senior management and after serious consideration, it was decided that [Mr. Jardine's] application would be rejected...[as he was] over 60 years old".

Upon receipt of that letter, Mr. Jardine described that he felt "psychologically down", depressed and rejected. Although he understood the stresses involved in again being the low person in an employment situation involving the "booking" system, he was anticipating employment as a bus driver with OC Transpo. As the winter went by, he felt he had "not been used too well". He decided to bring the complaints now before the

Tribunal. In the meantime, he continued to work part-time as a schoolbus driver for Charterways and from 1989 to 1992 as a Commissionaire. Currently, he is again retired.

ISSUES

OC Transpo agreed at the outset that Mr. Jardine was the victim of "direct discrimination" because of its refusal to consider further his application for employment based upon his age of over 60. There is no dispute that this action by OC Transpo constituted a prima facie violation of the Canadian Human Rights Act, sections 3(1), 7 and 10 which provide as follows:

Sec. 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.

Sec. 7 It is a discriminatory practice, directly or

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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.

Sec. 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.

Based upon the discriminatory practice which, in this case, is acknowledged by OC Transpo, the issue is whether OC Transpo is able to justify that practice by a statutory exception. The facts in this case would indicate that section 14(a) [now sec. 15(a)] of the Act will be the only relevant exception to which OC Transpo may turn. That section of the Act provides as follows:

Sec. 14(a) [now sec. 15(a)]

It is not 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.

Thus, differential treatment in relation to employment on any ground is allowable, if it is based upon a bona fide occupational requirement.

Both counsel for the Commission and for OC Transpo agreed that there was no issue of "adverse effect discrimination" based upon the facts before the Tribunal.

The law

The onus lies on the employer to prove, on the balance of probabilities, that it is acting in a discriminatory manner, allowed

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because it is based upon a bona fide occupational requirement. CHRA, sec. 14(a) [now sec. 15(a)]; Carson et al v. Air Canada (1982), 3C.H.R.R., D/818, at D/828-29; Carson et al v. Air Canada (1983), 5C.H.R.R., D/1857 (Review Tribunal), at D/1858.

The seminal case with regard to the definition of a bona fide occupational requirement is Ontario Human Rights Commission et al v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14 (Supreme Court of Canada). McIntyre, J. of the Supreme Court of Canada interprets similar language in Ontario legislation when he defines, at page 19-20 of that judgment, a "bona fide occupational qualification and requirement" as follows:

To be a bona fide occupational qualification and requirement a limitation, such as 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 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.

He goes further in this definition, to address specifically the employer claim of a bona fide occupational qualification and requirement based upon safety concerns. At page 20-21, McIntyre, J. says as follows:

In an occupation where...the employer seeks to justify the requirement 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 Etobicoke case has been accepted as the appropriate test of what is necessary to constitute a bona fide occupational requirement under the Canadian Human Rights Act, *Re CNR and Canadian Human Rights Commission* (1983), 147 D.L.R. (3d) 312 (Federal Court of Appeal) at 318-19; *Carson et al v. Air Canada* (1983), 5 C.H.R.R., D/1857 (Review Tribunal), at D. 1874; *Re Canadian Human Rights Commission et al and Greyhound Lines of Canada Ltd. et al* (1987), 38 D.L.R. (4th) 724 (Federal Court of Appeal) 729 ff.

Based upon that acceptance, the employer must satisfy two aspects of a bona fide occupational requirement as set out in the judgment of McIntyre,

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J. The first aspect is a subjective one - the employer must act with a genuine belief that the differential treatment is related to the particular job and its ability to be performed "with all reasonable dispatch, safety and economy". The employer cannot, certainly, act with an intention to defeat the human rights legislation.

The second aspect is an objective one - the differential treatment must be job-related in that there must be evidence that it is "reasonably necessary" in relation to job performance. If public safety is a concern, that evidence must justify the conclusion that "there is sufficient risk of employee failure" to warrant the differential treatment "in the interests of safety of the employee, his fellow employees, and the public at large".

These two aspects must be satisfied on a balance of probabilities; the Tribunal must make that decision based upon the evidence before it in each individual case. 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.

This creates a definition which is "expressed in very broad terms" (Mahoney, J. in *Re Canadian Human Rights Commission et al and Greyhound Lines of Canada Ltd. et al* (1987), 38 D.L.R. (4th) 724 (Federal Court of Appeal) p. 734.)

Certainly, it must be interpreted more broadly than the definitions drawn from the American jurisprudence concerning the definition of a bona fide occupational requirement. American cases on point attempt to set out most specifically the evidence which an employer must bring to satisfy the onus that there is an exception for its differential treatment of an individual. McIntyre, J. anticipated, perhaps, such attempts at specificity when he warned against the establishment of rules concerning the requirement of statistical and medical evidence to prove, on the balance of probabilities, the existence of a bona fide occupational

requirement. The Federal Court of Appeal, in *Re CNR and Canadian Human Rights Commission* (1983), 147 D.L.R. (3d) 312, at 320 and 340-41, indicated that interpretation of Canadian human rights legislation must deal cautiously with the more rigorous interpretations placed upon similar American legislation.

The decision of the Tribunal, then, must be based upon the evidence before it and whether that evidence satisfies the test for a bona fide occupational requirement as enunciated by McIntyre, J. in the *Etobicoke* case.

RESPONDENT'S EVIDENCE

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Mr. Ron Mooney is currently in the administrative position of Superintendent of Operating Personnel, in transportation for OC Transpo. Additionally, he was President of the Supervisory Staff's Union for some 10 years. He has been employed by OC Transpo since 1966, first as a bus operator and later working in supervisory capacities, both "on the streets" and in central control. His "overview" of the company's operations concentrated on the bus operator's position in the company.

Currently, OC Transpo has 123 routes, 66 of them described as "regular", which carry a minimum of two operators and operate from the early morning hours into the night. The remaining 57 routes are "express" routes which have limited stops and run to and from developed areas to and from the city centre, typically at peak periods or rush hours.

The equipment driven consists of either regular buses or articulated buses, longer with a movable mid-section and three entrance/exit areas, built to accommodate greater numbers of passengers.

The system of work assignments appears not have changed substantially from what Mr. Jardine described in the 1940's - a quarterly "booking" session is held and the work assignments are chosen or assigned by seniority. This system is part of a collective agreement as bus operators are unionized.

The new bus operator must pass a 29-31 day "basic operator training" programme, during which he or she is paid at a "training rate" before he or she begins a one-year probationary period. During the latter, the operator will receive follow-up evaluations and refresher training six months after the basic training programme is completed. This training costs the company an estimated \$5,050.00. During the one-year probationary period, the operator is paid at a somewhat reduced hourly rate (increasing at four-month intervals).

At the same time, the operator will be the low person in the seniority "booking" system, relegated to doing the work rejected by more experienced operators - and doing it for thirteen of every fourteen days. Most often, that work will be from the 2:30 p.m. "spare board", work which involves split shifts, driving routes considered by experienced operators to be "bad" (usually for reasons of numbers of passengers and the time of day,

such as rush hour or routes to "special events"), driving different routes daily, driving "express" supplements for schools or peak periods. The new operator may have to be at work for up to 15 hours to do 6-8 hours of paid work.

These combinations of work from the 2:30 p.m. "spare board", according to Mr. Mooney, create a great deal of frustration and stress for the new operator. Add to this the fact that these assignments must be carried out in an atmosphere of high volume and fast-paced traffic balanced with the

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company's demand for highly controlled time schedules and the new bus operator's stress level is exacerbated, according to Mr. Mooney. This situation will last at least three to four years. It is not unusual, then, that operators will be involved in years 0-5 in more avoidable accidents than their more experienced fellow-employees.

Ms. Kim Hunton, as Head of Claims for OC Transpo, indicated the methodology used by the company to investigate accidents involving OC Transpo operators while on duty. Statistics relating years of service to numbers of avoidable accidents have been compiled for the years 1986-1992, inclusive; included in these statistics is a "weighted average" as well as an average number of avoidable accidents per operator. With the exception of 1987, all years indicate a significantly higher average number of avoidable accidents for operators in their first five years of service with OC Transpo.

Lois Emburg, Employment Equity Co-ordinator, Human Resources Department for OC Transpo, was the person responsible for the compilation of the above-mentioned statistics. Additionally, she compiled data concerning the relationship between age and absenteeism of bus operators for the year 1987. Both compilations and analyses were made from the existing OC Transpo statistics.

While there appears to be nothing to indicate a difference in days absent for reasons of illness or "work compensation days" amongst all age groups, there is a significant increase in absenteeism for "long term disability" in bus operators over fifty years of age, which increases dramatically in the age group 55-60, and, again, equally dramatically, when the bus operator is over the age of sixty. It is these average "long term disability" absences which skew the total average number of days absent per operator to indicate substantially increased absences for older bus operators, especially those over sixty years of age.

Mr. André Houle has been an employee of OC Transpo since 1959 and its Manager of Personnel since 1972. He indicated that OC Transpo had always had a maximum age hiring policy for bus operators. In fact, he became concerned about that policy when he arrived in the personnel department, as a staffing officer in 1967, as the maximum age was then thirty-five. Due to his concern and recommendations, the age criteria for hiring bus operators was changed to forty-five. Eventually, that age requirement was removed as well; from January, 1974, through January, 1992, OC Transpo hired eighteen

persons over the age of 50 as bus operators.

Although OC Transpo had never had an application to be a bus operator

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from an individual over the age of 60, until Mr. Jardine applied, and, consequently, had never hired a bus operator over the age of 60, Mr. Houle testified that there had always been a policy that no one over the age of sixty would be hired by the company as a bus operator.

There has never been a written policy to that effect, nor have there probably ever been "memos" to the staff concerning this part of the selection criteria for the position of bus operator. Mr. Houle testified, however, that his understanding of the company's policy was confirmed by conversations he had with successive General Managers of the company with whom he worked during his tenure as Manager of Personnel. As well, all personnel staff were probably aware of this unwritten policy.

Mr. Houle underlined the company's concern for safety when hiring bus operators. He indicated that "safety is paramount" for this company. The job description produced by OC Transpo for its bus operators underlines the public nature of the work and the need for constant vigilance to maintain public safety.

Peripherally, Mr. Houle noted that the cost of training a new bus operator over the age of sixty would be considered when dealing with such an applicant and the company's policy. This indicates some flexibility in that policy concerning the age criteria. This ability to bend the policy somewhat, on an individual basis, was further evident from Mr. Houle's evidence that an applicant with extensive and immediately preceding experience as a bus operator in a large metropolitan area would not be rejected immediately if he were over the age of sixty. Nor would that applicant be expected to have to participate in the complete training programme for new bus operators if he were hired.

Mr. Houle indicated that the policy regarding applications by persons over the age of 60 who wished to be bus operators was not based upon a statistical analysis, although he was aware, through his long experience with OC Transpo, of the trends concerning avoidable accidents by newly-hired bus operators (no matter what their age) and long term disability absenteeism in the "older" operator age group. He was also aware that, at the time of Mr. Jardine's application and final processing in 1986, four bus operators over the age of fifty had been hired by the company and three had terminated their employment, two for medical reasons and the third by taking early retirement. The fourth was talking about retirement, and did take his early retirement in 1989. These patterns, according to Mr. Houle, based upon his past experience with OC Transpo, were "typical". Long-term bus operators were looking for retirement by age 55-60. Presumably, these impressions - as the analysis made by Ms. Emburg had not yet been compiled - combined with the belief that job stress may have been the underlying

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factor for the patterns, were the basis for the company's policy not to hire new bus operators over the age of sixty.

Medical evidence was introduced by the Respondent, with the concurrence of counsel for the Commission. The "Book of Medical Evidence" contains a "report" - really a letter of opinion, dated September 10, 1987 and addressed to Lois Emburg at OC Transpo - from OC Transpo's Occupational Health Physician, Dr. Andrew P. Ember, M.D.C.M. C.C.F.P. and a "report", in letter form appended by extensive literature on the subject of aging and its impact upon general driving ability, from Dr. D.M. Grinnell of the Rehabilitation Centre, Royal Ottawa Health Care Group.

Although both reports, and the literature generally, opine that, for different physiological and psychological reasons, persons over 60 likely would have difficulty beginning a job as bus operator and would likely pose some safety risk, all clearly state that it is impossible, using current assessment methods, to make an accurate statement of prediction concerning which individual over the age of 60 poses a safety risk if hired as a new bus operator.

Decision

Counsel for the Commission submitted that OC Transpo had failed to satisfy the standard of proof for a bona fide occupational requirement as set out by McIntyre, J. in the Etobicoke case. She indicated in her submissions that there was no evidence before the Tribunal to satisfy the first and subjective test. She indicated in her submissions that the evidence before the Tribunal which would address the second and objective test was self-serving as it was based upon the compilations of information made after the complaints were filed.

Counsel indicated that even if the evidence was not deemed to be self-serving, it was based upon assumptions as well as questionable and insufficient statistics. Perhaps based upon these, her own assumptions, Counsel for the Commission chose not to cross-examine one witness for the Respondent and not to bring reply evidence before the Tribunal.

There was nothing other than the Book of Medical Evidence produced by the Respondent to underline Counsel for the Commission's submission that OC Transpo should have attempted to create some individualized assessment for applicants to that company for the position of new bus operator, who were over the age of sixty. The medical opinion was clear, however, that such individualized assessments concerning safety risks are currently not available. Nor was there evidence brought by the Commission to disprove OC Transpo's contention that it was not economically viable for the company to hire and train bus operators at or over 60.

There was evidence, on the other hand, from four employees of OC Transpo - some who have always been in the administrative wing of the company, and others who have worked for some time as bus operators and who now work with bus operators in a managerial capacity. 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. 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.

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. Certainly, the company had no intention to thwart the objectives of human rights legislation. That is clear from the flexibility of the company to move its age limitation for hiring new bus operators from the age of 35 to 60 from the mid-1960's to the present. Indeed, Mr. Houle indicated that, notwithstanding the company's unwritten policy concerning the age of hiring new bus operators, each applicant would be treated individually and consideration would be paid to age within the context of other information about the applicant such as lengthy, immediate-past, similar employment experience.

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. The question must be, then, is this evidence alone sufficient to find that, on the balance of probabilities, the objective branch of the test has been satisfied?

Mr. Houle's statement that one can "see for yourself" that the role of bus operator is stressful, and cannot be handled adequately by a newly-hired person at or over the age of 60 sums up his impressionistic approach (albeit based upon many years of service with OC Transpo). It is not enough, however, to satisfy the objective test.

There was additional evidence before the Tribunal. The medical reports and appended literature as well as the compilations of information

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gleaned from OC Transpo files must be considered.

Both medical doctors rendered the opinion that someone should not be beginning a job as a bus operator at age sixty. Dr. Grinnell indicated that her opinion was based upon an increased safety risk, escalating in drivers over 55 and exacerbated in a group with union rules respecting seniority and job choices. Both doctors were clear that, although there was "no way of identifying which individual would pose an increased risk",

their opinion was that there was a real risk to safety which could be eliminated by the age of hiring limitation.

These opinions were underlined by the literature included in Dr. Grinnell's report. The literature, in the form of articles from medical and other scientific journals in most cases, stressed the fact that individual risk potentials cannot be pinpointed using current assessment methods and that "older persons" represent the group with the most variability with regard to individual functioning. They did, however, give an overview of the "older driver" who, on the whole, is not as vigilant as younger drivers, not as able as younger drivers to make rapid judgement calls, may have deteriorating physiological problems (such as vision), has more traffic violations and crashes, and, perhaps as a result of the latter observation, tends to try to avoid stressful driving conditions such as adverse road conditions, night driving, heavy traffic, left turns at busy intersections, or unfamiliar areas of driving.

The list appears to be almost a verbatim litany of the concerns for the beginning bus operator, no matter what his age, expressed by Mr. Mooney and Mr. Houle of OC Transpo.

Although not absolute in its nature, the literature presented by OC Transpo, through its "Book of Medical Evidence" - and unrefuted by the Complainant and the Commission - is a factual basis for the rationale of the company in its age of hiring limitation.

The statistical compilations made by OC Transpo also underline the rationale. Indeed, they were made "after the fact" but the statistics were compiled from information which had been kept by the company on an annual basis for a number of years, certainly from a time before Mr. Jardine made his application for employment.

The table comparing avoidable accidents to years of service speaks to the company's concern for safety - and directly to the years-of-service time-frame out of which Mr. Jardine would never move were he to begin operating a bus after the age of 60. He would remain, during his employment with OC Transpo, in the 0-5 years-of-service group, a group with a high percentage of avoidable accidents. He would never learn what Mr. Mooney described as the "tricks" which would create less hazardous situations in his job. He would never move up in

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seniority enough to get beyond the very stressful level of being relegated to the "spare board" and thus required to accept runs which correlate almost exactly with types of driving older persons try to avoid - rush hour, night driving, unfamiliar conditions because of daily route changes.

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.

This evidence adduced by OC Transpo, then, is sufficient to satisfy the objective branch of the test of a bona fide occupational requirement as enunciated by McIntyre, J. Additionally, 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.

Notwithstanding Mr. Jardine's belief that his past experience as a bus operator with OC Transpo, Voyageur, and TTC - as well as his part-time work with Charterways - took him out of the category of new bus operator and into that of experienced operator, the time-frame of his experience with city transit buses and the nature of his more recent work on school buses, would put him in the category of new bus operator in need of the full training programme with OC Transpo.

Therefore, OC Transpo has demonstrated that the company's prima facie discriminatory treatment of Mr. Jardine's application for employment as a new bus operator at an age of over 60 (by the time it was fully processed) was for reasons of a bona fide occupational requirement, allowed by s. 14(a) [now sec. 15(a)] of the Canadian Human Rights Act.

The complaints are DISMISSED.

Signed on the day of June, 1993.

Elizabeth A.G. Leighton