

DECISION RENDERED ON JANUARY 8, 1982
T.D. 1/82

THE CANADIAN HUMAN RIGHTS ACT
(S.C. 1976-77. C.33 AS AMENDED)

BETWEEN:

PHILIP D. FOUCAULT

Complainant,

- and -

CANADIAN NATIONAL

Respondent.

BEFORE: M. Wendy Robson, appointed a Human Rights
Tribunal pursuant to Section 39 of the Act.

Appearances: Yvon Tarte, representing Canadian Human
Rights Commission and Philip Foucault

L.L. Band, representing Canadian National

HEARD IN TORONTO, CANADA, ON JULY 7, OCTOBER 14, 15, 16 AND NOVEMBER 9,
1981.

>-

This hearing commenced on July 7th, 1981, and was adjourned following
the presentation of the Commission's case so that I could rule on a
motion
for dismissal made by counsel for the CNR.

By decision dated July 27th, 1981, I found that the Commission had made
a prima facie case that the CNR had engaged in a discriminatory
employment
practice based on physical handicap contrary to Sections 3 and 7(a) of
the
Canadian Human Rights Act.

The hearing resumed October 14, 1981, to deal with the question of
whether the CNR's refusal to employ Mr. Foucault fell within the
exception of
5.14 (a) of the Canadian Human Rights Act which reads:

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

Meaning of Bona Fide Occupational Requirement

I adopt the reasoning of Professor R.L. MacKay, Q.C. as set out on the
decision of Frank D. Jones, Q.C. in Foreman et al vs. Via Rail reported
on
volume I of the Canadian Human Rights Reporter, p. D.11, and further
approved
by R.D. Abbott in the Voyageur Colonial case reported in the Canadian
H.R.R.
vol. 1 at

p. D239. Mr. Abbott said:

"Professor MacKay's test, was initially, a subjective one, connoting honesty, good faith, sincerity, absence of fraud or deceit, unfeigned, lacking simulation or pretence, genuineness.....

.....Professor MacKay went on to hold bona fide has an objective element. Not only must the employment practice be imposed honestly or with sincere intentions, it must, in addition, be supported in fact and reason based on the practical reality of the work-a-day world and of life."

In the present case I was advised by the Counsel for the Commission that the Commission was not relying on the first element of Professor MacKay's test, and I find there was no element of bad faith on the part of the CNR.

I am faced with a consideration of the evidence in the light of the "objective element" of Professor MacKay's test.

Review of the Evidence

Mr. Rob Edwin Collins, an actuary, gave evidence concerning statistical information on back injuries. He defined his frame of reference as follows:

P. 187.22. "I had basically two purposes. One would be in a general way to show the relative importance of back injuries...is it a common injury or an uncommon injury; is it a costly injury or a less costly injury? The second purpose would be to compare whatever statistics I was able to get...and this did end up being Workmen's Compensation Board primarily...to the C.N.R. statistics which I was given access to, to determine whether the relative rates of back injuries and the cost of the back injuries was greater or less in the C.N.R., and most particularly in the bridges and structures section, than it was elsewhere."

The material he used comprised Workmen's Compensation Board summaries of statistics for accident claims for two years being 1978 and 1979; Construction Safety Association of Ontario data for 1979; CNR monthly accident reports prepared in the normal course of business by the Regional Chief Engineer for the Great Lakes region May, 1979, to April, 1980, and May, 1980, to April, 1981.

His findings can be summarized as follows: On a percentage basis 25.1% of all accident claims dealt with by the Workmen's Compensation Board relate to back injuries. The Construction Safety Association of Ontario data showed 25.8% of all injuries related to back injuries. 37.3% of all injuries

for the
Great Lakes Region CNR relate to back injuries. 54.8% of injuries in
the
Bridges and Structures Section relate to back injuries.

Exhibit R.3(B) shows Mr. Collins' conclusions concerning accident
frequency rates and was based on data from the Workmen's Compensation
Board
and the CNR only. The Accident Frequency Rate is the number of lost
Time
Accidents per million man-hours of work:

Jan 78- Jan79- Jan78-
Workmen's Compensation Dec 78 Dec79 Dec79

Back injuries 7.09 7.45 7.26
Other injuries 20.98 22.44 21.73
Total injuries 28.07 29.89 28.99

May79- May80- May79-
CNR (Great Lakes Region Total) Apr80 Apr81 Apr81

Back injuries 3.79 6.98 5.37
Other injuries 10.49 7.49 9.01
Total injuries 14.28 14.47 14.38

May79- May80- May79-
CNR (Bridges and Struct. GLR) Apr80 Apr81 Apr81

Back injuries 6.65 22.44 14.39
Other injuries 9.97 13.81 11.86
Total injuries 16.62 36.25 26.25

The conclusion he drew from the material was that the risk of back
injury in the Bridges and Structures Section of the Great Lakes
Engineering
Section of the CNR would appear to be significantly greater than the
risk of
back injury in either the Workmen's Compensation Board figures or the
remainder of the Great Lakes Engineering Region of the CNR.

Taken in conjunction with the other evidence presented and particularly
that of Dr. McGeough and Mr. Brummell, I have no doubt that is the case.

Dr. Moon and Mr. Brummell gave evidence concerning the requirements of
a bridgeman employed in the Bridges and Structures Section of the Great
Lakes
Division of the CNR.

Dr. Peter Moon is a qualified industrial psychologist who was retained
by the CNR to do a job study on the bridgeman's job.

In order to complete this study he spent some time in the Northern Ontario bush where a bridgeman's job was being done and also administered a Position Analysis Questionnaire the results of which appear in Exhibits R.21 and R.22. The analysis showed that certain items likely to be met by the bridgeman were above the 87th percentile. P. 689, line 9:

"From top to bottom. Out-of-door environment, dirty environment, risk of total disability, death, risk of permanent partial impairment, travel, kneeling, stooping, risk of temporary disability, low temperature, high level of physical exertion, climbing, handling devices and tools, first aid cases, vibration, awkward or confining work space, air contamination, high temperature, balancing, physical handling, man-made features of the environment, use of non-precision tools and instruments, body balance, touch, odour, noise intensity, and highly

skilled body coordination."

His general conclusion was that the bridgeman's job was one of the most physically demanding jobs he had encountered.

Mr. Dave Brummell also gave first-hand evidence concerning the bridgeman's job. He is presently a foreman on Special Duties with the Bridges and Structures function of the CNR, and has had considerable experience with bridgemen and their duties during his five years with the CNR. I was most impressed with his lucid description of the various activities performed by men on the job to which Mr. Foucault aspired, and I have no hesitation in accepting his evidence that the job is a particularly arduous one that takes a heavy toll on the bridgeman. Further I accept his evidence that there is considerable dependence on each other particularly in such activities as "slinging out", and the movement of heavy equipment and materials.

Medical Evidence

Dr. Vincent McGeough is the Regional Medical Officer for CNR, VIA and Air Canada and has been with the Regional Medical Office for 14 years. He is also certified in the Canadian Board of Occupational Medicine.

The doctor described the usual form of medical examination performed on a prospective employee. A CNR form filed as Exhibit R. 13 is filled out by a medical practitioner. If they are close enough the prospective employee is examined by a CNR doctor but more usually he or she would be examined

by a district medical officer, a family doctor in the area. It is expected that if the D.M.O. has any difficulty he will call the medical office in Toronto for guidance and the final decision concerning medical fitness is that of the Regional Medical Officer who is, at present, Dr. McGeough.

He explained at p. 325, line 12:

"That is put in there because there are many positions that are altered in disease or in industry, depending on the person's status, really. We try to match the person's medical condition to his job requirement, if possible."

It was his opinion that Mr. Foucault was not a suitable candidate for the job of bridgeman and he said at p. 406, line 7:

"Q. Do you feel that a person...or is it your medical opinion that a person with a discotomy of the type Mr. Foucault has had has a weakened back or back that hasn't been affected?

A. He has a weakened back.

Q. 'Weakened' in what sense?

A. In the sense that it's more liable to new complications, in the

sense that it will be more easily injured in the future, in the sense that it will progress almost always to further degenerative disease.

Q. Does a back in this weakened condition present a concern from the safety point of view?

A. Yes.

Q. In what way?

A. In this particular occupation his requirement is excessive heavy lifting and repetitive back bending - that's the nature of the job.

Q. From your knowledge of the job does he do that in tandem with others?

A. Yes, he does.

Q. What is the safety problem, then, that you are speaking of?

A. The possible chance of injury to himself or to others is much enhanced."

Dr. Terrence Pinkney is a general practitioner situated in Capreol. He has practised there since December, 1972, and he and his partner are family physicians for the Foucaults.

Dr. Pinkney is also a District Medical Officer for the CNR and in that capacity examined Mr. Foucault and prepared a report for the CNR

Regional

Medical Officer dated August 24, 1979, filed as Exhibit R13. The doctor had with him the medical records kept by him and his partner and testified that Mr. Foucault had been seen August 18th, 1978, when he had said he had got up on the morning of the 15th of August with pain over the old operative site. Rest and heat were prescribed and he returned to the office August 21, 1978, before returning to work on the 22nd of August, 1978.

He was seen again February 20, 1979, with "pain in the low back but it was not at the site of the previous surgery...it was to the left of the area of the surgery he had had before."

Further in evidence Dr. Pinkney said that at the time he signed the medical form he did not think he was fit for the job but had done so for reasons of sympathy, p. 296, line 18:

"Well, the man had just been laid off from the mine and was in need of a job, with a young family, and I told him that I didn't think this would pass, that the final decision was with the Medical Officer in Toronto, but I said I would pass it for him but not to be surprised if it was rejected."

Dr. John Graham Evans examined Mr. Foucault June 16, 1981, on behalf of the CNR. Dr. Evans is a graduate of the University of Toronto, did post-graduate work in surgery at the University of Toronto and Oxford, wrote

his fellowship in orthopaedic surgery at the Royal College of Surgeons of Canada in 1959. He has been the Chief of the Orthopaedic Surgical Service at St. Michael's Hospital, Toronto, and is presently attending orthopaedic surgeon at St. Michael's and Scarborough Centenary Hospital and Assistant Professor of Surgery at the University of Toronto.

In addition to the examination he also arranged for new X-rays to be taken. His report dated June 17, 1981, was filed as Exhibit R.10.

The X-rays of 1981 showed according to Dr. Evans, p. 240, line 9: "They showed that the lowest area in his back, between lumbar-5, which was the lowest movable segment, and the segment below that were showing some degenerative changes of wear and tear and some slight narrowing at that level and the rest of the examination was normal."

The doctor also commented on the type of operation Mr. Foucault had had in 1971. He was asked at p. 248, line 2:

"Q. With the type of operation that Mr. Foucault had, the herniated disc operation at L-5, S-1 where part of the lamina was removed and the narrowing of the space and degeneration, what effect does that have on his lifting ability so far as stability is concerned and as far as the fulcrum at L-5, S-1 is concerned?

A. It usually increases the stress on it and they are less effective in the future.

Q. Does it increase at all the risk of future injury or problem?

A. Yes.

Q. By what percentage, if any - can you assist us?

A. Approximately 25 to 30.

Dr. Renald Simard examined Mr. Foucault on behalf of the Human Rights Commission February 2, 1981. Dr. Simard is a graduate of the University of Ottawa who did five years of general practice before embarking on four years of training in physical medicine and rehabilitation. At present he is an assistant professor of medicine at the University of Ottawa in the Department of Physical Medicine and Rehabilitation, a consultant at acute general hospitals in Ottawa, including the Ottawa General and Ottawa Civic and on the full time staff at the Royal Ottawa Rehabilitation Centre. He is a Fellow of the Royal College of Physicians of Canada.

His report was filed as Exhibit C7, In the report and in his evidence Dr. Simard said he could find no indication of secondary changes in the muscles or in the movement of the spine which would indicate chronic back pain of long standing, nor was there any evidence of lost work time other

than very brief periods.

In his report he concluded, p. 611, line 22:

"The patient should be able to do moderate to heavy labour or physical work without any danger of recurrence of back problems anymore than the person who has never had surgery done to his back."

The doctors did agree on some matters. They agreed that Mr. Foucault had made a remarkable recovery from his 1971 surgery. There seems to be a consensus that neurological and other testing will not always indicate whether there is or is not an ongoing problem with the back and further that no one can predict who might have a recurrence or when that recurrence of back problem might take place.

Summary and conclusion

Mr. Foucault was operated on in 1971, at which time part or all of the disc located at L-5, S-1 was removed. Several minor incidents of back pain and distress occurred in 1978 and 1979. He applied for the position of bridgeman with the CNR and was sent for a medical examination by Dr. Pinkney in late August, 1979. The doctor signed the medical form as "fit", he commenced work for the CNR and was subsequently discharged on the 10th of September, 1979, following review of the medical report by the Registered Medical Officer.

I must decide whether the CNR's denial of employment was based on a bona fide occupational requirement. I am assisted in this decision by the reasoning of the Tribunal in the matter of K.S. Bhinder vs. the Canadian National Railways, a decision rendered September 22, 1981. At page 80, after an extensive review of American and Canadian authorities:

"In all of these cases, respondents attempted to justify a discriminatory act by contending that complainants, because of an individual characteristic, were less able to perform the duties of the job in question than other applicants. The burden is on the employer to lead evidence to show that indeed its requirements are rationally based and not founded upon unwarranted assumptions or stereotypes.

That Tribunal also reviewed cases where the safety of others is affected and concluded at page 89:

"Thus, hazardous jobs, to the extent that others may be put in danger or otherwise imposed upon, are treated as special instances of the bona fide occupational requirement exception. The weight of the burden on employers to establish the merit of a discriminatory employment qualification, will vary according to the degree of danger involved and the necessity of the requirement."

And in the summary at page 148:

"11. At the root of the concept of 'bona fide occupational requirement' is a determination as to the ability of an employee to perform his or her duties. That is, the requirement is related to merit. A characteristic of a person that renders him or her incapable of performing the duties of a particular employment will be a proper basis for the exclusion of that person by the employer, even though the characteristic is a prohibited ground under the Act. The burden is on the employer to lead evidence to show that indeed its requirements are rationally based and not founded upon unwarranted assumptions or stereotypes."

Mr. Foucault falls within a rather exclusive group of people who have had discotomies. He was seeking employment as a bridgeman which occupation is often hazardous and always physically demanding. The statistics indicate a disproportionate number of back injuries in that occupation and further indicate that those who have had back problems of a serious nature are significantly susceptible to recurrence. Also the work of a bridgeman is done in concert with others and given the unpredictability of a recurrence of back injury, Mr. Foucault, could present a danger to his fellow employees.

Decision

I therefore find that the respondent has discharged the burden of proof and its practice of not hiring bridgemen who have had discotomies has been a bona fide occupational requirement and not a proscribed discriminatory practice. The complaint of Philip Foucault is therefore dismissed.

Dated at Peterborough the 24th day of December, 1981.

M. WENDY ROBSON