T. D. 8/ 89

Decision Rendered May 23, 1989

HUMAN RIGHTS REVIEW TRIBUNAL

BETWEEN:

Pacific Western Airlines Ltd. Appellant (Respondent)

and

Jan Corrigan Respondent (Complainant)

REVIEW TRIBUNAL: Richard Hornung, Chairman
Ian Seph, Member
Andy Semotiuk, Member

DECISION OF THE REVIEW TRIBUNAL

APPEARANCES: René Duval Counsel for the Canadian Human Rights Commission
Ross Ellison Counsel for the Appellant

LOCATION AND DATE: Edmonton, Alberta, November 3rd, 1988.

AWARD

I. This is an Appeal from the Award of Donald Lee given April 5th, 1988 wherein he found:

"the Complaint in the present case to be substantiated in that the Respondent, though not wilfully, has nevertheless engaged in a discriminatory practice in contravention of the Canadian Human Rights Act by having failed, or neglected to consider the Complainant's request for considering her for any Customer Service Agent or Ramp Service Agent positions, the whole in violation of and contrary to the provisions of Section 7 of the Act."

On May 19th, 1988, the Respondent appealled the Tribunal's Decision on a number of grounds. The appeal was subsequently heard at Edmonton, Alberta on November 3rd, 1988.

II. It is the view of this Tribunal that the fundamental question in this Appeal, is: whether or not it had been proven, to the Tribunal below, that the employer was aware that the Complainant wanted the position in question.

Mr. Ellison very effectively argued that before the Tribunal below could find that there was discrimination there must have been a positive finding that the person hiring (in the present case, Mr. Reid) was aware that the Complainant wanted the job in question. We agree. Simply put,

there can be no discrimination under the Canadian Human Rights Act if the employer is not aware that the Complainant wanted to be considered for employment.

Mr. Ellison, argued that the Tribunal below did not, in fact, reach the fundamental conclusion that the employer was aware that the Complainant wanted the position in question. According to him, a review of the Judgment indicates that, at best, the Tribunal concluded that the employer was negligent in not knowing that the Complainant wanted the position. This negligence, according to Mr. Ellison, does not equate with knowledge and accordingly, there could have been no discrimination by the employer unless the Tribunal below found as a fact that the employer was aware of Ms. Corrigan's job application for the positions.

III. The confusion about whether or not the Tribunal below decided that the employer was aware of Ms. Corrigan's job application, arises from the language employed.

In its decision, the Tribunal concludes, at page 8, as follows: "In my opinion, the Complainant did inform the Respondent in writing, of her wish to be a Customer Service Agent or a Ramp Service Agent, not once but twice, in June 1982 and October 1984 (Ex. C- 3 and C- 4). Whether or not Ramp Service Agent was her first choice or second choice and whether or not it was a logical choice are secondary points because the main consideration is the fact that she did not include Ramp Service Agent in her June 1982 and October 1984 memos. She is under no obligation to make it absolutely obvious and clear or to remind Management on a regular basis about her wish." (emphasis mine)

Having reached, what appears to be a firm conclusion about Ms. Corrigan having informed the employer of her wish to have the position, the Tribunal continues as follows:

The June 28, 1982 and October 3, 1984 memos do exist, and in normal circumstances would certainly have come to the attention of Management. Although one is not expected to practically remember every single letter or memo that goes through the office, a competent Management should have a system in place to ensure that employees' requests for internal transfers or promotions are followed up properly." (emphasis mine)

This subsequent quote indicates, according to Mr. Ellison, that the Tribunal below did not reach a conclusion that the employer was aware of Ms. Corrigan's job application but rather that it should have been aware had it had a proper "system" in place.

Again, this "negligence" view of the findings of the Tribunal below appears to be supported in the language employed on Page 9 where it is stated as follows:

"Sex discrimination is not necessarily a practice that is always overtly displayed. Direct evidence that sex discrimination is deliberately practised was not present in this case. However, the circumstantial evidence that I have described does tend to support the Complainant's case." (Emphasis mine)

The final support for the argument advanced by Mr. Ellison comes from the actual order which appears on Page 10 of the Award and has already been referred to. There, Mr. Lee found:

"The Complaint ... to be substantiated in that the Respondent, though not wilfully, has nevertheless engaged in the discriminatory practice...."

The employer's argument is that the language used above indicates that there was no direct finding that the employer knew that Ms. Corrigan wanted the position in question, and that the very best the Tribunal decided was that management was "not running a good ship" and should have had a system in place that made it aware of Ms. Corrigan's job applications when the position was awarded. At worst, according to Mr. Ellison, the employer was negligent; and, negligence, as stated earlier, does not in fact equal the required knowledge.

IV. Although the language employed by the Tribunal below may have been confusing, our review of the evidence nevertheless discloses that there is sufficient grounds for it to reach the conclusion that it did.

I do not propose to offer explanations for the decision of the Tribunal below however, the language employed reflects the fact that although the Company had been informed of Ms. Corrigan's desire to obtain the positions, this noticewas given well prior in time to the actual point where the positions became available. The knowledge of Ms. Corrigan's memoranda may well have passed with the effluxtion of time and Mr. Reid may well not have remembered them when he made his decision with respect to hiring someone else. Under the circumstances, it is understandable how the Tribunal below reached the conclusion that Mr. Reid did not "wilfully" intend to discriminate against Ms. Corrigan. However, in point of fact and under the circumstances, the effect of his decision nevertheless had that result.

Although this Tribunal might have reached a different conclusion were that avenue available, we are nevertheless of the view that the findings of fact, with respect to the knowledge of Ms. Corrigan's application, are supported, in a broad sense, by the evidence.

V. The obligation of an Appeal Tribunal is to review the findings of fact made below and to disturb those findings only if:

"it is satisfied that such findings are not supported by the evidence or that the conclusion reached by the (Tribunal below) is so clearly wrong as to make that decision unreasonable".

R. v. Andreas (1982) 2 W. W. R. 249. This position, taken by the Saskatchewan Court of Appeal, is supported by a line of cases most noteable of which is Stein v. The Ship "Kathy K" (1976) 2 S. C. R. 802 where Mr. Justice Ritchie states (at page 808):

"(The) authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re- examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial".

We are not entitled, as an Appeal Tribunal, to set aside the findings of the Tribunal below merely because we would take a different view of the evidence than did Mr. Lee. Our function is merely one of review.

With these precepts in mind, from a review of the evidence, we cannot conclude that the Tribunal below made some "palpable and overriding error" in this case which affected its assessment of the facts. There is, in our view, sufficient evidence to support those findings and were we to interfere with the same we would in effect be substituting our assessment of the facts and clearly overstepping our function.

Accordingly, the Appeal is dismissed. DATED at the City of Regina, in the Province of Saskatchewan, this 27th day of January, 1989.

RICHARD I. HORNUNG, Q. C.

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