T. D. 11/ 87

Decision rendered on October 23, 1987

TRANSLATION FROM FRENCH

CANADIAN HUMAN RIGHTS TRIBUNAL HEARING AN APPEAL UNDER THE CANADIAN HUMAN RIGHTS ACT (SC 1976- 77, C 33, AS AMENDED)

BETWEEN:

JACQUES LEDEUFF, Complainant- appellant;

AND:

THE CANADA EMPLOYMENT AND IMMIGRATION COMMISSION, Respondent;

BEFORE: CLAUDE D MARLEAU, Chairperson, AND: NIQUETTE DELAGE AND MURIELLE ROY,

APPEARANCES: ANDRE BLUTEAU Counsel for the respondent, ANNE TROTTIER Counsel for the Canadian Human ,RUSSELL JURIANSZ Rights Commission and the complainant-appellant

Date of hearing: March 10, 1987

DECISION

Following notice of an appeal filed by the Canadian Human Rights Commission and Mr Jacques LeDeuff, the present tribunal was appointed on November 24, 1986 by Sidney N Lederman, QC, in compliance with section 41.2 of the Canadian Human Rights Act (SC 1976- 77, c 33, as amended), to review a decision originally rendered by Mr Nicolas Cliche on October 14, 1986.

The notice of appeal (Exhibit T- 2) submitted to the tribunal reads as follows:

[TRANSLATION] The grounds for appeal are: 1) The tribunal erred in its interpretation of section 5 of the Canadian Human Rights Act. 2) The tribunal erred when it ruled that the complainant was not discriminated against on the basis of national or ethnic origin. 3) The tribunal erred when it ruled that the complainant had not suffered in respect of feelings or self-respect. The notice of appeal was dated at Ottawa on October 20, 1986.

THE FACTS

Initially, Mr Jacques LeDeuff filed a complaint which read as follows:

[TRANSLATION] I allege that the respondent differentiated adversely in my regard and harassed me on the basis of its perception of my national or ethnic origin (perceived as being other than Canadian), contrary to sections 5(b) and 13.1(1)(a) of the Canadian Human Rights Act. Because my name sounded foreign, I was contacted by the respondent and asked what my immigration status was in Canada. According to the officer with whom I spoke, this is standard practice. I therefore believe that the respondent differentiates adversely in relation to individuals and practises harassment on the basis of national or ethnic origin and on the basis of its perception of national or ethnic origin.

The tribunal of original jurisdiction, in the person of Mr Nicolas Cliche, was appointed on May 13, 1986 to hear Mr LeDeuff's complaint.

At the hearing conducted by Mr Cliche, the counsel for the respondent raised a question of jurisdiction, arguing that the Canada Employment and Immigration Commission was not providing a service to the public as described in section 5 of the Canadian Human Rights Act, and that the tribunal therefore had no jurisdiction over this matter.

After studying the precedents cited by counsel for both sides in support of their arguments, the original tribunal concluded that the Canada Employment and Immigration Commission was providing service to the public and was therefore subject to section 5 of the Canadian Human Rights Act. The tribunal made the following statement:

The present tribunal is of the opinion that the Canada Employment and Immigration Commission derives its authority from an act passed by the Parliament of Canada. The scope of this act is general and whenever the Government of Canada applies an act of general scope, it is providing a service to the public. The Canada Employment and Immigration Commission was carrying out an official duty as an agent of the Crown and thus was providing a service to the public.

The present tribunal therefore judges that, in taking the steps it did in the LeDeuff case, the Canada Employment and Immigration Commission was providing a service to the public and consequently was obliged to refrain from acting on a prohibited ground of discrimination. (page 8, decision TD 6/ 86)

Although the notice of appeal for purposes of which the present tribunal was appointed did not contain a cross appeal by the respondent, the latter's counsel has nevertheless been permitted to file a preliminary objection concerning the question of jurisdiction, to the effect that the respondent was not engaged in the provision of goods and services as described in section 5 of the Canadian Human Rights Act.

The present tribunal, having taken this objection under advisement, and after reviewing the decision of the original tribunal, as well as the precedents and arguments submitted by counsel for both sides, concludes that the original tribunal did not err with regard to the application of section 5 of the Canadian Human Rights Act in ruling that the Canada Employment and Immigration Commission and its officers were providing service to the public and therefore obliged to refrain from acting on a prohibited ground of discrimination.

POWER OF THE REVIEW TRIBUNAL

Sections 42.1(3)(4)(5) and (6), Canadian Human Rights Act.

42.1 (3) Subject to this section, a Review Tribunal shall be constituted in the same manner as, and shall have all the powers of, a Tribunal appointed pursuant to section 39, and subsection 39(4) applies in respect of members of a Review Tribunal.

(4) An appeal lies to a Review Tribunal from a decision or order of a Tribunal on any question of law or fact or mixed law and fact.

(5) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed from and of submissions of interested parties but the Review Tribunal may, if in its opinion it is essential in the interests of justice to do so, receive additional evidence or testimony.

(6) A Review Tribunal may dispose of an appeal under this section by

(a) dismissing it; or (b) allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed from should have rendered or made. 1976- 77, c 33, s 42.1; 1985, c 26, s 72.

THE LAW

Sections 5 and 13.1 address the substantive law pertaining to the present hearing. They read as follows:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. 13.1 (1) It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(b) in the provision of commercial premises or residential accommodation, or

(c) in matters related to employment, to harass an individual on a prohibited ground of discrimination. First question: Did the original tribunal err in its interpretation of section 5 of the Canadian Human Rights Act?

To answer this question, we will summarize the evidence submitted at the original hearing.

Mr Réal Hébert is a PM- 2 officer with the Immigration Group of the Canada Employment and Immigration Commission.

One of his duties is to act as an investigator for the purposes of the Immigration Act, and, more specifically, in order to locate illegal immigrants alleged to have committed crimes in Canada.

One of the methods used by Mr Hébert and which, according to the evidence submitted, seems to be used systematically throughout Canada, consists in going to the courts of the Sessions of the Peace and superior criminal courts on mornings when appearances will be held in order to examine the lists of persons summoned to appear.

From these lists, Mr Hébert chooses names which he thinks may be foreign. Once he has made his selection, he attempts to determine the immigration status of these persons through telephone calls or, if unable to contact them by telephone, through form letters.

According to the facts, Mr Hébert selected the name of Mr Jacques LeDeuff from a roll at the Hull courthouse and made several attempts to reach Mr LeDeuff by telephone.

When he was unable to contact Mr LeDeuff, he sent him a form letter. Mr LeDeuff received the letter and contacted Mr Hébert, who was then able to ask whether Mr LeDeuff was a Canadian citizen. In response to questions asked by Mr LeDeuff, Mr Hébert explained how his name had been selected for verification.

Mr LeDeuff was upset by this procedure and filed a complaint with the Canadian Human Rights Commission, which has led to this appeal.

From the evidence submitted to the original tribunal, it appears that the Canada Employment and Immigration Commission has issued no distinct or systematic guidelines in this regard and that investigators are free to use their own judgment in drawing up lists of illegal immigrants who have committed crimes on Canadian soil.

Mr Hébert told the original tribunal that he also examined lists at family courts and various provincial government organizations in order to obtain names for verification purposes.

In ruling on the application of section 5 of the Canadian Human Rights Act to this case, that is, whether or not the methods used by Mr Réal Hébert, an officer of the Canada Employment and Immigration Commission, constituted a discriminatory practice, the original tribunal stated:

(page 8, decision of Mr Nicolas Cliche)

To do this, it has developed a procedure, which it applies in all regions of Canada. Officers of the Canada Employment and Immigration Commission visit the registries of criminal courts and prepare a list of names which appear to be foreign or non- Canadian.

Réal Hébert admitted that he did not follow any guidelines or apply any objective standards, and that he simply relied on his own judgment in trying to determine which of the persons on the roll might be in Canada illegally or be landed immigrants in conflict with the law.

If the evidence had shown that Réal Hébert systematically looked for names of a particular origin, race or ethnic group, it might be possible to claim that the investigation procedure was directed against a specific origin, race or ethnic group. However, the evidence showed that the immigration officer, Mr Hébert, merely selected names which did not appear to be Canadian, regardless of the country of origin, race or ethnic group concerned.

Réal Hébert did not ask the complainant if he was French, Huguenot or Belgian. He asked him if he was a Canadian citizen. The complainant replied in the affirmative, saying that he had been born in Montreal. Mr Hébert was satisfied with the answer and decided there was no need to investigate any further.

It does not appear, from the evidence, that the procedure used by the Canada Employment and Immigration Commission is discriminatory, directed against individuals of a particular race or national or ethnic origin.

The Commission is merely verifying the status of persons who might not be Canadian.

Each case must be analysed on its own merits. If it appeared that the Canada Employment and Immigration Commission was trying to track down individuals of a specific country, national or ethnic origin or race, without just cause, the present tribunal might have to reconsider its decision. However, in the case at hand, the Canada Employment and Immigration Commission was simply verifying the names of persons who seemed to be of foreign extraction and who had committed crimes in Canada.

The present tribunal does not feel the respondent acted in a discriminatory manner.

(pages 8 and 9, original decision) > - 11 With all due respect for the decision of the original tribunal, the present tribunal cannot accept such a restrictive application of section 5 of the Canadian Human Rights Act. Such an interpretation would have the effect of limiting the scope of the Act with regard to its primary objectives.

Section 2 of the Canadian Human Rights Act provides that: 2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. 1976- 77, c 33, s 2; 1980- 81- 82- 83, c 143, ss 1, 28.

Furthermore, under the heading "General", subsection 3.(1) states: 3.(1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

(2) Where the ground of discrimination is pregnancy or child- birth, the discrimination shall be deemed to be on the ground of sex. 1976- 77, c 33, s 3; 1980- 81- 82- 83, c 143, s 2.

With the enactment of various types of human rights legislation, including the present Canadian Human Rights Act, the courts have been required to resolve questions concerning the scope of the intended protection against practices involving discrimination on prohibited grounds.

In a recent decision made by the Supreme Court of Canada (Ontario Human Rights Commission and Theresa O'Malley (Vincent) v Simpsons- Sears Limited, and Canadian Human Rights Commission, Saskatchewan Human Rights Commission, Manitoba Human Rights Commission, Alberta Human Rights Commission, Canadian Association for the Mentally Retarded, Coalition of Provincial Organizations of the Handicapped and Canadian Jewish Congress [1985] 2SCR, page 536), McIntyre J made the following ruling, at page 547, paragraph (a), with respect to the rules of interpretation pertaining to human rights legislation:

The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J in Insurance Corporation of British Columbia v Heerspink, [1982] 2SCR 145, at pp 157- 58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. (Emphasis is ours.)

One of the issues considered in this decision was that of adverse effect discrimination. It had been argued that, inasmuch as such discrimination is indirect, it did not come under the scope of the present act.

The Supreme Court rejected this argument and put adverse effect discrimination in the same category as direct discrimination.

Thus, the Supreme Court sought to extend the application of the Canadian Human Rights Act to all types of discrimination on prohibited grounds. The present tribunal believes the issue addressed by the Supreme Court is analogous to that dealt with in the case at hand.

The fact of trying to locate illegal immigrants, by applying a specific act, that is, the Immigration Act, in order to determine the citizenship of various persons, is not in itself a prohibited ground of discrimination under the Act. However, that does not prevent the present tribunal from

examining the procedure used by the Canada Employment and Immigration Commission, as that procedure may or may not be based on a prohibited ground of discrimination, that is, national or ethnic origin, and my in itself constitute indirect discrimination.

In the present case, discrimination on the grounds of national or ethnic origin is a matter of the Canada Employment and Immigration Commission officer's perception of the origin of the names he selects from the criminal court roll. That the lawmakers intended such a perception to fall within the scope of the Canadian Human Rights Act and the Canadian Human Rights Tribunal is indicated by a recent decision, Gordon Hum v the Royal Canadian Mounted Police, decision TD 10- 86, rendered December 11, 1986, which stated at page 21:

Piecing together the practice of the RCMP in enforcing the Immigration Act in circumstances such as those in this case from the various witnesses, provides the following picture. The members of the RCMP do not normally stop individuals at random to ask questions relating to citizenship and place of birth as a means of enforcing the Immigration Act. Furthermore they do not make it a practice to ask such questions merely because an individual has violated highway traffic legislation by speeding. It is typically only if the conduct of the individual raises suspicion that the questions will be asked. However, it is not suspicion by itself which triggers the questions but certain characteristics of the person under suspicion. If the individual is a member of a visible ethnic minority then the physical characteristics are the crucial factor. If not, then it will be an alternative characteristic, usually a foreign accent, which triggers the questions. As Superintendent Barker said in evidence the test is different. The consequence of this differentiation is that of two individuals both of whom are acting suspiciously in the mind of investigating police officers in the same factual circumstances, the one who is of a visible ethnic minority will be questioned based on his membership of that minority, even if every other characteristic would be entirely consistent with Canadian citizenship, while the one who is of the visible ethnic majority will only be questioned if he exhibits a further characteristic or characteristics which suggest a foreign origin. The process is one, then, which clearly differentiates between suspects on the basis of racial origin.

At page 23, the tribunal comes to the following conclusion:

I find that Mr Hum was the subject of adverse differentiation under section 5(b) of the Canadian Human Rights Act.

The present appeal is very similar to the Hum case in that it was the police officer's perception of Mr Hum's ethnic origin which constituted the prohibited ground of discrimination. This perception was guided by physical factors indicating that Mr Hum belonged to an ethnic minority, and the police officer's subjective notion that all Canadians are necessarily Caucasian. The officer was therefore discriminatory in his perception, rather than in his application of the Immigration Act.

The case before this tribunal involves a similar situation. When Mr Hébert wishes to establish the citizenship of persons who have been summoned before the criminal courts, he simply examines the rolls at the various registries and selects names which, in his perception, sound foreign.

Mr Hébert uses subjective criteria, based on his own judgment, and thereby concludes that these names belong to persons from ethnic or national groups other than Canadian.

At page 41 of the transcript of the original tribunal, Mr Hébert, in response to a question asked by the counsel for the defendant concerning the criteria he used when selecting names, stated:

[TRANSLATION] Well listen, I would be hard pressed to answer your question. I use strictly personal criteria. A name I might consider Canadian might be something else to you. I can't explain it to you.

And he continued: [TRANSLATION] For me ... well, listen, I've travelled a lot, I've been with Immigration for twenty years. A name which sounds to me like it might be foreign, in my opinion, that person might be a foreigner. That's the best answer I can give you.

It is the opinion of this tribunal that the original tribunal, in ruling that no discrimination took place, because Mr Réal Hébert was not systematically looking for names of one national origin, race, or ethnic group in particular, was too restrictive in its interpretation of the Canadian Human Rights Act. The present tribunal adopts the arguments of Vancise J A and Hall J A in the case of Saskatchewan Human Rights Commission and Michael Huck v Canadian Odeon Theatre Ltd ([1985] CHRR, vol 6, decision 432, paragraphs 22151- 22237, paragraph 22174):

"The interpretation of a statute which guarantees fundamental rights and freedoms and which prohibits discrimination to insure the obtainment of human dignity should be given the widest interpretation possible. See Smart et al - v. - Livett [1951], 1 W. W. R. (NS) 49 and 65 Sask (C. A.). The intention of the legislator must be gathered from the words of the Act when read in context, but context also includes facts known to the legislature when the Act was passed. The Act should be interpreted in light of a social milieu or context existing at the time and the mischief to be remedied. See E. A. Driedger: Construction of statutes, 2nd edition, page 243. Generally human rights legislation has been given a broad interpretation to ensure that the stated object and purposes are fulfilled. A narrow restrictive interpretation which would defeat the purpose of the legislation, that is, the elimination of discrimination, should be avoided. That approach has been followed by many courts, including this one, in interpreting human rights legislation. See A. G. of Canada - v. - The Canadian Human Rights Commission, [1980] 1 CHRR 91; Bailey et al and the Canadian Human Rights Commission - v. - Minister of National Revenue, [1980] 1 CHRR 193; Re Attorney General for Alberta and Gares [1976] 67 DLR(3d) 635; Insurance Corporation of British Columbia - v. - Heerspink and et al. [1982] 2 SCR 145 and 157." (Emphasis is ours.) At page 14, the tribunal cites many other rulings based on similar interpretations of human rights legislation, which need not be reproduced here.

The first question at issue here is:

Did the original tribunal err in its interpretation of section 5 of the Canadian Human Rights Act?

The present tribunal responds in the affirmative to this first ground for appeal and in so doing also responds in the affirmative to the second ground for appeal, that is, whether or not the

original tribunal erred when it ruled that the complainant was not discriminated against on grounds of ethnic or national origin.

The present tribunal concludes, therefore, that the Canada Employment and Immigration Commission and its officer, Mr Réal Hébert, acted in a discriminatory manner on the grounds of national or ethnic origin, within the meaning of the Canadian Human Rights Act, in the provision of goods and services as described in sections 3 and 5 of the Canadian Human Rights Act.

EMOTIONAL INJURY

The tribunal has responded to the first two grounds for appeal, and must now address the third, that is:

Did the tribunal err when it ruled that the complainant did not suffer in respect of feelings or self-respect?

The original tribunal, at page 9 of its decision, answered this question as follows:

He was asked if he was a Canadian citizen, he replied in the affirmative and the immigration officer deemed the case closed. The complainant did not suffer any harm or loss. He merely answered a question asked to determine whether or not he was a Canadian citizen.

With regard to compensation for emotional injury, subsection 41(3) of the Canadian Human Rights Act states:

41.(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self- respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

At the present hearing, counsel for Mr LeDeuff claimed emotional injury and cited the following passages from the transcript of the original hearing:

[TRANSLATION] Afterwards, first I was upset and I think any Canadians who know a little bit and are citizens here would find it strange that they can be questioned concerning their status when they have always been Canadian citizens. I filed a complaint so that cases like this, so that something like this wouldn't happen again, based on a person's name. (page 8, line 19 et seq, transcript, original hearing)

My reaction, my first reaction is surprise, you're always surprised after so many years to have someone bother you and it's also ... it's upsetting, it's upsetting and humiliating and shows that the information that should normally be updated by the government or its departments, this

information doesn't seem to be up- to- date. They have to do checks like that. (page 52, line 1 et seq, transcript, original hearing).

In the case of Marilyn Butterill v Via Rail Canada Inc, the Human Rights Review Tribunal was required to interpret subsection 41(3) of the Canadian Human Rights Act.

In paragraph 2050, that review tribunal stated:

We are also of the opinion that compensation referred to in section 41(3) should, like that under section 41(2), be available as a matter of course were the circumstances to which it refers exist, unless it can be shown that there are good reasons for denying such relief. It is true that Parliament saw fit to deal with this type of compensation in a separate section, and the marginal note refers to it as "special compensation." This does not indicate to us, however, that it is an extraordinary remedy calling for unusual circumstances to justify its award. The reason for placing it in a separate subsection and referring to it in the marginal note as "special compensation" is, in our opinion, simply that the sums involved are not related to actual pecuniary loss, and are not subject to arithmetic calculation, it was decided to place a five thousand dollar limit on the award. Because such a limit would not be appropriate to awards made under subsection (2), it was necessary to create a special subsection for these items. If it has been established either by direct evidence or by inference that the circumstances referred to in subsection (3) exists, compensation should be awarded for these non- pecuniary losses as readily as it is awarded for pecuniary losses under the preceeding subsection."

Given this precedent and the undisputed evidence submitted at the original hearing, the present tribunal is of the opinion that the Canada Employment and Immigration Commission by engaging in a discriminatory practice, as has been determined, caused Mr Jacques LeDeuff to suffer in respect of feelings or self- respect, as described in paragraph 41(3)(b) of the Canadian Human Rights Act.

CONCLUSION

The tribunal must, therefore, decide what order to make. In addition to awarding damages for the aforementioned emotional injury, the tribunal can also make a general order, deriving its authority from subsections 41(1) and (2), which read as follows:

41. (1) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 15(1), or

(ii) the making of an application for approval and the implementing of a plan pursuant to section 15.1, in consultation with the Commission on the general purposes of those measures;

(b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice. In his argument before the tribunal of original jurisdiction, Me Trottier asked the tribunal to:

[TRANSLATION] Order the respondent to cease its discriminatory practices, that is, to cease making telephone calls or sending letters to individuals solely on the basis of foreign- sounding names.

Consequently, we order the Canada Employment and Immigration Commission to: [TRANSLATION] Put an end to the discriminatory practices used by Mr Réal Hébert or any other person acting in the same capacity, that is, to refrain from entering into oral or written communication with persons selected according to a perception of their immigration status based solely on a foreign- sounding name.

So that this order may have full effect, it must be communicated immediately to any immigration officers who might conduct investigations to locate illegal immigrants on Canadian soil, and their immediate superiors.

The tribunal therefore orders the chairperson of the Canada Employment and Immigration Commission to issue a directive to all immigration officers and inspectors working on Canadian soil and their immediate superiors, explaining that this practice has been deemed discriminatory by the present tribunal and must be discontinued.

With regard to emotional injury, the tribunal, in accordance with paragraph 41(3)(b) of the Canadian Human Rights Act, orders the Canada Employment and Immigration Commission to pay Mr Jacques LeDeuff damages of one hundred and fifty dollars, taking into consideration the fact that the questions asked by the officer of the Canada Employment and Immigration Commission in an effort to determine Mr LeDeuff's citizenship, while certainly upsetting, were limited in scope.

SIGNED IN QUEBEC CITY, ON AUGUST 28, 1987

(signed) CLAUDE D MARLEAU, Chairperson

(signed) NIQUETTE DELAGE

(signed) MURIEL K ROY