

T.D. 9/95
Decision rendered on May 24, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

G.S. SEHMI

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and -

VIA RAIL CANADA

Respondent

TRIBUNAL DECISION

TRIBUNAL: Marie-Claude Landry, Tribunal Chairperson

APPEARANCES BY: Odette Lalumière, Counsel for the Commission
Chantal Lamarche, Counsel for the Respondent
G.S. Sehmi, Complainant

DATES AND PLACE

OF HEARING: May 24-25 and July 5, 1994, Montreal, Quebec

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NATURE OF THE COMPLAINT:

On November 3, 1993, the President of the Human Rights Tribunal Panel, Keith C. Norton, Q.C., B.A., LL.B., appointed the undersigned, Marie-Claude

Landry, to hold a pre-hearing conference on February 3, 1994, and then to inquire into the complaint filed by the Complainant.

On June 16, 1989, G.S. Sehmi signed a complaint alleging that the Respondent had engaged in discriminatory practices against him, namely suspending and demoting him because of his religion and ethnic origin, contrary to section 7(b) of the Canadian Human Rights Act (R.S.C. 1985, c. H-6) (the Act).

The complaint was heard in Montreal on May 24-25 and July 5, 1994.

FACTS:

The Complainant was called to testify before the Tribunal regarding the facts in support of his complaint. The Complainant was born in Kenya in East Africa. He testified that he is from eastern India and is a Sikh by religion.

He began to work at Via Rail in 1978 as an electrician. In 1985, he was promoted to Mechanical Train Rider. In 1987, his position was apparently abolished. The Complainant testified that he applied for and obtained another Mechanical Train Rider position in 1987.

At page 9 of volume 1 of the transcript of proceedings, he stated that Gregory James Guitard became his immediate superior at the Respondent company in 1988. He claimed that, on one occasion when he had to go to Mr. Guitard's office on business, Mr. Guitard said to him: "When are you going to remove that piece of rag from your head?" Mr. Sehmi explained that he first interpreted the comment as a joke, but that Mr. Guitard made the same comment to him a number of times.

Mr. Sehmi testified before the Tribunal that he was frequently harassed after this incident, but he did not give specifics. This was in December 1988.

It was then that the Complainant allegedly asked Mr. Guitard to start making any complaints or comments about him in writing. The Complainant testified that he had never received complaints or comments from his previous supervisors at the Respondent company. The Complainant later testified that Mr. Guitard asked him to come to his office, where he said that he had a complaint against him, namely that he had used taxi chits for personal reasons. In this regard, a letter from the taxi stand was filed in the record of the Tribunal. Mr. Sehmi then said that it was the usual policy when the train arrived at the station late. The letter also said

that the Complainant had tried to sell a book of taxi chits. The Complainant testified that Mr. Guitard told him he would make sure the

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Complainant was fired from the company and would not find this type of work again (page 14, volume 1, transcript of proceedings).

According to the Complainant's testimony, Mr. Guitard asked him to come to his office again on or about April 3, 1989, at about 9:00 a.m. It was not until about 4:30 p.m., following a call from Mr. Guitard telling him that he had to come to the meeting and temporarily return his work tools, that Mr. Sehmi went to Mr. Guitard's office. He was allegedly given a letter stating that he had been suspended for three days. According to the Complainant's testimony, Mr. Guitard gave him a second letter, which can be found at tab 17 of the Commission's book of exhibits, stating that he had been suspended for an additional two weeks and demoted.

With respect to the taxi chit issue, the Complainant later explained that a book of fifty chits was given to them to be used for transportation between workplaces. He admitted that he had used two chits to get to his home in Brossard (page 51, volume 1, transcript of proceedings). He explained the problem that had occurred on the day he used the chits, namely that he arrived at the station after midnight and therefore had to use two chits to get home. He also testified that he believes he is the first employee who has been demoted and suspended for using taxi chits for personal reasons.

According to the Complainant's testimony, there are other employees of the Respondent who are members of visible minority groups.

With respect to damage, the Complainant stated that he had suffered as a result of his children becoming aware of the events after Mr. Guitard called his home. He said that he had been accused like a criminal and that, as a result, his co-workers no longer speak to him. He also said that he had been obliged to pay for legal advice and had incurred salary losses.

The Tribunal must note that the Complainant's evidence with respect to damage is not precise.

In cross-examining the Complainant, Counsel for the Respondent brought out the following points:

- In 1987, when the Complainant received his second promotion to Mechanical Train Rider, Mr. Guitard was on the selection committee

(page 44, volume 1, transcript of proceedings). In this regard, a letter of confirmation of employment was filed at tab 1 of the Respondent's book of exhibits;

- Taxi chits were to be used only for work, that is, to get from Central Station to the maintenance centre and vice versa, and the Complainant knew this;
- The Complainant admitted using taxi chits to get to his home in Brossard;

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- Although the Complainant went to Brossard, this destination was not written on the chits; the Complainant explained this by saying he prepared the chits in advance;
- This was the first time the Complainant used taxi chits;
- The Complainant was supposed to have a meeting with his supervisor, Mr. Guitard, on the morning of April 3, 1989, but showed up only in the afternoon and at Mr. Guitard's insistence;
- The Complainant refused to return his work tools;
- Before Mr. Guitard began occupying his position, there was no taxi chit system in place at the Respondent company.

Mr. G.S. Sehmi was the only witness for the Commission.

In rebuttal evidence, Counsel for the Respondent began by calling Paolo Mancuso, who was the Executive Director of Pontiac Taxi in 1989. He testified about the method of using taxi chits and their usefulness. At page 69 of volume 1 of the transcript of proceedings, he said there were rumours that employees of the Respondent were selling chits. He added that he himself had worked in the area to try to find the culprits.

He also stated that he knew Mr. Sehmi as a customer and had driven him elsewhere than to his workplace on a few occasions. More specifically, he said that he remembered once driving the Complainant to Brossard. At page 73 of volume 1 of the transcript of proceedings, the witness claimed that the Complainant told him he had a book of chits to sell and that they agreed to meet the next day. The witness stated that he went to the meeting but did not contact the Complainant to try to buy a book of taxi chits from him.

The witness testified that following this incident, he contacted the person in charge at Via Rail, Michel Bourdon, and told him of the situation. The witness did not know the name of the Via Rail employee in question but identified him as wearing a [TRANSLATION] "white turban and blue jacket". At the hearing, in answer to a question by Counsel for the Respondent, at line 7, page 76, volume 1 of the transcript of proceedings, the witness stated:

[TRANSLATION]

Q: Is the person to whom you are referring the same person seated over there at this time?

A: Yes, that is him. He had a heavier beard.

The second witness for the Respondent was one of the main persons involved, Gregory James Guitard, the Complainant's immediate supervisor. He gave the Tribunal his version of the facts. He testified that he has occupied a permanent position as Mr. Sehmi's supervisor since October 1988. He stated that he had instructed the Complainant about the use of taxi chits and that the Complainant had even asked him once for authorization to use the chits to get from Central Station to his home in Brossard. Mr. Guitard testified that he told the Complainant on that occasion that he was absolutely prohibited from using taxi chits to go to Brossard or for other personal

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reasons. He added that this information was given to all the other mechanical train riders. The witness said that once or twice, on an exceptional basis, he had authorized the use of chits by his employees for personal reasons. However, he testified that such authorization was very specific and exceptional. Mr. Guitard also confirmed that he had called Mr. Sehmi to a meeting and that Mr. Sehmi had not shown up; in his opinion, this was evidence of insubordination. He testified that he contacted the Complainant again and insisted that he come to the meeting and return his tools, to which the Complainant replied that he would not return his tools.

He stated that the Complainant said he wished to consult a lawyer and that the Complainant's general attitude made him suspicious at the time (page 14, volume 1, transcript of proceedings).

In answer to a question by Counsel for the Respondent about the discriminatory comments alleged by the Complainant, the witness categorically denied making such comments and said several times that he had other visible minority employees.

At page 106 of volume 1 of the transcript of proceedings, Mr. Guitard stated that following the four accusations against the Complainant, which are set out in the letter filed at tab 6 of the Respondent's book of exhibits, representatives of the Respondent company initially decided to dismiss the Complainant; this appears to be the company's general policy. However, he said that to avoid possible problems, and this was later confirmed by the testimony of Georges Cyr, they decided to suspend the Complainant for two weeks and demote him to electrician.

According to the witness, in February 1991 all mechanical train rider positions were filled by supervisors, and the positions were permanently and completely abolished in 1994.

The witness also testified that he gave credence to Mr. Mancuso's version since, in his words, he was an independent and impartial witness.

Counsel for the Respondent also called Georges Cyr, the Respondent's Senior Human Resources Officer. Mr. Cyr confirmed that the Respondent's policy in cases of fraud and theft was to dismiss the person in question immediately, regardless of the amount involved, because the person could no longer be trusted. He also stated that the disciplinary measure was the same for everyone.

The witness stated that he was part of the committee that discussed what disciplinary measures would be appropriate in the Complainant's case. He testified that it was decided to demote the Complainant rather than dismiss him because he was a member of a visible minority. At page 161 of volume 1 of the transcript of proceedings, in answer to a question I asked, the witness added that his recommendation was to dismiss the Complainant but that it was part of his duties to inform the Respondent of the consequences of dismissal, and those consequences were the basis for the decision merely to demote the Complainant. The witness also stated that the Respondent has had an anti-harassment and anti-discrimination policy since 1985 and that

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there are visible minority employees at Via Rail in all locations and positions.

With respect to the abolition of the Mechanical Train Rider position in 1991, Mr. Cyr corroborated all of Mr. Guitard's testimony and confirmed that the Complainant would have ended up in the position of electrician that he occupied at the time of the hearing even if the events in question had not occurred. At page 163 of volume 1 of the transcript of proceedings, he added that, in his opinion, it was the first time a

decision had been made in favour of demotion rather than immediate dismissal. The last part of Mr. Cyr's testimony dealt with a complaint that was allegedly made earlier by Mr. Sehmi. In this regard, a letter dated September 14, 1987, was filed with the Tribunal by Counsel for the Respondent as Exhibit R-2, and the witness stated that Mr. Sehmi was not the only person demoted in 1987.

Finally, Counsel for the Respondent called Michel Bourdon to testify. In 1989, Mr. Bourdon was the budget and cost control supervisor at the Montreal maintenance centre. He explained to the Tribunal how taxi chits were used and stated that those used by Mr. Guitard's unit were specially made for his employees to ensure that they were used only between Central Station and the Montreal maintenance centre. According to his testimony, which corroborates that of Mr. Guitard, it would have been difficult to detect the sale by an employee of his or her book. He also confirmed Mr. Guitard's statement that only supervisors and managers, including Mr. Sehmi, had full books of taxi chits.

In answer to a question by Counsel for the Commission, Mr. Bourdon testified that the taxi chit system had been adopted to avoid abuse by employees making personal use of the chits. On this point, the Tribunal is referring to page 193 of volume 2 of the transcript of proceedings.

SPECIAL CONSIDERATIONS:

Also relevant are two letters filed in the record by the Complainant, one of which was signed by a lawyer whom the Complainant had hired, and neither of which mentions discrimination. It should be noted that on the second day of the hearing, Counsel for the Commission stated that she was waiting for instructions from her client and that she was unsure whether there was prima facie evidence of discrimination. She subsequently informed the Tribunal that her client had instructed her to withdraw the case in light of Kamani and Canadian Human Rights Commission and Canada Post Corporation, T.D. 20/93.

Following this, as Mr. Sehmi had requested that the hearing continue, it resumed on July 5, 1994.

The investigator's report was also filed on the last day of the hearing. The Tribunal finds the report, the content of which was confirmed by the testimonies, illuminating in several respects. The investigator states in her conclusions at page 5, paragraph 33: [TRANSLATION] ". . . there is no

evidence in support of the allegation that inappropriate comments were made in respect of the Complainant."

ISSUE AND LAW:

The Tribunal must decide whether, on the facts, the Respondent has engaged in a discriminatory practice contrary to the Act. The evidence presented to the Tribunal to establish the facts is contradictory in some respects. After carefully weighing the evidence, the Tribunal gives greater probative value to the Respondent's version and the testimony of its witnesses. Accordingly, in light of the evidence submitted by each party and the testimonies, the Tribunal must find that the Respondent's actions were not motivated by either religion or ethnic origin. The Tribunal cannot help but note the employer's good faith: in a situation in which its general policy called for dismissal, it showed judgment by not imposing the maximum punishment--dismissal--on the Complainant. The Respondent has unequivocally and unquestionably proved that when an employee steals or commits fraud, that employee is dismissed. The Tribunal cannot believe the Complainant's testimony alleging that he was suspended and demoted because of his religion and origin. The evidence is clear that what was involved was rather a disciplinary measure imposed on an employee of the Respondent and that the disciplinary measure in no way involved discrimination. It is therefore not within the Tribunal's jurisdiction.

The case law on this matter is unequivocal. Where there is no evidence of discrimination or where the employer shows that the disciplinary measure imposed was the same as (in this case, it was less strict than) that imposed on other employees in the same situation, the complaint cannot be allowed. On this point, we are referring to *Bailey v. The Right House Limited*, 3 C.H.R.R. D/998.

FOR THESE REASONS, THE COMPLAINT IS DISMISSED.

OBITER DICTUM:

The Tribunal would also like to express its regret, as it was apparent that a brief review of the record would have led to the conclusion that the case involved a disciplinary measure and not a practice contrary to the Act. It is clear from the report of Ms. Fecteau, the Commission's Investigator, that, *inter alia*, there was no evidence in support of the allegation that Mr. Guitard made inappropriate comments in respect of the Complainant;

moreover, the report's contents confirm the testimonies and the evidence in the record.

The Commission has a duty to scrutinize the evidence in the record to determine whether a hearing is warranted, as stated in *Kamani and Canadian Human Rights Commission and Canada Post Corporation*, T.D. 20/93. In that case, the Tribunal Chairman, Sidney N. Lederman, Q.C., rightly states the following at pp. 14-15:

The role of the Canadian Human Rights Commission in exercising its discretion to refer a complaint to a Tribunal was considered in *Syndicat des employes de production du Quebec et de l'Acadie v. Canada* (Human Rights Comm.) (1990), 11 C.H.R.R. D/1. There, the Supreme Court of Canada was concerned with the question of whether the Canadian Human Rights Commission was making a judicial or quasi-judicial decision in deciding to dismiss a complaint. In considering the role of the Commission in this respect, Sopinka J. stated at D/13 that:

"Section 36(3) [now s. 44(3)] provides for two alternative courses of action upon receipt of the report. . . The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence be weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage."

A proper and diligent review of the evidence in the instant case should have led to the conclusion that there was no reasonable basis for sending this case on to a Tribunal. Moreover, the duty of the Commission to scrutinize the evidence does not end with a review of the investigator's report. There is a continuing duty to assess whether a Tribunal hearing is warranted.

The Tribunal Chairman adds the following at page 16:

The Commission has extraordinary powers and must exercise those powers responsibly in the public interest. The mere making of an allegation of racial discrimination against an individual and a

corporation is disparaging and adversely affects their reputation. The harm is obviously greater when those allegations continue over a span of five years. There is an obligation on the Commission to review with care the evidence which gives rise to the allegation of racial discrimination at all stages of the process.

In conclusion, in light of the investigator's report, the evidence submitted to the Tribunal and the information that could have been verified before the investigation, we are of the opinion that a hearing could have been avoided in this case.

MARIE CLAUDE LANDRY
Tribunal Chairperson