

**CANADIAN HUMAN RIGHTS TRIBUNAL                      TRIBUNAL  
CANADIEN DES DROITS DE LA PERSONNE**

**MICHELINE MONTREUIL**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**NATIONAL BANK OF CANADA**

**Respondent**

**REASONS FOR DECISION**

**MEMBER: Athanasios D. Hadjis**

**2004 CHRT 7  
2004/02/05**

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**I. INTRODUCTION**

[1] The Complainant alleges in her complaint that the Respondent refused to employ her because she is a transsexual person. She claims that in so doing, the Respondent discriminated against her on the ground of sex.

[2] The *Canadian Human Rights Act* ("Act") provides that it is a discriminatory practice to refuse to employ an individual on the prohibited ground of sex (ss. 3 & 7). The Complainant's birth certificate identifies her sex as being male. According to the complaint form that the Complainant filed in September 2001, she declares herself to be a transsexual person who dresses as a woman and who was, at that time, in the period of transition to become a woman. The Respondent is not contesting the Complainant's contention that discrimination on the basis of a person's transgendered status constitutes sex discrimination under the *Act*.

[3] However, at the opening of the hearing into the complaint, Counsel for the Respondent noted that in a recent Court of Appeal of Quebec judgment regarding the Complainant,<sup>1</sup> she apparently acknowledged before the Court that she no longer intends to undergo the surgical operations to modify her sexual organs. Consequently, Respondent Counsel reserved himself the right to submit, in final argument, that this apparent variation from her allegations in the complaint may raise questions as to her credibility.

## **A. References to the Complainant in this Decision**

[4] The Complainant has acted as a party to proceedings before several courts, including the Federal Court, the Superior Court of Quebec, and the Court of Appeal of Quebec, on matters relating to the name by which she may be permitted to identify herself. In the judgments rendered in these cases, the Complainant has been referred to either by the female or the male gender, depending on the decision-maker. For instance, in the case of *Montreuil v. Directeur de l'état civil*<sup>2</sup>, Madam Justice Rousseau-Houle applied the female gender, whereas Mr. Justice Morin, noting that the Complainant is still physically a man, used the male gender in his dissenting reasons.

[5] In relation to this topic of gender identity, I find of particular interest the discussion in *Sheridan v. Sanctuary Investments Ltd. No. 3*,<sup>3</sup> a case regarding a complaint filed by a transgendered person. The British Columbia Human Rights Tribunal noted that there exists in some individuals a "lack of congruence between the various indicators of sex". With respect to transsexuals, there can exist a complete dissociation between their physical sex and their subjective experience of their masculinity or femininity.

[6] The Respondent did not present any position, one way or the other, regarding this question. The Complainant, on the other hand, explained that she wishes to be referred to by the female gender. Under the circumstances, I see no reason to deny the Complainant's request. The Complainant is therefore referred to by the female gender throughout this decision.

## **B. The Role of the Canadian Human Rights Commission at the Hearing**

[7] The Commission limited its participation to the delivery of a statement at the opening of the hearing, in which it set out what it perceived to be the principles that are "key" to the inquiry into the complaint. Commission counsel left the hearing room shortly after reading the statement and did not attend for the remainder of the hearing.

## **II. FACTS**

### **A. Complainant's Employment Application**

[8] The Complainant's academic and professional background is broad and varied. She is a member of the Bar of Quebec, and has earned a Master's degree in business administration from Laval University, as well as a *Diplôme d'études*

*supérieures spécialisées* in human resources, administration and organization from the University of Paris - Panthéon-Sorbonne. In 1981, she successfully completed the securities course offered by the Canadian Securities Institute (CSI). Aside from the practice of law, she has worked as a management consultant and has taught numerous courses in law, economics, finance and management at the University of Quebec and at several colleges (CEGEPs). In the 1970's, she owned and operated a restaurant in Quebec City. She is the author of numerous publications including several articles involving the banking industry. The Complainant has even served in the Canadian military. Suffice it to say that the Complainant has benefited from a wealth of experience in her lifetime.

[9] The Complainant lived most of her public life as a man, under the name of Pierre Montreuil, while at the same time concealing her "existence" as Micheline. The Complainant contends that in 1997, the Quebec City CEGEP at which she was then employed as an instructor, dismissed her for having been observed in public at a local shopping centre, dressed as a woman. She decided at this point to cease hiding her true identity and to proceed with the development of her new life as Micheline. She disposed of her men's clothing and set about changing her life completely, which included reorienting her professional career. She was by now certain that her dismissal had effectively barred any future teaching opportunities within the CEGEP system.

[10] The Complainant felt compelled to move from Quebec City to a larger city like Montreal. She viewed Quebec City as being an insular place that was not open to individuals like her. She perceived Montreal, on the other hand, as a diverse and large community in which she could live her life more anonymously without drawing the same negative attention. She testified that it is normal for persons who are in the process of changing their sex to radically turn their backs on the past and make new lives for themselves by, for instance, moving to a different place.

[11] The Complainant therefore decided to seek employment, now openly as a woman, in a completely new environment. She came across an employment advertisement placed by the Respondent in the *La Presse* newspaper of May 2, 1998. The notice stated that the Respondent was recruiting persons to work in its call centre (known as "TelNat") on a part-time basis (20 to 35 hours per five day week) with the eventual possibility of full-time work. The stated salary was a minimum of ten dollars per hour. The job's duties consisted of providing customer service and selling banking products. Candidates were required to possess at least a Diploma of Collegiate Studies, be bilingual, and have experience in customer service or sales. The advertisement noted that the Respondent was offering an opportunity for a career path commensurate with the employee's skills, as well as ongoing training, a nice working environment and a competitive wage scale. The indicated place of work for these positions was Montreal. The Respondent ended its advertisement by urging those who are willing to take up a challenge and

interested in pursuing a career within a large-scale enterprise, to apply. Although not stated in the ad, a condition of employment for all new TelNat agents was that they would be subject to a six-month probationary period during which the Respondent maintained the right to dismiss an employee at its discretion.

[12] The Complainant responded to the ad by telephone, following which she also sent in a one-page version of her *curriculum vitae* and photocopies of her passport, driver's licence and Social Insurance Card. The name appearing on these latter documents is Micheline Montreuil or, in the case of the passport, Micheline Pierre Montreuil. In the accompanying photographs, she bears an appearance that is usually associated with that of a woman. However, her sex is identified on the driver's licence and the passport as being male.

[13] The Complainant had already applied to other banking institutions for different positions but the jobs being offered by the Respondent were particularly attractive to her. As stated in the advertisement, the Respondent employed 16,000 employees and offered the opportunity for a rising career within the company. She knew that there was a relatively high rate of turnover amongst call centre employees. She believed that as a lawyer, with qualifications in the banking and securities field, she would be able to advance fairly quickly within the bank, perhaps becoming a member of the litigation branch after a few years.

## **B. First Interview**

[14] The Respondent invited the Complainant to its offices on Metcalfe Street in Montreal, to proceed through a pre-selection or screening process. The Complainant and about thirty other candidates were convened on May 22, 1998. Upon her arrival, the Complainant was asked to complete an application form. She explained on the form that her reason for leaving her previous employment at the CEGEP was her desire to completely change her life and re-orient her professional career. In the space on the form earmarked for the addition of other information that would be helpful in the assessment of her candidacy, the Complainant wrote that she had made a big change in her life and that she hoped that the Respondent would help her to "realize" [« *concrétiser* », in French] this change. She added that she must start at the "bottom of the ladder" in order to "climb". In accordance with the Respondent's employment equity policy, a self-identification questionnaire was provided to the Complainant to complete. Although not identifying herself as being a member of any of the designated groups listed (aboriginal, visible minority or disabled), she wrote in, under the heading "other", that she was transgendered.

[15] After the form was completed, the Respondent conducted what it described as an "exploratory" interview of the Complainant. The interviewer's report indicated that her candidacy was accepted, meaning that it would now proceed to

the next stage of assessment. It was noted in the report that the Complainant was a "special case" [« *cas particulier* »] and that she had exceptional motivation. After the interview, the Complainant had to complete a series of tests: a scenario-type test, a numerical reasoning test and a personality test. The first two exams were passed with success. The Complainant contends that she passed the personality test at this stage as well, but I am not persuaded of this fact. The briefing card [« *fiche synthèse* »] prepared following this phase of her assessment noted that several elements arising from her personality testing needed to be verified more thoroughly during the subsequent final interview that was to be conducted with the managers at TelNat. It was stipulated, however, that these elements could not form the sole basis for the elimination of a candidacy. The elements were identified as her "emotionalism (empathy and sense of urgency)" [« *émotivité (empathie et sens de l'urgence)* »] and her "social desirability" [« *désirabilité sociale* »].

### **C. Second Interview**

[16] Once a candidate passes the pre-selection process, it is ordinarily the Respondent's policy to invite her back for a "final" interview, which is conducted by the manager in charge of the department that is recruiting the candidates. However, in the present case, the Complainant was asked by the Director of the Respondent's human resources department, Suzanne Girard, to return to the Metcalfe Street offices for an intermediate or second interview, before proceeding to the final interview. At Ms. Girard's request, Lisette Cloutier, who was in charge of human resources within TelNat, also attended the interview, which took place on July 8, 1998. Ms. Cloutier testified that on certain occasions, such intermediate interviews were conducted, particularly where the "profile" of the candidate called for additional verifications for reasons such as the level of the candidate's education, her years of experience or even her "personal situation". Ms. Cloutier could not identify the specific reason for which Ms. Girard decided to interview the Complainant, and Ms. Girard was not called as a witness during the course of the hearing to provide any additional explanation.

[17] The interview lasted for about two hours. By the accounts of both Ms. Cloutier and the Complainant, the interview went well overall. Ms. Cloutier found the Complainant to be courteous and articulate. She did not find the candidate's attitude during the course of the interview to be arrogant. There was some discussion about the Complainant's academic background and professional experience, and the interviewers asked why she was interested in such a low level position, considering her extensive qualifications. The Complainant replied that she viewed the TelNat job as an opportunity to gain entry into the company, with the hope of advancing through the ranks over time. Ms. Cloutier testified that she considered this reply to be acceptable [« *correct* »]. She advised the Complainant that in order to advance within the bank, she must be willing to remain in her entry level position for up to two or three years. The Complainant answered that

she was prepared to accept this condition and to even work extended hours, if necessary.

[18] According to the Complainant, it was obvious from her physical appearance that she was a transgendered person, and, to ensure that there would be no misunderstanding, she asked in a frank manner whether her status created a "problem" for the employer. Ms. Cloutier explained that she was responsible for dealing with "special cases", and she assured the Complainant that the Respondent maintained a non-discrimination policy with respect to its hiring practices. The Complainant thought it appropriate at this point to hand over to her interviewers a one-page document entitled *Firms that officially accept "Transgendered"*, the text of which set out a list of large American-based multinational companies that had adopted liberal and open policies vis à vis transgendered persons. Amongst the businesses listed was the Chase Bank. The Complainant had received this list by e-mail from an acquaintance in the United States who has worked for the advancement of transgendered rights. The Complainant claims that the reason she delivered the document to Ms. Cloutier and Ms. Girard was so as to reassure the Respondent that it would not be alone amongst large corporations in adopting an open policy towards transgendered persons.

[19] Ms. Cloutier interpreted the Complainant's gesture differently. She wondered to herself whether the Complainant genuinely wanted to work as a call centre employee or whether her true intention instead was to get herself hired and then set about promoting the integration of transgendered persons within the organization. However, at no time did Ms. Cloutier, or Ms. Girard for that matter, ever question the Complainant openly about these concerns. The interviewers ultimately concluded that the Complainant met all the basic criteria and that her application for employment should be advanced to the next and final stage of assessment. About two weeks later, Ms. Cloutier called the Complainant and notified her that she had passed the second interview.

#### **D. Third Interview**

[20] On August 12, 1998, Lise Roy, who was the supervisor of the quality control section at TelNat, telephoned the Complainant to invite her to the third and final interview. During the call, Ms. Roy discussed with the Complainant some of the conditions of employment including salary, work hours, as well as the required training and probation periods. According to Ms. Roy, such matters are usually discussed with all candidates during these calls. The Complainant recalls explaining to Ms. Roy that, if offered a position with the Respondent, she would move from Quebec City to Montreal.

[21] The interview was conducted on August 20, 1998, at the TelNat offices situated within the Respondent's head office, at 500 Place d'Armes in Old Montreal. The Complainant met with Ms. Roy and with Josée Lecompte, who was a team supervisor at TelNat. The interview followed a typical pattern, according to Ms. Roy. During the first portion, which she described as the formal part, questions were posed to the Complainant to determine her interest in and suitability for the job. This was followed by an informal discussion, during which the Complainant was asked if she had any questions to put to her interviewers. This second phase was meant to create a more relaxed atmosphere by engaging the candidate in some light talk. Interviewees were not obliged to ask any questions and indeed, some chose not to do so. It appears that candidates could be hired even where the informal conversations did not ensue. In the Complainant's case, however, the informal exchange took place, and it evolved into what Ms. Roy described as a "blah-blah-blah" between women.

[22] The Complainant recalls the interview as having been very positive. It was explained to her that the initial functions of the position (within TelNat's "Express Line" service) involved providing basic information over the telephone to the Respondent's clients, such as their account balances. After acquiring more experience, employees were assigned to receive calls of a more complex nature. According to the Complainant, after her interviewers had noted that she held an MBA degree and that she had completed her CSI securities course, they informed her that there was a possibility of advancement to the loans and investments branch of the customer service department. At the close of the interview, the Complainant was told that she would be receiving a reply from the Respondent within two to three weeks. She asserts that she was shown the TelNat work area and was told that this was where she would be working. She left the meeting feeling certain that she would be hired for the job.

[23] Ms. Roy and Ms. Lecompte deny having indicated where the Complainant would be working or having intimated that she would be hired at all. They testified that immediately after the Complainant's departure, they sat down to discuss her candidacy. They agreed to recommend to the human resources department that it would be "risky" to hire the Complainant. It was decided that Ms. Lecompte, who had been taking notes during the interview, would prepare a typed report setting out the reasons for their decision. It was not the normal practice to prepare such reports but they felt compelled to do so in this case, due to certain specific remarks made by the Complainant. I have reproduced the report in its entirety below, without any alteration to the emphasis and underlining of the original text:

[TRANSLATION]

**MS. MICHELINE MONTREUIL**



September 1, 1998

Re:

*Report of the interview held on August 25, 1998 at the Telnat Call Centre, in the presence of Josée Lecompte and Lise G. Roy. There were two parts to the interview.*

□····"Formal" part of the interview

During this interview, Ms. Montreuil showed that she was willing and able to take our training and hold the position of Telnat customer service representative.

In our opinion, the candidate was overqualified for the Express Line representative position. Because of her skills, knowledge and experience, she seemed to us to be a suitable candidate for a position in the financial services sector. However, we detected a condescending, even self-important, tone when she mentioned, **"If the Bank does not recognize my abilities, a competitor will seek me out."**

□····Informal discussion part of the interview

We wanted to make Ms. Montreuil aware of her overqualification, in light of her experience, and to explain that the position may not be suitable for her.

It was then that she launched into a description of the different stages that financial institutions have gone through over the last forty years and mentioned racism, sexism, and other types of discrimination.

She claimed that she herself was the ambassador of her "type" in the banking industry and said, **"In the 1950s, women, with some difficulty, entered the workforce. Subsequent to that, in the 1960s, companies hired on Italians and Greeks. In the 1970s, Blacks and Chinese made their entrance. Then in the 1980s, Gays were accepted. Now it's my turn, just like Martians who, in 2010, will pay everyone a surprise visit with their little antennae and their green bodies."**

In a joking manner, she added the following:

**"Not only can I open doors, but I can also break them down."**

She also informed us about her time with the Canadian Forces and showed us a photo in which she was dressed as a soldier before she underwent her physical transformation.

The discussion continued and Ms. Montreuil asked us where the courthouse was because she had to go plead her case regarding the name change she requested (i.e. from Michel Montreuil to Micheline Montreuil).

On this topic, she said the following:

**"I'll get my way by wearing them down; I'm persistent."**

The interview ended on a humorous note from Ms. Montreuil.

Knowing that Josée Lecompte had also been a member of the Canadian Forces, she finished with, **"You could say that the Army turns out beautiful, great women!"**

**In light of Ms. Montreuil's remarks, we believe it would be risky to offer her a position as a customer service representative.**

**Lise Roy, Team Leader**

**Josée Lecompte, Team Leader**

Ms. Roy and Ms. Lecompte testified that in describing the making of a job offer to the Complainant as being "risky", they were in effect recommending that she not be hired.

[24] The Complainant takes issue with the manner with which her alleged remarks were presented in the report. She identifies several errors in the text, which call into question its reliability in recounting the events and statements contained therein. For instance, while it is possible that the Complainant spoke to the interviewers about her pending litigation regarding her petition to have her name officially changed, she denies ever having asked them for directions to the Montreal Courthouse. The Complainant points out that she has attended the Montreal Courthouse countless times during her legal career and knows its location very well. Moreover, her petition had been filed and presented before the Superior Court in Quebec City, not Montreal. She also notes that she was not seeking to have her name changed from Michel, as set out in the report, but rather from Pierre. The Complainant alludes to these errors as evidence that the report does not reliably reflect her comments during the interview, suggesting that her words were presented out of context.

[25] Similarly, the Complainant presents a somewhat different version of the comment that she allegedly made with respect to the hiring of various minority groups within the banking industry. She claims that this part of the conversation was far more detailed than as put forward in the report and consisted of her pointing out that over the last forty years, one minority group after another has managed to be integrated into the industry, in spite of initial resistance attributable to misconceived notions and prejudice. She contends that the remark about how Martians may one day also seek integration was intended to illustrate with some humour, how firms are continuously adapting to accommodate the needs of various groups within society. The Complainant underscores the fact that this conversation took place during the informal portion of the meeting that Ms. Roy herself described as a "blah, blah, blah" between women.

[26] This report was never shown to the Complainant prior to the hearing and in fact, the Respondent only disclosed it to her part way through her testimony.

#### **E. Notification to Complainant of Refusal to Hire**

[27] By September 10, 1998, exactly three weeks after the Complainant's third interview, the Respondent had still not informed her of whether she had been hired. On the same day, however, a very significant event occurred in the Complainant's life. The Superior Court of Quebec issued a judgment confirming the decision by the Société de l'assurance automobile du Québec (SAAQ) to delete the name "Micheline" from her driver's licence. Unbeknownst to the Complainant, and in fact, even before she herself had learned of the Court's ruling, two Quebec City newspapers published articles about the judgment, that very morning. Over the course of the day, other newspapers as well as numerous radio stations and television networks from across the province contacted her. She agreed to participate in interviews with all media outlets. She felt it important to present her side of the story, ever mindful of the fact that her status as a transgendered person, who also happens to be a lawyer by profession, lent itself easily to sensationalism. She also points out that the first newspaper articles were printed without putting forward her perspective on the questions raised, and contained several important errors.

[28] According to the Complainant, she had never contacted the press in the past about any of the legal proceedings regarding her name, and in particular, she did not solicit any of the coverage that followed the judgment's release on September 10<sup>th</sup>. She acknowledges, however, that she did not turn down interviews whenever they were sought by the media. The articles about her continued into the month of October 1998, and on October 7, 1998, her story was featured on the front pages of the *Journal de Montréal* and the *Journal de Québec*. She was interviewed on popular television programs such as "*Point J*" and "*JE en direct*".

[29] Over this entire period, the Complainant had still not received any word from the Respondent about her job application. On October 14<sup>th</sup>, she went to the Respondent's Place d'Armes head offices, where her third interview had been conducted, and asked to speak to Ms. Roy. The Complainant was told that Ms. Roy was unavailable but that a reply would be received by the Complainant in the mail, on or before October 19<sup>th</sup>. Despite these assurances, the Complainant did not receive any correspondence from the Respondent throughout the month of October. In the meantime, she noticed that the Respondent was continuing to place the same advertisement in the *La Presse* newspaper that she had first seen back in May, for the recruitment of new employees to work at the TelNat call centre.

[30] On November 10, 1998, the Complainant attended at the Respondent's recruitment centre in its offices on Metcalfe Street, where her first two interviews had taken place. She was given an appointment to meet with Ms. Girard later that week. In the meantime, the Complainant prepared and handed over to the Respondent a three-page letter setting out in detail each of her interactions with the Respondent since applying for the job. The Complainant concluded her letter by requesting that she be provided with some information as to the status of her application for employment. The Complainant stated, in unambiguous terms, that she wanted to work for the Respondent. She affirmed her willingness to work in any posting that the Respondent felt was best suited to her qualifications, adding that she understood that most non-entry level vacancies are filled internally. She noted that it was precisely for that reason that she wanted to join the Respondent's workforce at the entry level, irrespective of how low the wage scale was.

[31] When the Complainant arrived for her appointment with Ms. Girard on November 13<sup>th</sup>, the latter told the Complainant that a decision had been made and a written reply would be forthcoming shortly. Indeed, the Complainant did receive a letter at her home, from the Respondent, dated November 6, 1998, but she insists that it was not delivered until November 18<sup>th</sup> or 19<sup>th</sup>. The letter explains, in two short paragraphs, that after having interviewed the Complainant, the Respondent "unfortunately" could not retain her candidacy, as her qualifications did not meet the requirements of the position. Interestingly, the letter is addressed to "Mister Pierre Montreuil", not "Micheline Montreuil".

[32] The Complainant took great offence to the usage of this name, arguing at the hearing that it demonstrates how the Respondent's decision was influenced by the media coverage she had received. In all of the documents that she had submitted to the Respondent, she had never referred to herself as "Pierre", only as "Micheline". The evidence, however, shows that a background check conducted of her by the Respondent when she first applied for the job yielded a report that identified her name at birth as being "Pierre Montreuil". The Respondent claims that it simply thought it appropriate to address the Complainant by her official name, as it was recorded at that time. I am not persuaded that the usage of

"Pierre" in the letter is indicative of a desire by the Respondent to insult the Complainant nor that it demonstrates that its decision not to hire her came about as a result of the publicity she was then attracting.

[33] By March 4, 1999, the Complainant had written no fewer than three letters to the Respondent, requesting information about the status of her job application. She did not acknowledge, in any of these letters, that she had received the Respondent's refusal letter of November 6<sup>th</sup>, 1998. The Complainant testified that since the letter was addressed to Mister Pierre Montreuil, she never treated it as having been sent to her. On March 16, 1999, the Complainant received another letter from the Respondent, signed by its Vice-President (Human Resources), Santo Alborino. This letter, which was now addressed specifically to Ms. Micheline Montreuil, noted that a response had already been sent to her (the November 6<sup>th</sup> letter) and that consequently, the Respondent considered the file closed.

[34] On April 13, 1999, the Complainant filed the first version of her complaint with the Canadian Human Rights Commission. The Commission initially decided that her complaint was inadmissible because it was not filed under her legal name, as it was registered at that time. The Complainant sought judicial review of this decision before the Federal Court and was successful. The Court ordered the Commission to accept the Complainant's complaint and further ordered that it be drafted setting out her name as being "Joseph Yves Pierre Papineau Montreuil, known under the name of Micheline Montreuil". The complaint that is now before me, drafted pursuant to the order, was signed and filed with the Commission on September 4, 2001. On April 15, 2003, the Tribunal granted the Complainant's request to modify the style of cause of the case and identify her only by the name of "Micheline Montreuil".

[35] Since June 3, 2002, the Complainant has been employed as a tax collection agent within the call centre of the Ministère du revenu du Québec. Her functions consist of calling taxpayers who are in default and making arrangements for the payment of the sums that are due. I was not provided with any details about what employment the Complainant may have had prior to this date.

### **III. LEGAL FRAMEWORK**

[36] It is a discriminatory practice under the *Act* to refuse to hire a person on the basis of sex (ss. 3 and 7). In *Kavanagh v. Attorney-General of Canada*,<sup>4</sup> a case involving a post-operative transsexual, the Canadian Human Rights Tribunal decided that discrimination on the basis of transsexualism constitutes sex discrimination. A similar finding was reached in the British Columbia case of

*Sheridan*,<sup>5</sup> which related to a pre-operative transsexual. As I have already indicated, the Respondent is not contesting the notion that a refusal to hire based on a person's transgendered status constitutes sex discrimination.

[37] The burden is said to be on a complainant to establish a *prima facie* case of discrimination.<sup>6</sup> A *prima facie* case, in this context, is one that covers the allegations made and that, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. Once the *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. If a reasonable explanation is put forward, the complainant must demonstrate that the explanation is merely a pretext and that the true motivation behind the employer's actions was in fact discriminatory.<sup>7</sup>

[38] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. It is sufficient that the discrimination be one of the factors in the employer's decision.<sup>8</sup> The standard of proof in discrimination cases is the balance of probabilities.

[39] In *Basi*,<sup>9</sup> the Canadian Human Rights Tribunal stated that discrimination is not a practice that one would expect to see displayed overtly. The Tribunal went on to say that in fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practiced. A tribunal should therefore consider all circumstances to determine if there exists a "subtle scent of discrimination".

[40] In the employment context, two tests have been developed in the jurisprudence to assist a tribunal in the determination of whether a *prima facie* case of discrimination has been established.<sup>10</sup> The first was articulated in the case of *Shakes v. Rex Pak Ltd.*<sup>11</sup> The Ontario Board of Inquiry held, in that case, that a *prima facie* case could be established by proving:

- a) that the complainant was qualified for the particular employment;
- b) that the complainant was not hired; and
- c) that someone no better qualified but lacking the distinguishing feature, which is the gravamen of the human rights complaint, subsequently obtained the position.

[41] The Canadian Human Rights Tribunal developed a second test, in *Israeli v. Canadian Human Rights Commission*,<sup>12</sup> to address situations where the

complainant is qualified but is not hired, and the employer continues to look for a suitable candidate. In such cases, a *prima facie* case may be established by demonstrating:

- a) that the complainant belongs to one of the designated groups under the *Act*;
- b) that the complainant applied and was qualified for a job that the employer wished to fill;
- c) that, although qualified, the complainant was rejected; and
- d) that, thereafter, the employer continued to seek applicants with the complainant's qualifications.

[42] In several subsequent decisions of this Tribunal, it has been observed that while the *Shakes* and *Israeli* tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case.<sup>13</sup> The circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate.

## IV. ANALYSIS

### A. *Prima Facie* case

[43] The Complainant applied for the position in May 1998 and had she been hired, she would have begun work with a group of numerous other new recruits, who were to be trained in September for about a week, and then begin answering calls shortly thereafter. There do not appear to have been a finite number of job openings available. On the contrary, the Respondent was advertising on a regular basis for the recruitment of new TelNat employees. TelNat had an annual turnover rate that fell between 20% and 30%, and this necessitated an ongoing search on the Respondent's part to fill positions and ensure that the service was being provided to its customers. Moreover, TelNat was in the process of expanding at that time, which in turn, presumably, required the presence of a growing number of customer service representatives. Thus, while there were individuals from the Complainant's cohort of job applicants who were eventually hired, the Respondent continued to seek other applicants thereafter.

[44] The *Shakes* test appears to contemplate circumstances where a complainant participates in a job competition against others for one or several specific positions. The test does not appear appropriate, however, in ongoing recruitment-type situations because, irrespective of whether the persons hired at a given moment lack the "distinguishing feature" of the complainant, other employment positions into which the complainant could potentially be hired continue to remain available. The *Israeli* test, on the other hand, by virtue of its fourth component, encompasses situations where an employer continues to seek job applicants. As such, the *Israeli* test is better suited to the facts that are before me, and my analysis, therefore, follows the stages advanced therein.

### **B. The Complainant Belongs to One of the Designated Groups**

[45] As I have already mentioned, it is not in dispute in the present case that as a pre-operative transgendered person, the Complainant belonged to the group of persons who cannot be discriminated against on the basis of sex, under the *Act*.

### **C. The Complainant Applied and Was Qualified for a Job the Employer Wished to Fill**

[46] The Complainant applied for a job that the Respondent undoubtedly wished to fill. The Respondent was engaged in an ongoing campaign for the recruitment of TelNat agents, and the Complainant sought to be one of those hired. Was she qualified for the job?

[47] The Complainant had successfully passed through the first stage of the selection process. Although her briefing card stated that her "emotionalism" and "social desirability" remained to be addressed in the final interview, it was also specified that a candidacy could not be eliminated solely on account of these elements. The Complainant was later requested to submit, by exception, to a second, intermediate level interview. She passed this stage as well.

[48] The Respondent suggested at the hearing that the Complainant lacked experience in customer sales and service, which was a required qualification according to the Respondent's newspaper advertisement. The facts do not support this submission. Her knowledge in sales consisted of her business experience, derived principally from the operation of a restaurant. This information was provided in the first two copies of her *curriculum vitae* that she sent to the Respondent by mail in early May 1998, and was repeated in the more complete version of the document that she gave to the Respondent during the second interview in July. Moreover, none of the documents spelling out the Respondent's assessment of the Complainant make mention of any weakness in this area. On the contrary, one finds in Ms. Cloutier's handwritten notes from the second



interview, the following entry: "sales = OK". The Respondent's records confirm that the Complainant also met the other two minimum requirements set out in the job ad, namely, possessing a Diploma of Collegiate Studies and being bilingual.

[49] In the report prepared after the third interview, Ms. Lecompte and Ms. Roy noted that the Complainant had shown that she was in a position to take the Respondent's training and to hold the position of TelNat customer service representative. According to Ms. Roy, the job called for persons who could follow all the necessary training, and who would thereafter be able to appropriately answer customer inquiries. Ms. Roy testified that "without any doubt", the Complainant possessed the abilities to perform all of these tasks. Ms. Roy's and Ms. Lecompte's stated concern with respect to the Complainant's candidacy lay, instead, with her being *overqualified* for the position. In their opinion, overqualified employees are more likely to lose their motivation to work, which in turn leads to poor performance or a premature departure from their job.

[50] If a complainant is overqualified, does it mean that he or she is not qualified for the purposes of satisfying the second component of the *Israeli* test? I do not believe so. It seems counterintuitive to expect a complainant, who bears the burden of demonstrating that she was qualified for the position at issue, to exercise a certain self-restraint in leading evidence about her qualifications, for fear of crossing some imaginary Rubicon beyond which she will suddenly be deemed to have been overqualified and thereby, *not* qualified at all.

[51] In my opinion, once a complainant has established that she was qualified for a position, and assuming that a *prima facie* case has been proven in all other requisite respects, it should then fall to the employer, in its explanation, to demonstrate that the complainant was overqualified for the job and that the refusal to hire her was justified as a result. Besides, from a practical perspective, an employer would certainly be better placed to demonstrate in what manner a complainant is overqualified for the position, than a complainant herself is able to demonstrate that she is not overqualified. For instance, in the present case, the evidence is that a majority of TelNat employees are university students. A number of the agents hold Bachelor level degrees, and there is definitely at least one Master's graduate who has been employed within the call centre. Mr. Alborino stated in his testimony that he imagines it is possible that persons with doctoral degrees have been hired at TelNat in the past. How then can the Complainant be expected to demonstrate that she is not overqualified when, based on these facts, there is no readily apparent point beyond which a job applicant ends up becoming overqualified for a TelNat position?

[52] Thus, in answer to the second question of the *Israeli* test, I find that the Complainant applied and was qualified for a job that the Respondent wished to fill.

#### **D. Although Qualified, the Complainant's Candidacy was Rejected**

[53] The Respondent rejected the Complainant's candidacy although it took several months before she was formally advised of its decision.

#### **E. The Employer Continued to Seek Applicants with the Complainant's Qualifications**

[54] The Respondent continued its advertisements for the hiring of TelNat customer service representatives throughout 1998 and into 1999. The annual turnover rate of between 20% and 30% necessitated an ongoing renewal of staff. The Respondent's newspaper ads were all virtually identical and no changes were stipulated in the required job qualifications. I am, therefore, satisfied that the Respondent continued to seek applicants with the same qualifications as the complainant.

[55] Each of the components of the *Israeli* test has been made out and consequently, the Complainant has established a *prima facie* case of discrimination.

#### **F. Respondent's Explanation**

[56] The Respondent put forth essentially three explanations for not having hired the Complainant:

- a) the Complainant was overqualified for the position;
- b) the Complainant's attitude during the final interview was not that of a person who wishes to serve the public, but was rather one of a person who is self-centred and condescending;
- c) the Complainant's real motive for applying was to use the position to promote the rights of transgendered persons.

[57] The Respondent contends that it would not, under any circumstances, have hired the Complainant because she was overqualified. Employees, it is argued, whose skills and knowledge exceed the requirements of their position are more likely to lose interest in their jobs and perform inadequately, or even worse, quit their jobs altogether. The Respondent could not afford to allow such situations to develop since there is a cost involved in training a TelNat call centre employee,

not to mention the operational difficulties that would result from an unexpected loss of personnel.

[58] This explanation appears reasonable but I find, for the following reasons, that it is in fact, pretextual. During all of the Complainant's interviews, she dealt directly with the Respondent's concerns regarding her "stability" at this job. The Complainant stated repeatedly that she was seeking to make a change in her life and to that end she declared that she would move to Montreal and stay in the position for as long as required of her (perhaps as many as two to three years), before seeking a promotion. The Respondent acknowledged that, in fact, many TelNat employees seek and successfully end up gaining promotions within the Bank.

[59] Furthermore, if indeed the Complainant were at risk of leaving her job prematurely, as alleged by the Respondent, it would not have been an extraordinary occurrence. Most TelNat call centre agents are students, and a good number of them typically do not remain in their positions for as long as two years. In fact, the 20% to 30% annual turnover rate suggests that many, if not the majority, of all employees do not stay in their jobs for a prolonged duration. Ms. Roy testified that twenty-four months is considered to be a long stay for a call centre employee.

[60] The Complainant was fully aware of the tasks associated with frontline call centre work, no matter how menial. It was obvious that she nonetheless was deliberately seeking this employment in order to make a change in her life, and with the hope, or even the expectation, that a person with her talents would eventually rise up through the ranks of the company. After all, the Respondent's print ads for the job stated explicitly that employees would be offered the opportunity for a "career plan" that would be commensurate with their skills. Mr. Alborino testified that the majority of staffing actions, other than those at the lowest entry levels, are initially posted internally within the company. If this search does not prove fruitful, an external recruitment is organized. I accept the Complainant's evidence that she was mindful of this prospect of eventual advancement and that this topic formed part of her conversation with the interviewers.

[61] So then, in light of her declared commitment to stay in the job in accordance with, if not beyond, all of the employer's expectations, why did the Respondent not take the Complainant at her word?

[62] The answer lies in the Respondent's third explanation for not having hired the Complainant. It is clear from the evidence of Ms. Roy, Ms. Lecompte, and Ms. Cloutier that they had some difficulty understanding why a person with the Complainant's credentials would choose to work at an entry-level position. As

Ms. Lecompte put it, she was "perplexed" by the Complainant's decision. The Complainant must have had some other motive. Ms. Roy and Ms. Lecompte believed to have found their answer during the informal conversation at the close of the interview. In hearing the Complainant's comments about the progress of minority groups over the last century and her statement that she is a persistent person who is prepared to break down doors, Ms. Roy and Ms. Lecompte concluded that her genuine motive for applying was to promote the rights of transgendered persons. It is noteworthy that the interviewers chose to end their report by advising that it would be risky to hire the Complainant in light of her *remarks*, not her qualifications.

[63] Indeed, Ms. Roy testified that after hearing these comments, she concluded that the Complainant's real reason for seeking an entry-level position must be to become a "pioneer" who will make her condition publicly known. Ms. Roy added that the Respondent does not recruit employees in order to give them an opportunity to make their "crusade". Yet, both interviewers acknowledged that the Complainant never said that she intended to do anything of the sort. In their report, it is stated that the Complainant told them she considered herself to be an "ambassador" of her "type", but at the hearing, Ms. Lecompte admitted that she had formulated this term herself and that the Complainant never actually made such an assertion.

[64] Moreover, their concern was never put directly to the Complainant for an answer. She was never asked about her true motives or whether she intended to use her position as a promotional tool. I accept the Complainant's explanation with respect to her comments about the progress of various minority groups within society. In the context of the light conversation, or "blah-blah-blah", the Complainant sought to make the point, in the same tone, that it was proper for the Respondent to allow transgendered persons to join its workforce, just as the door had been opened to others in the past.

[65] Mr. Alborino, in his capacity as the Respondent's Vice President (Human Resources), endorsed the findings of Ms. Roy and Ms. Lecompte. He believed that the Complainant was seeking a sort of "platform" to advance a personal interest and he affirmed, in his testimony, that there was no place for such activity within the bank. When pressed, however, neither he nor any of the other witnesses were able to satisfactorily explain how a call centre agent, whose tasks consist of answering calls from bank customers about branch locations, account balances and the like, would use this position as a platform for the rights of the transgendered. No one suggested, for instance, that the Complainant would somehow engage customers in conversations about transgendered rights. The Respondent's concerns appeared to basically centre on her motivation for the job; while the interest of other TelNat employees, such as university students, supposedly lay in performing the job's tasks and receiving a salary in return, the Complainant's interests would somehow lie elsewhere.

[66] I find this contention troubling. If indeed the Complainant attaches some importance to the fact that she may be the first openly transgendered person to be hired by the Respondent, or any other Canadian bank for that matter, does this imply that her dedication to the job should be put in question, that her sincerity should be doubted? The advancement of human rights has been achieved over time through the actions of many individuals who have made great efforts and sacrifices in order to break through barriers, whether, for instance, to gain access to certain schools or to acquire the right to sit at the front of a bus. Their principal motivation may have been to bring an end to discrimination, but does this necessarily imply that they were not equally interested in earning an education or travelling to the other end of town?

[67] In reality, the Respondent's rationale means that employment will be denied only to a member of the designated group (transgendered persons, in this case), for it is likely that this same individual would be the one to celebrate his or her achievement, and perhaps make it known to others. In so doing, the Respondent is effectively treating, as a factor in its decision not to hire, the candidate's status as a member of the designated group. It falls to reason that a similar job applicant who lacks the distinguishing feature that is the gravamen of the human rights complaint would not be denied the same employment opportunity on this basis. What is more disturbing in the present case, is that the Respondent's decision was based solely on its perception that the Complainant would act in what it considered to be an unacceptable fashion, without ever testing that perception by questioning the Complainant directly on the topic.

[68] For all these reasons, I am satisfied that the Complainant's sex was a factor in the decision by the Respondent to refuse to offer her the TelNat position.

[69] It was argued by the Respondent that the Complainant would not have been hired, in any event, because of her condescending and self-important tone noted by the interviewers during the formal first portion of the meeting. I am not persuaded, however, that this conclusion was drawn solely from observations gleaned during the first part of the interview. Ms. Roy testified that she came to this finding based on, for instance, the Complainant's comments about changes that she had made to her physical appearance and remarks about her prior military service. Ms. Roy also cited as an example, the photo that the Complainant presented of herself as a soldier, before her physical transformation. All of these occurred during the informal latter portion of the interview.

[70] Ms. Roy explained that the problem with self-centred call centre agents who "like to hear themselves talk", is that they occasionally engage customers in unnecessary conversation, which takes up their and the customer's time. It appears, however, that possessing such a tendency has not prevented other persons from being hired at the call centre. Ms. Roy pointed out that she must

occasionally work on this "aspect" with respect to some of her employees. The fact that these persons are nonetheless employed by TelNat brings into question whether this explanation by the Respondent, for not having hired the Complainant, is just a pretext.

[71] However, whether or not the explanation is deemed pretextual is, in the end, of no significance. I have already found that discrimination was a factor underlying the other two explanations provided. It is of no bearing, if, as the Respondent alleges, the principal reason for refusing to hire the Complainant was her alleged self-centredness. As the Federal Court of Appeal pointed out in *Cranston v. Canada*,<sup>14</sup> the notion of proximate cause has no relevance under the *Act*. For there to be a finding of discrimination, it is sufficient that the discrimination be a basis for the employer's decision, it need not be the only reason.<sup>15</sup>

[72] Although I have determined that the Respondent's conduct was discriminatory, I do not believe that its representatives demonstrated any intent to discriminate against the Complainant. To the contrary, I have no reason to doubt their declared sense of openness with respect to her transgendered status. It is settled law, however, that intent to discriminate is not a pre-condition to a finding of discrimination.<sup>16</sup>

[73] To summarize, after having considered all of the evidence, I am satisfied that discrimination based on sex was a basis, at least in part, for the Respondent's decision not to hire the Complainant for the position of call centre agent at TelNat. The complaint is therefore substantiated.

## **V. REMEDY**

[74] During the hearing, the Complainant requested that the Tribunal only determine the question of liability at this time. In the event of a finding of liability, the Tribunal would retain jurisdiction to hear, at a later time, evidence and arguments from the parties on the question of remedy. The Respondent did not object to this request and I therefore granted it. In light of my present finding that the complaint has been substantiated, I am retaining jurisdiction with respect to any remedy to which the Complainant may be entitled under the *Act*. In the event that the parties do not reach an agreement on this issue, they may contact the Tribunal Registry to arrange for additional hearing dates.

Signed by

Athanasios D. Hadjis

OTTAWA, Ontario

February 5, 2004

**Canadian Human Rights Tribunal**

**PARTIES OF RECORD**

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DECISION OF THE TRIBUNAL DATED:	February 5, 2004
APPEARANCES:	
Micheline Montreuil	On her own behalf
Céline Harrington	For the Canadian Human Rights Commission
André Giroux	For the Respondent

<sup>1</sup>*Montreuil v. Directeur de l'état civil*, REJB 2002-35333, [2002] J.Q. No. 5004 (C.A.Q.) (QL).

<sup>1</sup>

<sup>2</sup>*Ibid.*

- <sup>3</sup> (1999), 33 C.H.R.R. D`467 at para. 92 (B.C.H.R.T.). See also *Kavanagh v. Attorney-General of Canada* (2001), C.H.R.R. D/119 at para. 11-18 (C.H.R.T.).
- <sup>4</sup> *Ibid.*
- <sup>5</sup> *Ibid.*
- <sup>6</sup> *Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ["O'Malley"].
- <sup>7</sup> *Basi v. Canadian National Railway Company (No. 1)* (1988), 9 C.H.R.R. D/5029 at para. 38474 (C.H.R.T.); *Singh v. Canada (Statistics Canada)* (1998), 34 C.H.R.R. D/203 at para. 162 (C.H.R.T.), *aff'd* [2000] F.C.J. No. 417 (F.C.T.D.) (QL); *Premakumar v. Air Canada*, [2002] C.H.R.D. at para 78 (C.H.R.T.) (QL).
- <sup>8</sup> *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para 7 (F.C.A.); *Pitawanakwat v. Canada (Secretary of State)* (1992), 19 C.H.R.R. D/10 at para. 85 (C.H.R.T.).
- <sup>9</sup> *Supra* note 7 at para. 38481.
- <sup>10</sup> *Lincoln v. Bay Ferries Ltd.*, 2003 FC 1156.
- <sup>11</sup> (1981), 3 C.H.R.R. D/1001 at para. 8918 (Ont. Bd. Inq.).
- <sup>12</sup> (1983), 4 C.H.R.R. D/1616 at 1618 (C.H.R.T.), *aff'd* (1984), 5 C.H.R.R. D/2147 (C.H.R.T.- Rev. Trib.).
- <sup>13</sup> *Singh*, *supra* note 7 at para. 161 (C.H.R.T.); *Premakumar*, *supra* note 7 at para. 77; *Martin v. Sauteaux Band* [2002] C.H.R.D. No. 4 at para. 27 (CHRT) (QL); *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster* [2002] 2 FC 430 at paras. 33-35 (F.C.T.D.).
- <sup>14</sup> [1995] F.C.J. No. 1719 at para. 10 (F.C.A.).
- <sup>15</sup> *Canada (Employment and Immigration Commission) v. Lang*, [1991] 3 F.C. 65 at para. 2 (F.C.A.).
- <sup>16</sup> *O'Malley*, *supra* note 6 at para. 14; *Chopra v. Canada (Attorney-General)*, 2002 FCT 787 at para. 62.