

T.D. 10/92
Decision Rendered on August 5, 1992

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

NICOLE BENOIT

Complainant

- and -

CANADA POST CORPORATION

Respondent

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

DECISION OF THE TRIBUNAL

TRIBUNAL: ROGER DOYON - Chairman
 CLAUDETTE B. BERGERON - Member
 NICOLAS CLICHE - Member

APPEARANCES: Marc Santerre
 Counsel for Respondent

François Lumbu
Counsel for Canadian Human Rights Commission

DATES AND February 11, 12, 13 and 14, 1992,
PLACE OF Montreal
THE HEARING:

INTRODUCTION

The tribunal, composed of Roger Doyon, Claudette B. Bergeron and Nicolas Cliche, is unanimous with respect to the reasons for this decision.

THE COMPLAINT

On September 21, 1988, Nicole Benoit lodged a complaint with the Canadian Human Rights Commission against the Canada Post Corporation. She claims to have been discriminated against because of her race, colour (black) and ethnic origin (Haitian), in contravention of subsection 7(a) of the Canadian Human Rights Act. She further claims that the respondent adopted a policy or practice that deprives or tends to deprive an individual or class of individuals of an employment opportunity, based on race, colour (black) and ethnic origin (Haitian), in violation of section 10 of the Canadian Human Rights Act.

The complaint appearing as exhibit C-1 reads as follows:

[translation]

The Canada Post Corporation discriminated against me by refusing to employ or continue to employ me because of my race (black) and ethnic origin (Haitian), in contravention of section 7 of the Canadian Human Rights Act.

Furthermore, the Canada Post Corporation pursues a policy or practice that deprives or tends to deprive an individual or class of individuals of an employment opportunity based on race, colour (black) and ethnic origin (Haitian), in violation of section 10 of the Canadian Human Rights Act.

In October 1987, I began working as a regular casual employee at the Post Office located at 1500 Ottawa Street in Montreal, and continued up to June 1988, as a primary clerk. I worked from five to six days a week without a problem until May 1988. In June 1988, a new supervisor, Serge Roy, took up his duties. He reduced my workdays to three a week and then told me that I was on call. When, some days later, I telephoned him to know when I could work, he told me that there was no more work. I asked him why he was doing that. He told me that he was acting on the orders of his supervisor, J.P. Charest.

I know that there was a lot of work. I have always done my work carefully and exceeded the average standards for letter sorting. As well, to

my knowledge, no errors have ever been found in my work.

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I allege that Serge Roy and J.P. Charest reduced my hours and dismissed me because of my race, colour and ethnic origin.

Two weeks after Serge Roy's arrival, he and J.P. Charest also dismissed 20 other black people of Haitian origin. There is now only one black person working in Serge Roy's section, while there were 30 out of 85 employees when I arrived.

However, there has been a withdrawal of the part of the complaint relating to the application of section 10 of the Canadian Human Rights Act, so that the case is limited to the application of section 7 of the Act.

The complaint must be examined in light of subsection 3(1) and paragraph (a) of section 7 of the Canadian Human Rights Act, RSC (1985), c. H-6 (as amended).

Subsection 3(1) of the Act reads as follows:

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.

Section 7 of the Act states that:

It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

THE FACTS

The evidence reveals that during the period in question, the respondent operated a postal sorting centre at 1500 Ottawa Street in Montreal. In this centre, mail is sorted for the cities of Montreal and Laval and the part of the South Shore that includes Longueuil, St. Lambert, Greenfield Park and Brossard.

The management organization chart for this sorting centre consists in a director assisted by a manager, area

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superintendents, first-line supervisors and module supervisors for each shift.

The postal sorting operations are divided into three areas:

- manual sorting area, mechanical sorting area and mail receiving and shipping area;

The manual sorting area is in turn divided into three areas:

- short and long primary, flat primary and final sortation.

The short and long manual primary sorting area is subdivided into 11 modules of 20 to 40 employees under the responsibility of a supervisor.

Short and long manual primary sortation consists in sorting short and long letters. Once sorted, the mail is forwarded for final sortation, which is a sorting by mail carrier route.

For the short and long manual primary sortation, the employee takes up position before a case subdivided into 126 case separations. The mail, which is brought in a tray containing 450 letters, is given to the employee, who empties it onto his or her worktable. On the side of the tray is a pocket in which is placed a coded accompanying card indicating the type of mail - short and long primary or flat primary. Inside the coded accompanying card is a coloured tag that determines the mail's

delivery commitment. Before beginning to sort the letters, the employee must hook this tag onto a small hook attached to his or her case.

This operation is important because it makes it possible to calculate the employee's performance, as the tags are collected every two hours.

The employee sorts the mail by placing it in the case separations following the FSA method. This is an alphabetical method based on the first three characters in the postal code indicated. In the absence of an FSA, the mail is sorted into case separations with colours indicating areas by alphabetical order, and forwarded for final sortation. For mail destined for outside the Montreal processing plant, there are three case separations - one for the mail going to the United States, one for abroad (outside Canada and the US) and one for outside Montreal. There are also case separations for unstamped, insufficiently stamped or without mailing address.

At the short and long manual primary sortation, Canada Post engineers determined from a time and motion study that the

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minimum sorting standard is 1,657 letters an hour, or approximately three and a half trays.

There is also constant quality control. While the maximum is demanded, a one per cent margin of error is tolerated. The area superintendents, the supervisor, constantly check the employee's work quality, as does the manager on occasion. To do this, they go to the employee's case and evaluate the work done and the employee's performance, using the Baker performance method. According to this method, the employee must deposit a letter in the case every two seconds in order to meet the standard workload. An employee hired by the respondent, Canada Post, as casual employee is first assigned to short and long manual primary sortation, which has no particular requirement other than the ability to read, as the work is very simple to do.

Upon being hired, the employee is given explanations on the work methods. As manual primary sortation is the basic work, the employee whose work is satisfactory increase its chances of being assigned to mechanical or final sortation, so that its working hours are increased and thus obtain better job security.

In general, the casual employee assigned to short and long manual primary sortation is able to do satisfactory work after two weeks.

During the period from October 1987 to May or June 1988, the primary manual sorting operations on the night shift required 80 regular employees and 350 to 400 people on call as casual employees, 180 to 250 of whom were required for the night shift.

In April 1988, Canada Post undertook a major reorganization. The Laval sorting centre ceased its operations, and most employees at this centre were relocated to the Ottawa Street sorting centre, with the mail being forwarded there as well. Before the reorganization, the Ottawa Street sorting centre's operations required 1,400 to 1,500 casual-employee working hours a night. During the restructuring and adaptation period, the number of working hours of casual employees rose to 1,900 a night.

Following the introduction of the FSA method and the addition of new mechanical sorting machines, and once the adaptation period was over, the number of casual-employee working hours decreased gradually to 700 a night.

As this situation would considerably reduce the number of casual employees on the night shift, the manager of this shift, Jean-Paul Charest, took the initiative to divide their workweek in two, from Monday to Wednesday and from Thursday to Saturday. As this was a major change, the manager decided to meet all the casual employees on the night shift personally by module.

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"[translation]... I wanted to be sure that the message given to everyone was the same and that they all clearly understood the situation we were in," he said (Volume 2, page 273).

These meetings were held over three nights, in the presence of the module supervisor. At the time of the meetings, no decision had been made concerning the workers who were to be laid off. Despite the implementation of this new work division policy, some layoffs were required, and the manager, Jean-Paul Charest, required the supervisors to provide him with an evaluation of the casual employees in order to retain those who performed better and to lay off those whose performance was less strong.

As the introduction of a three-day workweek proved to be unsuccessful, the workweek was changed back to five days, so that at the end of the reorganization period, the short and long manual sorting operation on the night shift required 180 casual employees, 100 to 125 per night shift.

The evidence shows that the complainant was hired by the respondent on April 26, 1987, as a casual employee, and assigned to manual short and long sortation on the evening shift. She was assigned to the respondent's establishment at 1500 Ottawa Street in Montreal.

According to exhibit I-1, entitled Appendix 2, which shows her working hours, it appears that Nicole Benoit worked sporadically - 15 days - from October 26, 1987 to February 28, 1988. She claims in her testimony that her performance was more than satisfactory, with her sorting up to four, five and even seven trays an hour, while the required standard is three and a half trays an hour.

During the period in which she was assigned to the evening shift, the manager was Hébert Loisel, who had 32 years of experience as a manual sorting supervisor. This witness had occasion to check the complainant's work and noted that she made many errors. "[translation] While my regular employees did three trays an hour, Ms. Benoit did a quarter or perhaps half of a tray an hour at most" (Volume 2, page 424).

Transferred to the night shift in early March 1988, Ms. Benoit worked there on a regular basis, particularly in April and May. The manager, Hébert Loisel, was called upon to work on this night team in order to check the work of the casual employees, of whom there were more during this period, and to assist in their training.

His work consisted in checking the cases and ensuring that the casual employees performed well (Volume 2, page 408).

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When he noticed errors, he notified the employee and also kept an eye on the employees' productivity.

Volume 2, page 412, 413.

[translation]

Q. Were you also able to see which employees were productive and which ones were not?

A. It is easy to see. With the knowledge that I possessed, when . . . every two hours, first of all, we collect tags to determine productivity, then we mark it on a board. We

demand 100 per cent, but at 90 per cent . . . at the time we required 90 per cent.

So, if we had 80 or 75 per cent, there was something wrong somewhere.

Q. When you speak of volume, 90 per cent is . . .

A. Sorted mail.

Q. . . . from your area.

A. From our area, yes. And I could quickly see which employees were performing satisfactorily and which ones were not.

In order to determine which employees were not performing satisfactorily, I used the Baker method. First, I looked at the employees who were doing work in the area, and I could tell at a glance who was performing satisfactorily and who was not.

When I saw an employee whose performance was not up to par, I used the Baker method.

Mr. Loisel had to check Ms. Benoit's work on several occasions and noted that there was no improvement even though he explained to Ms. Benoit her mistakes and how they could be corrected. Instead of admitting her mistakes, she continued to blame other employees. He drew the following conclusions (Volume 2, pages 418, 419):

Q. In terms of the quality of the sorting, what did you notice about Ms. Benoit's work?

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A. I noticed that there were 95 per cent errors.

Q. When you say 95 per cent errors, that means that there were many errors?

A. Yes, indeed. It could not be any worse: only five per cent properly sorted. That's almost none. It's nothing, zero. With a percentage of errors like that, how would you expect delivery service to be guaranteed to clients in two days? It's impossible.

Mr. Loisel notified the supervisor, Serge Roy, and the manager, Jean-Paul Charest, of the complainant's poor work. The module supervisor, Serge Roy, was responsible for ensuring that the mail was properly sorted and that the employees met the standards required by the employer regarding quality of work and productivity. Under his responsibility were 80 regular employees, 40 of whom were casual. The complainant was in this group.

Serge Roy noted on a number of occasions that Ms. Benoit made many mistakes in sorting the mail. "[translation] In her case, she could have 90 per cent of the letters improperly sorted" (Volume 3, pages 479 to 482).

Despite repeated warnings, not only was there no improvement, but she also claimed that she was not the one who was making the errors.

From February 1, 1988 to June 1988, Jean-Yves Rhéaume was acting supervisor of short and long manual primary sortation on the night shift, under the direction of the manager, Jean-Paul Charest. His work consisted in supervising on four or five occasions approximately 35 casual employees, giving them the basic training and supervising their productivity and the quality of their work.

The complainant joined his team in March 1988, along with other employees from the evening work team. Most of them were black but there were also Hispanics and Quebeckers. The supervisor, Rhéaume, had occasion to frequently check the complainant's work. It was not good, and her production was poor, so that he had to supervise her work intensively, as he did with other employees who had difficulty meeting the normal requirements of the job. He informed the manager, Jean-Paul Charest, of the complainant's problems.

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Initial remarks on Ms. Benoit's work performance were made to the manager, Jean-Paul Charest, approximately two weeks after she began the night shift, around the beginning of April 1988. These remarks were made by manager Hébert Loisel, supervisors Jean-Yves Rhéaume and Claude Pelletier, and

supervisor Serge Roy. They were to the effect that Ms. Benoit "[translation] was unproductive in terms of her sorting speed and sorting quality" (Volume 1, page 190).

To ensure the validity of the remarks received relating to the complainant's performance, the manager, Jean-Paul Charest, decided to look into the situation personally.

An initial check in May 1988 enabled him to see that Ms. Benoit made many sorting errors in her case. After he informed her of these errors and how to correct them, she blamed them on the employee who was sorting before she started her shift.

As these explanations could have been valid, Mr. Charest made a second check approximately two weeks later, after ensuring that Ms. Benoit's case was empty at the beginning of her shift. He noted that after one hour of work, she had made many errors and sorted only one tray. The percentage of errors was "[translation] much more than in the area of 20 to 30 per cent. The errors were enormous" (Volume 1, page 198).

When informed of the substandard quality of her sorting and her poor performance, Ms. Benoit maintained that she sorted on average seven trays an hour, which was impossible according to Mr. Charest, "[translation] because seven trays represent almost 3,000 letters in 126 different case separations . . . When someone sorts four trays an hour, they are up to normal speed. In an exceptional case, there are people who can sort up to five trays an hour, but that is really exceptional" (Volume 1, pages 202, 203).

Mr. Charest did not see fit to dismiss the complainant when these observations were made, for the following reasons:

[translation]

...The person was working in short and long primary, where people were working fewer hours. You have surely seen that on the evening shift, the hours were few. Therefore, more time was allowed for learning.

You also have the fact that there are people who learn more slowly than others. We were also in a period where we needed many casual workers, and the employment office could not meet our demand.

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In addition, we were aware that most of these people were welfare referrals, and in order to show good will, we were patient (Volume 2, page 254).

The implementation of a new work schedule forced the manager, Jean-Paul Charest, to dismiss 12 casual employees, which he did without regard to race and ethnic origin. These employees were informed of their release by their area superintendent. Witness Charest stated the following:

[translation]

Q. Were all these people black or Haitian?

A. Oh, no, definitely not. I remember a Ms. Lacelle, for one, because I went to Labour Canada afterward for that case. She is white and lives in Pointe-aux-Trembles, and is a native of Quebec. I do not dismiss people based on race but on performance (Volume 1, page 205).

It was manager Jean-Paul Charest who made the decision to dismiss the complainant.

Volume 1, page 212.

[translation]

Q. And who made the final decision to dismiss her?

A. The final decision is mine as shift manager, upon the recommendation of my superintendent or of my supervisors.

CHAIRMAN: But is it you who in fact made it?

WITNESS: Yes, it was me. They do not have the right to dismiss a first-line supervisor.

MATTERS IN DISPUTE

Did the respondent, the Canada Post Corporation, refuse to employ or continue to employ the complainant because of her race, skin colour or

ethnic origin? Were the complainant's race, skin colour or ethnic origin one of the reasons why she lost her job?

BURDEN OF PROOF

The burden of proof and the order of presentation of the evidence in cases of discrimination have been set forth in many decisions,

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particularly in *Julius Israel v Canadian Human Rights Commission et al* (1983), 4 CHRRD/1616, page 1617:

The burden of proof in discrimination cases is important, as is the order of presentation of the evidence. Cases of refusal of employment on discriminatory grounds before boards of inquiry in Canada, whether at the federal or provincial level all seem to employ the same burden and order of proof. The complainant must first establish a prima facie case of discrimination. Once this is done, the burden of proof shifts to the employer to provide a reasonable explanation for the otherwise discriminatory behaviour. Finally, the burden shifts back to the complainant to prove that this explanation was merely a "pretext" and that the true motivation behind the employer's actions was in fact discriminatory.

THE EVIDENCE

It seems appropriate to analyze whether the complainant succeeded in demonstrating prima facie evidence of the allegations made in her complaint.

Ms. Benoit stated in her complaint that:
[translation]

"In October 1987, I began working as a regular casual employee at the Post Office located at 1500 Ottawa Street in Montreal, and continued up to

June 1988, as a primary clerk. I worked from five to six days a week without a problem until May 1988."

During her testimony, the complainant maintained that upon her hiring, she worked three days a week for two months, after which she worked "five to six times a week on a regular basis." (Volume 1, page 43).

The respondent produced exhibit I-1, entitled Appendix 2, which shows the number of days and hours worked by the complainant during her period of employment from October 26, 1987 to June 27, 1988 (36 weeks). For the period from October 26, 1987 to March 29, 1988 (21 weeks), she worked only sporadically - 100 working hours in 16 days.

During the period from March 20, 1988 to June 27, 1988 (15 weeks), she worked on a more regular basis, and occasionally, five days a week.

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The complaint and the complainant's testimony do not reflect the reality shown by exhibit I-1. In addition, while Ms. Benoit maintains that she was hired for the night shift, exhibit I-1 shows that she began work on October 26, 1987 on the evening shift, and was transferred in March 1988 to the night shift.

The complaint states that:
[translation]

In June 1988, a new supervisor, Serge Roy, took up his duties. He reduced my workdays to three a week and then told me that I was on call. When, some days later, I telephoned him to know when I could work, he told me that there was no more work.

The evidence shows that the reorganization undertaken by the respondent was supposed to lead to a reduction in working hours of casual employees, and hence a reduction in this labour force. In order to minimize the consequences of this reorganization, the manager, Jean-Paul Charest, decided to divide the workweek into three-day periods, from Monday to Wednesday and from Thursday to Saturday. This measure was not aimed at Ms.

Benoit in particular but all casual employees who were assigned at that time to the night shift. However, the manner in which the respondent's representatives proceeded, as stated in the complaint, and the complainant's testimony on this point are contradictory.

Ms. Benoit stated as follows (Volume 1, pages 16-17):
[translation]

"Q. What happened once Serge Roy arrived?

A. Once Serge Roy arrived, there was one night that we went to work. At six o'clock in the morning, he contacted the staff where I was working, because he had to divide the group into two teams. There was one team that was to work from Monday to Wednesday, and another that was to work from Thursday to Saturday.

But he had another list. It was the names of the people he would have to let go. My name was not on this list. After Serge finished reading the names of the people he had to let go, I followed him, as many other people did.

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I asked Mr. Roy what days I would be working, because there were two teams. I did not know what team I was on. He told me, 'There is no work for you here, it's over.' I said, 'How can that be?'

Q. So, he told you that it was over.

A. Yes. He told me that there was no more work for me. I asked him how it could be that there was no more work for me, because my name was not mentioned on the layoff list. He told me, 'Go home. There is no work for you here.'

The evidence shows that the manager, Mr. Charest, met the casual employees personally in early July 1988 to explain to them the planned changes to the workweek. The implementation took place around 15 days later. Moreover, at the time of the meetings with the casual employees, no decision had yet

been made as to which casual employees would be assigned to the workweek extending from Monday to Wednesday and which ones would be assigned to the workweek extending from Thursday to Saturday. The manager, Jean-Paul Charest, had asked for a report from the module supervisor on the casual employees in order to keep those who performed best, and not the others. The identity of these people was not yet known.

The evidence further shows that the way in which the respondent proceeded when dismissing a casual employee was simply to no longer call the person in to work and to inform that employee only if the employee inquired.

It is nevertheless curious that the complainant did not relate these facts, which could have been highly incriminating with respect to the respondent, when her complaint was filed. While the respondent's manner of proceeding when dismissing a casual employee is unusual to say the least and could not be accepted under other circumstances, such as in labour law, it must be retained because it appears in the complaint itself and has been corroborated by the evidence.

In her complaint, Ms. Benoit claims: "[translation] I know that there was a lot of work."

The evidence shows, on the contrary, that the working hours assigned to casual employees on the night shift decreased gradually in early July 1988 from 1,900 hours to 700 hours, and that the number of casual employees fell from its past level of 350-450 to 180.

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Ms. Benoit alleges in her complaint that: "[translation] I have always done my work carefully and exceeded the average standards for letter sorting."

The preponderance of evidence clearly shows that the complainant did not meet the employer's standard requirements. In addition, in response to the remarks of her supervisors, she claimed that she was a victim of the errors made by the other employees rather than admitting her mistakes and trying to do better. She also laid claim to a level of performance that was exceptional or even impossible to achieve - five or even as many as seven trays an hour.

Ms. Benoit stated in her complaint that: "[translation] As well, to my knowledge, no errors have ever been found in my work."

The testimony of the supervisor, Hébert Loisel, who has 32 years of experience and who had to check the complainant's work, both on the evening shift and on the night shift, is devastating. The testimony of the night shift manager, Jean-Paul Charest, who checked the complainant's work on two occasions, and the testimony of the module supervisor, Serge Roy, who had the complainant under his responsibility, are conclusive.

There is no doubt that Ms. Benoit did not have the ability to carry out the work assigned to her, even though the evidence shows that it can generally be carried out satisfactorily after two weeks of training, and the complainant stated that two to three days was sufficient (Volume I, page 12).

The complaint also states that:

"[translation] Serge Roy and Jean-Paul Charest reduced my hours and dismissed me because of my race, colour and ethnic origin."

Was Ms. Benoit the victim of racism on the part of the respondent's representatives?

While she did not allege this in support of her complaint, she claims that the module supervisor, Serge Roy, once refused her permission to leave to go to the bathroom. Witness Serge Roy claims that he cannot refuse permission since permission is not required. The rule for when an employee wants to go to the bathroom is that the employee has only to signal by hand that he is going. Nestor Datchi, who worked with Serge Roy as module supervisor, confirmed this.

The evidence shows beyond all doubt that the working hours were reduced for all casual employees on the night shift, independently of their race, skin colour or ethnic origin.

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As for the dismissal, the evidence indicates that the respondent dismissed casual employees who did not satisfy the requirements of the work to be carried out, and retained those whose work was satisfactory, again independently of race, skin colour and ethnic origin.

The testimony of Nestor Datchi, a black person, is revealing. Hired by the respondent in 1987 as a casual employee, he was assigned to manual primary sortation, after which he went to final sortation. In July 1988, he was

promoted to the position of acting supervisor, and one year later, became a permanent supervisor.

The respondent could have claimed that its dismissal resulted from changes made to the division of working hours of casual employees assigned to the night shift. The respondent instead showed that the complainant's dismissal resulted from her inability to do the work to which she had been assigned and that it was justified.

CONCLUSION

The complainant did not show that, prima facie, the loss of her job resulted from a discriminatory practice on the part of the respondent, in violation of subsection 3(1) and paragraph (a) of section 7 of the Canadian Human Rights Act.

CONSEQUENTLY, the Tribunal:

Dismisses the complaint made by Nicole Benoit to the Canadian Human Rights Commission following her release by the Canada Post Corporation.

SIGNED at Ville St-Georges on June 18, 1992.

[signed]

ROGER DOYON Chairman

SIGNED at La Malbaie on June 24, 1992.

[signed]

CLAUDETTE B. BERGERON Member

SIGNED at Ville St-Joseph on July 6, 1992.

[signed]

NICOLAS CLICHE Member