TD 7/ 86

Decision rendered November 19, 1986

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT

(S. C. 1976- 77, C. 33 as amended) AND IN THE MATTER of a Hearing Before a Human Rights Tribunal Appointed Under Section 39 of the Canadian Human Rights Act.

BETWEEN:

DENNIS GELL Complainant

and

CANADIAN PACIFIC LIMITED Respondent

AND

BETWEEN:

J. STEWART PHILLIPS Complainant

and

CANADIAN PACIFIC LIMITED Respondent

TRIBUNAL LYMAN R. ROBINSON, Q. C.

DECISION OF TRIBUNAL

APPEARANCES: RUSSELL G. JURIANSZ Counsel for the Commission and Counsel for the Complainants
N. D. MULLINS, Q. C. Counsel for the Respondent

DATE OF HEARING: August 19, 1986 (French version to follow/ Version française à suivre)

This decision involves the complaints made pursuant to the Canadian Human Rights Act (hereinafter referred to as the "Act") by Dennis Gell dated the 14th day of August 1984 and J. Stewart Phillips dated the 9th day of August 1984. Both of the complainants are employees of Canadian Pacific Rail division of Canadian Pacific Limited and the complaints pertain to the terms of the Canadian Pacific Limited Pension Plan (hereinafter referred to as the "Pension Plan".

The Respondent, Canadian Pacific Limited, is a corporation carrying on business, so far as is relevant to these complaints, within the legislative jurisdiction of the Parliament of Canada.

The hearing of both complaints by the Tribunal took place in Vancouver, British Columbia on the 19th day of August, 1986. At the outset of the hearing, counsel for Canadian Pacific Limited and counsel for the Commission and the Complainants agreed that the evidence and the argument, to the extent that it was applicable, would be applied to both complaints. Counsel tendered an Agreed Statement of Facts together with Appendices which contained, inter alia, the relevant documentation with respect to the Canadian Pacific Limited Pension Plan. The Agreed Statement of Facts with the Appendices was filed as an Exhibit. The only witnesses who gave testimony were the two Complainants. Their testimony was primarily directed toward the claim made pursuant to Section 41(3)(b) of the Act for special compensation for suffering in respect of feelings or self- respect.

The crux of both complaints is that the Complainants have not been permitted, under the terms of the Pension Plan, to buy back pension benefits with respect to their respective years of service with the Company when they were not members or contributors to the Pension Plan. The expression which is frequently used to describe the opportunity of an employee to purchase pension benefits in relation to earlier years of service is a "buy- back" option. In their respective complaint forms, each of the Complainants alleges that he has been discriminated against because he has been denied the opportunity or option to buy back pension benefits in respect of those years of service with the Company when he had not been contributing to the Pension Plan. The alleged discrimination lies in the fact that the option to buy back pension benefits was only extended to some members of the plan. The Complainants allege and counsel for the Commission argued that the discrimination among members of the Pension Plan, who were given the option to buy back pension benefits, was a discrimination based on age and therefore it was a "discriminatory practice" which was contrary to section 7 (b) of the Canadian Human Rights Act. The complaint form of Mr. Phillips also alleged that the alleged discriminatory practice was contrary to Section 10 (a) of the Act; however, counsel on behalf of Mr. Phillips expressly abandoned and did not rely on Section 10 of the Act (see pages 141- 42 of the Transcript). Therefore I shall not give any consideration to the question of whether the alleged discriminatory practice was contrary to Section 10 (a) of the Act.

Issues:

The primary issue is whether the Respondent Company engaged in a discriminatory practice, directly or indirectly, whereby in the course of its employment of the Complainants, the Company differentiated adversely in relation to the Complainants on a prohibited ground of discrimination contrary to Section 7 (b) of the Act. The only prohibited ground of discrimination which has been alleged by the Complainants was a discrimination based on age. In order to address this issue, the following questions must be answered:

(1) Did the Company "differentiate adversely" in relation to the Complainants?

(2) If there was adverse differentiation, was the differentiation based on the "prohibited ground of discrimination" alleged in the complaint forms, namely, age?

(3) If there was adverse differentiation on the ground of age, was the differentiation made in the "course of employment"?

If each of these three questions is answered in the affirmative, there is a fourth question which must be answered, namely:

(4) Does Section 65 of the Act preclude the complaints being dealt with under Part III of the Act?

Finally, if it is found that the Respondent Company did engage in a discriminatory practice contrary to the Act, and the complaints are not barred by Section 65, the issue of whether the complainants should be awarded special compensation for suffering in respect of feelings and self- respect, must be considered.

History of Pension Plan

In order to address these questions, it is necessary to understand the chronological history of the Pension Plan in so far as it is relevant to the issues in this case. This historical analysis will include:

1. The pre- Canadian Human Rights Act terms of the Pension Plan. 2. The 1978 Amendment to the Pension Plan which allowed a defined group of employees to join the Pension Plan. 3. The 1979 Amendment to the Pension Plan which allowed the same defined group of employees, who had become contributors pursuant to the 1978 Amendment, to "buy- back" up to 10 years of pensionable service. 4. The 1980 Amendment to the Pension Plan which allowed employees, who had been excluded from participating in the Pension Plan by reason of being 40 years of age or more when they commenced their service with the Respondent Company, to become a members of the Pension Plan. 5. The 1982 Amendment to the Pension Plan which allowed employees, who had become contributors pursuant to the 1978 Amendment and who had exercised the option to "buy- back" up to 10 years of pensionable service pursuant to the 1979 Amendment, to buy back additional years of pensionable service.

Each of these provisions require more extensive analysis.

THE PRE- CANADIAN HUMAN RIGHTS ACT IN TERMS OF THE PENSION PLAN

Both of the Complainants began their employment with Canadian Pacific Rail many years before the Canadian Human Rights Act came into force. There are several terms of the plan which existed during this period which are material to this case. The terms of the pre- Canadian Human Rights Act Pension Plan in so far as they are material to this case are found in the The Pension Rules and Regulations: Canadian Pacific Limited, revised to September 1, 1977. This is the last document in Appendix "A" of the Agreed Statement of Facts.

During the pre- Canadian Human Rights Act period, Rule 8 (a) of the Pension Rules and Regulations provided that an employee whose service with the company began after his 40th birthday was not eligible to join the Pension Plan.

Both of the complainants had two periods of service with the Respondent Company.

Mr. Gell's first period of service with the Respondent Company was from 1947 until 1961 when he resigned from his employment with the Company. His last period of service began on November 19, 1971. Mr. Gell was born on January 18, 1931 and therefore he was over forty years of age when he began his last period of service with the Respondent Company. Consequently, under the terms of Rule 8 (a) of the Pension Plan as they stood until March 1, 1980, he was not eligible to participate in the Pension Plan.

Mr. Phillip's first period of service with the Respondent Company was from June, 1952 until March 5, 1966 when he was dismissed for cause by the Respondent Company. On March 8, 1966, he applied for and received a return of the contributions which he had made to the Pension Plan. His last period of service began June 2, 1967 when the Respondent Company voluntarily reinstated him to its employ. Mr. Phillips was born on October 25, 1924 and therefore he was over forty years of age when he began his last period of service with the Respondent Company. Nevertheless, according to paragraph 5 of the Agreed Statement of Facts, Mr. Phillips had the option, upon his reinstatement, to resume his former pension status. This option existed by reason of a proviso in Rule 8 (a) which provided that dismissal followed by reinstatement within two years did not constitute a break in the continuity of service. Rule 11 (k), as it then existed (now Rule 11 (m)) provided that if he repaid, in full, the amount of his contributions to the Pension Plan which he had received at his request upon his dismissal, the period for which such refunded contributions were originally made would be included in the employee's term of service. Mr. Phillips had three months after the date of his reinstatement to exercise the option to resume his pension status. Pursuant to a letter dated July 20, 1967 (Appendix "B" of the Agreed Statement of Facts), Mr. Phillips elected not to exercise the option of returning his earlier contributions and he elected to not participate in the Pension Plan. Therefore he did not resume his former pension status, Consequently, under the terms of the Pension Plan, as they existed prior to March 1, 1980, he was not subsequently eligible to join or contribute to the Pension Plan at a later time.

In my view, the first period of employment of each Complainants was legally terminated and these first periods of service are not relevant to proceedings under this Act.

The provision in Rule 8 (a) of the Pension Plan, as it existed in the pre- Canadian Human Rights Act period, rendered persons who joined the service of the Company after the age of 40 years ineligible to join the Pension Plan, was a perfectly lawful provision prior to the coming into force of the "Canadian Human Rights Act. After the coming into force of the Act, Section 65 of the Act provided in effect a two year "grace period" in relation to pension plans in order to provide an opportunity to bring pension plans into conformity with the Act. This two year grace period expired on March 1, 1980. On that date, an amendment to the Canadian Pacific Limited Pension Plan came into effect which permitted employees, who had formerly been excluded from participating in the Pension Plan by reason of having entered into the service of the Company after attaining the age of forty years, to become contributors to the Pension Plan. The interpretation and effect of Section 65 of the Act and the 1980 Amendment to the Pension Plan will be considered later in this Decision.

Another term of the Pension Plan in the pre- Canadian Human Rights Act era, which is relevant an understanding of the subsequent amendments is a provision whereby after January 1, 1966,

employees of Canadian Pacific were no longer required to be members of the Pension Plan. However, if an employee elected to withdraw from the Pension Plan, he or she was not allowed to re- enter the Pension Plan at a later time (see Paragraph 4 of the Agreed Statement of Facts). Similarly, new employees, who did not elect to join the Pension Plan at time of the commencement of their employment, were not eligible to join the Pension Plan at a later date.

THE 1978 AMENDMENT TO THE PENSION PLAN

The essence of the 1978 Amendment, in so far as it is relevant to this case, was that it permitted employees, who came within two defined groups, to join the Pension Plan provided that they did so within a specified six month period. Paragraph (i) of the Amendment defined a group which included those employees, who had entered the service of the Company between December 31, 1965 and May 1, 1977 but who had elected not to join the Pension Plan although they were otherwise eligible to join the Pension Plan. Paragraph (ii) of the Amendment defined a group which included employees who had been members of the Pension Plan prior to January, 1966 but who had elected to cease being a contributor on and after January 1, 1966. The actual text of this Amendment is found beginning on the third last page of Appendix "C" of the Agreed Statement of Facts. The employees, who by virtue of this Amendment were given an option of joining the Pension Plan, could only join and begin making contributions prospectively. The Amendment did not permit such employees to join the Pension Plan retroactively to the date of the commencement of their service with the Company or to buy back pension benefits for past years of service.

Neither of the Complainants were permitted to join the Pension Plan pursuant to the 1978 Amendment. Mr. Gell made a request to join the Pension Plan pursuant to the 1978 Amendment by a letter dated June 25, 1978 (Exhibit C- 1) but this request was denied. Mr. Phillips made a request to re- enter the Pension Plan pursuant to the 1978 Amendment (see paragraph 9 of the Agreed Statement of Facts) but this request was denied (see Appendix D of the Agreed Statement of Facts). Although there was not clear evidence on the point, the apparent reason for denying them the opportunity to join the Pension Plan pursuant to the 1978 Amendment, was:

(a) they did not come within paragraph (i) of the 1978 Amendment because although their dates of entry into the service of the Company fell within the prescribed dates (December 31, 1965 to May 1, 1977) they were not, in the words of the 1978 Amendment, "eligible to become a contributor" because both men were over 40 years of age at the time of their last entry into the service of Canadian Pacific Rail; and

(b) Neither Mr. Gell nor Mr. Phillips came within the terms of eligibility described in paragraph (ii) of the 1978 Amendment, namely, being an employee of the Company on December 31, 1965 who had elected under the Pension Rules, which then existed, to cease being a contributor.

Although Mr. Phillips was an employee of the Company an December 31, 1965, he did not then elect, pursuant to the Pension Rules which then existed, to cease making contributions to the Pension Plan.

It was argued by counsel for the Commission that the effective date of this amendment was significant in relation to the coming into force of the Canadian Human Rights Act on March 1, 1978 and the application of section 65 of the Act. Therefore, I shall set out the history of this Amendment in some detail in order to ascertain the effective date of this Amendment. The Amendment came about as a consequence of negotiations between the various railway companies including Canadian Pacific Rail and the Associated Railway Unions in early 1978. These negotiations presumably covered a range of labour- management issues. These negotiations were culminated by a Memorandum of Settlement which was signed on February 21, 1978. A copy of that portion of the Memorandum of Settlement which pertains to pensions is the first document in Appendix "C" of the Agreed Statement of Facts. The provisions which are relevant to this case are found on page 2 of Appendix "C" (page 4 of Memorandum of Settlement), under the heading of "Pension Re- opener". It may be observed that the Memorandum of Settlement pertained to a number of railway and related companies. After the signing of the Memorandum of Settlement on February 21, 1978, it remained for the individual companies, who were parties to the Memorandum of Settlement, to make the necessary changes in their respective pension plans in order to implement the terms of the Memorandum of Settlement. In the case of Canadian Pacific Limited, this required an amendment to Pension Rule 8 (b). The Canadian Pacific Limited Pension Plan is, in effect, a company plan. Pursuant to the terms of the Pension Plan, the Company remains the trustee of the trust fund until such time as a there is a pension trust agreement made between the Company and a corporate or other trustee. Only the Board of Directors of the Respondent Company can make and approve changes to the Pension Plan. Rule 2 of the Pension Plan does provide for the establishment of a Pension Committee consisting of three representatives of the unions which represent Canadian Pacific Rail employees and representatives selected by the Board of Directors of the Company; however, this Committee has only been created for the purpose of administering the pension system. Rule 34 of the Pension Plan provides, with the marginal note of effective date":

"These Rules and Regulations may be altered, added to or repealed from time to time as the Committee, subject to the approval of the Board, may hereafter determine."

Therefore the change which had been agreed upon between the representatives of the Unions and the Company on February 21, 1978 was referred to the Pension Committee of the Canadian Pacific Limited Pension Plan for consideration. At a meeting of the Committee which was held on June 6, 1978, the committee determined that Rule 8 (b) should be amended subject to the approval of the Board of Directors of the Company. A copy of the minutes of that meeting were attached to the Agreed Statement of Facts in Appendix "C". The amendment to Rule 8 (b) was approved at a meeting of the Executive Committee of the Board of Directors of Canadian Pacific Limited on June 26, 1978. A copy of an extract from the Minutes of this meeting are found in Appendix "C" of the Agreed Statement of Facts.

I find that the effective date of this amendment was the 26th day of June, 1978. Although the representatives of the Company and the Associated Railway Unions had signed a Memorandum of Settlement on February 21, 1978 which provided, inter alia, that an amendment would be made to the terms of the Pension Plan, changes to the terms of the Pension Plan could only be formally made under the authority of the Board of Directors of the Company. This did not occur until the 26th day of June, 1978.

THE 1979 AMENDMENT

The essence of the 1979 Amendment was to provide those employees, who had exercised the option granted by the 1,078 Amendment to join the Pension Plan, a further option of purchasing back pension benefits for up to ten years of pensionable service.

This Amendment followed after negotiations with the unions representing railway employees much in the same fashion as the 1978 Amendment. A copy of an extract from the Memorandum of Settlement between the railway companies and the railway unions dated the 14 day of March, 1979, a copy of the Minutes of the Pension Committee of the Canadian Pacific Limited Pension Plan Pension dated the 2nd day of October, 1979 and a copy of an extract from the Meeting of the Executive Committee of the Board of Directors of Canadian Pacific Limited dated the 22nd day of October 1979 approving the amendment are all found in Appendix "E" of the Agreed Statement of Facts. The text of this amendment is found on the last page of Appendix "E".

The Complainants were not eligible to participate in this buy back option because the option was only available to those employees who had elected to join the Pension Plan and became contributors during the six month period which was defined in the 1978 Amendment.

THE 1980 AMENDMENT

The 1980 Amendment allowed employees, who had been excluded from participating in the plan by reason of being forty or more years of age, the option of joining the Pension Plan and becoming contributors to the plan. This Amendment brought the Pension Plan into compliance with the provisions of the Canadian Human Rights Act and Regulations. A copy of the Minutes of the Meeting of the Pension Committee of Canadian Pacific Limited dated the 18th day of April, 1980, recommending the changes be made effective March 1, 1980, and a copy of an extract from the minutes of a meeting of the Board of Directors of Canadian Pacific Limited dated the 7th day of May 1980 approving the changes recommended by the Pension Committee are found in Appendix "F" of the Agreed Statement of Facts. The text of the new Rule 8 (j) is found on page 2 of Appendix "F".

After this Amendment became effective, both Complainants elected to join the Pension Plan and began making contributions. Mr. Phillips commenced making contributions on March 4, 1980 (see the reference in the letter dated November 8, 1983 from CP Rail addressed to Mr. Phillips in Appendix "G" of the Agreed Statement of Facts). Mr. Gell joined the Pension Plan with an effective date of March 14, 1980 (see the reference in the letter dated July 8, 1983 from CP Rail addressed to Mr. Gell in Appendix "H" of the Agreed Statement of Facts).

THE 1982 AMENDMENT

The essence of the 1982 Amendment was to provide a further option to those employees who had exercised the option to join the Pension Plan pursuant to the 1978 Amendment and who had further exercised the option to buy back up to ten years of pension benefits pursuant to the 1979 Amendment. This further option enabled this defined group of employees to purchase pension

benefits equal to the remainder of their years of service with the Company for which they did not have pension benefits.

DISCUSSION OF THE ISSUES

The first issue is whether the Respondent Company engaged in a discriminatory practice, directly or indirectly, whereby in the course of its employment of the Complainants, the Company differentiated adversely in relation to the Complainants on a prohibited ground of discrimination, namely, age, contrary to Section 7 (b) of the Act. In order for the Complainants to be successful, there must be an affirmative answer to each of the following three questions:

(1) Did the Company "differentiate adversely" in relation to the Complainants?

(2) If there was adverse differentiation, was the differentiation based on the "prohibited ground of discrimination" alleged in the complaint forms, namely, age?

(3) If there was adverse differentiation on the ground of age, was the differentiation made in the "course of employment"?

If each of these three questions is answered in the affirmative, there is a fourth question which must be answered, namely:

(4) Does Section 65 of the Act preclude the complaints being dealt with under Part III of the Act?

1. Adverse Differentiation

Did the Respondent Company "differentiate adversely" in relation to the Complainants?

The discriminatory practice which has been alleged in the complaints relates to the differentiation in the Respondent Company's Pension Plan between some employees who have been given the option to buy back pension benefits while other employees including the Complainants have not been given the same option. This differentiation has been "adverse" because the Complainants will not receive or be otherwise able to acquire pension benefits upon retirement which will be as high as if they had been given the option to buy back back pension benefits.

The Pension Plan is the Respondent Company's Pension Plan and only the Board of Directors of the Company can make changes in the Pension Plan. Therefore the Company is responsible for the adverse differentiation. Nevertheless, it should be acknowledged that the amendments to the Pension Plan, which limited the option to buy back pension benefits to a defined group of employees that did not include employees falling within the circumstances of the complainants, were a product of negotiations between the Associated Railway Unions who represented the employees of the Respondent Company including the Complainants on the one hand, and the railway companies including the Respondent Company on the other hand. The Respondent Company, when it approved the Amendments, which limited the buy back option to a defined

group of employees, was merely implementing in good faith that which had been bargained for in negotiations with the unions. There is no evidence and no suggestion that the adverse differentiation, in relation to the Complainants or other employees in the same position as the Complainants, was intended by the Respondent Company.

The question of whether the Respondent Company differentiated adversely in relation to the Complainants is answered in the affirmative.

2. Ground of Adverse Differentiation

Was the adverse differentiation based on a "prohibited ground of discrimination", namely, age?

The only two amendments to the Pension Plan which relate to the purchase of back pension benefits are the 1979 Amendment and the 1982 Amendment. There is no reference in either of these Amendments to the age of the employees who were entitled to exercise the option to purchase back pension benefits. The option was available to any employees, regardless of their age, who elected to join the Pension Plan as a consequence of the 1978 Amendment . Indeed, there was evidence given by Mr. Gell that he was aware of some of employees of the Company, who were were older than Mr. Gell, who were entitled and who did exercise the options provided by the 1978 and 1979 Amendments. This world be entirely possible. For example, there could be employees who were born in 1927 (they would be 4 years older than Mr. Gell) and who joined the Company in 1966. Such employees would have been 39 years of age when they joined the company and they would therefore have been eligible to join the Pension Plan. Nevertheless, they may have chosen, at that time, not to join the Pension Plan. Such employees would have been entitled to join the Pension Plan pursuant to paragraph (i) of the 1978 Amendment and subsequently entitled to exercise the "buy back" options pursuant the 1979 and 1982 Amendments. Another example of employees who would be older than the Complainants but who would have been eligible to exercise the "buy back" options would be those who came within paragraph (ii) of the 1978 Amendment. That paragraph extended the right to join the Pension Plan to any employee who had elected to cease becoming a contributor on and after January 1, 1966. There could easily have been employees within that defined group, who were, for example, as old as 50 years of age when they ceased to contribute in January 1966 and who would have been as old as 62 when they were permitted to rejoin the Pension Plan pursuant to the 1978 Amendment and as old as 63 when they exercised the buy back option provided by the 1979 Amendment.

Although these Amendments did differentiate among the employees of the Respondent Company, it is my conclusion that none of these Amendments discriminated on the basis of age or any of the other grounds of discrimination which are prohibited by the Canadian Human Rights Act. The determination of who was entitled to exercise the option to join the Pension Plan in 1978 was based on when the employee joined the Company or when the employee had elected to cease contributing to the Pension Plan. The determination of who was entitled to exercise the option of buying back pension benefits was related to manner and period of time when employees joined the Pension Plan, namely, those who joined the Pension Plan during the six month period in 1978 which was specified by the terms of the 1978 Amendment. Similarly, the 1982 Amendment did not discriminate on the basis of age. The determination of who was

entitled to exercise the option provided by the 1982 Amendment was related to the prior purchase of back pension benefits as provided by the 1979 Amendment.

Counsel for the Commission argued that it was a discriminatory practice based on the prohibited ground of age for the Respondent Company to have restricted the buy- back option contained in the 1982 Amendment to the those employees who were permitted to participate in the 1979 Buy-Back Amendment which in turn was restricted to those employees who were permitted to join the Pension Plan pursuant to the 1978 Amendment which in turn was limited to employees who were eligible (in the sense of being under 40 years of age when they commenced their last period of service with the Company) to participate in the Pension Plan when they joined the Company.

Both counsel referred to Dalton v Canadian Human Airlines Limited et al. (1985) 6 C. H. R. R. D/ 2524 (Fed. Ct), rev'd (1986) 7 C. H. R. R. D/ 3189 (Fed. C. A.). In this case, the collective agreement between C. P. Air and its union contained a seniority clause which provided that, in the case of employees in the same classification whose employment with the Company began on the same day, the older employee was considered to be more senior. The seniority lists were used for a variety of purposes including overtime opportunities, vacations, and the order of lay- off. This provision had been in existence for many years prior to the coming into force of the Canadian Human Rights Act. After the Act came into force and after a complaint had been made to the Canadian Human Rights Commission by another C. P. Air employee, a new seniority provision was agreed to by C. P. Air and the union representing the employees and approved the the Commission. Under the new seniority provision, seniority was to be determined, in the case of employees whose employment commenced on the same date, by a process of random selection. Dalton was adversely affected by the reordering of the seniority lists and she commenced an action in the Federal Court claiming a declaration that the approval by the Canadian Human Rights Commission of the determination of seniority by random selection was invalid. In addition, she claimed an injunction to restrain C. P. Air and the union from adopting the revised seniority list. Dalton's claim was based primarily on two arguments. One of her arguments was that she should have been given notice and an opportunity to be heard before the Commission approved the new seniority determination provision. The other argument was the Act did not apply retrospectively to interfere with vested rights.

The trial division of the Federal Court granted the requested declaration and injunction. On appeal by the Commission, the Federal Court of Appeal allowed the appeal and dismissed Dalton's action. The Federal Court of Appeal concluded at, paragraph 25500, that the trial court's decision was based on the conclusion that Dalton had not received notice from and had not been given an opportunity to be heard by the Commission before the Commission approved the new seniority determination provision. In the opinion of the Federal Court of Appeal, there was no obligation to give Dalton notice or the opportunity to be heard. Therefore the Court of Appeal allowed the appeal and dismissed Dalton's action.

In the judgment of the trial court, Reed J. expressed views on the retrospective application of the Act. Counsel have argued that some of these views and conclusions are applicable to this case. When the Dalton case was considered by the Federal Court of Appeal, Mahoney J. (with whom Urie and Ryan JJ. concurred) stated, at paragraph 25499, that he was not expressing any opinion with respect to those views and conclusions of the trial judge.

In her discussion of whether the Canadian Human Rights Act had either a retrospective or retroactive effect Reed J. referred to Dreiger, Construction of Statutes., 2nd edition. At page 186, Dreidger defines "retroactive" effect, in the following terms:

"It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative with respect to past transactions as of a past time.... A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment."

I think that it is clear that the Canadian Human Rights Act does not have any retroactive effect.

Dreiger describes retrospective effect at page 186: "A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future."

Does the Canadian Human Rights Act have the retrospective effect of opening up closed transactions in relation to pensions and changing their consequences in relation to the future? To some extent, the Act does have this effect. it was this retrospective effect which made it necessary to change Rule 8 of the Pension Plan in order to permit employees, who had entered the service of the Company after attaining the age of forty years, to join the Pension Plan. However, this retroactive effect only entitled such employees to join the Pension Plan and begin making contributions prospectively from the date when those provisions came into force, namely, March 1, 1980. The Act did not have a retroactive effect which would have required the Company to permit such employees to join the Pension Plan retroactively to the date of their commencement of service with the Company.

Does the Act operate retrospectively and have the effect of opening up the 1979 "Buy- Back" Amendment? In the Dalton case, the seniority lists in question had been created before the coming into force of the Canadian Human Rights Act when it was not improper to create seniority lists in relation to the age of the affected employees. At paragraph 20925 of the Dalton case, Reed J. agreed with counsel for the Commission that the Act did not have any "retroactive" effect in the sense of seeking to undo any employment decisions which had been taken in the past in reliance on the seniority lists which had been created on the basis of age. At paragraph 20,031, Reed J. expressed the view that:

"... continual reliance, in the making of various employment decisions from time to time, on a seniority list which contains a built- in discriminatory feature is a succession or repetition of discriminatory acts."

Furthermore, in her view, such continual reliance differed from: "... continuing effects of one discriminatory act, (such as compulsory retirement at a specific date), in that new and different types of 'damage' accrue to the plaintiff on each occasion (less favourable shift to be worked, earlier placement on temporary lay- off status)."

How would the distinction made by Reed J. in the Dalton case apply to the present case? Is this a case where a previous discriminatory act (the ineligibility to join the pension plan if an employee began service with the Company after the employee's fortieth birthday) has a continuing effect or it is a case of a continual reliance on a built- in discriminatory feature that constitutes a succession of discriminatory acts each with a new and perhaps different type of damage which accrues?

In my view, the discriminatory effect of the former Rule 8 which rendered employees over the age of 40 years ineligible to join the Pension Plan, is a past discriminatory act which has a continuing effect. Counsel for the Commission did not suggest the Canadian Human Rights Act should be given "retroactive" effect thereby rendering the former Rule 8 invalid and requiring all employees, who had been excluded from the Pension Plan by virtue thereof, to be enrolled in the Plan from the date of their respective dates of commencing employment with the Respondent Company. However, the effect of extending the "buy- back" amendments of 1979 and 1982 to all the employees who are in the same position as the Complainants would be to place such employees in the same position as if the Act was given the retroactive application described in the preceding sentence.

In my view, this case is not the same as the Dalton case where various types of employment decisions had been taken and would continue to have been made on the basis of the seniority lists established on the basis of the prohibited ground of age. This is not a case where new and different types of damage could possibly accrue on the basis of employment or pension decisions being made om relation to either the former Rule 8 (a) or the 1978 Amendment.

Therefore, it is my conclusion that the adverse differentiation was not made on a prohibited ground of discrimination, namely, age. This question is answered in the negative and this determination is a sufficient basis for dismissing the complaints. Nevertheless I shall proceed to answer the remainder of the questions which I set out at the beginning of this Decision.

3. Was Adverse Differentiation made in the Course of Employment?

Although the differentiation did not occur directly in relation to the of the Complainant's employment in the sense of being related to wages, working conditions, promotion, etcetera, the differentiation did occur in a relationship which arose from the employment relationship. The opportunity to participate in a pension plan is one of the benefits which is commonly associated with employment relationship. Therefore, I conclude that the differentiation occurred at least indirectly in the course of the Complainant's employment with the Respondent Company. Such an indirect relationship is all that is required in order to find a discriminatory practice under Section 7 (b) of the Act, if the other essential elements of Section 7 are found to exist.

4. Does Section 65 of the Act preclude the complaints being dealt with under Part III of the Act?

If I had found that there was adverse differentiation by the Respondent Company on the prohibited ground of age in the course of employment, does Section 65 of the Act preclude the complaints being dealt with under Part III of the Act?

The substantive sections of the Canadian Human Rights Act came into force on March 1, 1978; however, Section 65 of the Act provides, in effect, a grace period of two years during which time pension plans could be brought into compliance with the Act and no complaints may be dealt with respect to adverse differentiations which existed prior to the Act coming into force and which continued through the two year grace period.

Both counsel made reference to section 65 in their respective arguments. Counsel were not aware of any prior decisions of a Tribunal established under the Act or of the Courts in which the meaning of section 65 has been interpreted.

Section 65 has two paragraphs. Paragraph (a) provides that no complaint may be dealt with under Part III that relates to any action taken by a person in accordance with the provisions of a pension fund or plan, based on, inter alia, the age of the employees, before the expiry of two years after the commencement of Part III. The effect of Subsection (b) is to provide that no complaint may be dealt with under Part III that relates to any provision of any pension fund or plan described in paragraph (a) before the expiry of two years after the commencement of Part III. Both paragraph (a) and paragraph (b) require further examination and interpretation.

PARAGRAPH (a)

Several aspects of paragraph (a) of Section 65 require interpretation: "Action"

I interpret paragraph (a) as providing a protection for persons who were responsible for the administration of pension plans against complaints under Part III which related to any "action" taken by them in accordance with the provisions of a pension plan notwithstanding that the action may have been based on one of the prohibited grounds of discrimination enumerated in sub- paragraph (i) including age provided that the action did not increase discrimination. At the time when the Canadian Human Rights Act came into force, many administrators of pension plans would have been bound by contract or by trust agreements to carry out the provisions of a pension plans which may have contained provisions that were contrary to the Act. It would have been unfair to subject these administrators to complaints under Part III for actions taken while pension plans were being brought into conformity with the Act.

In my view, an amendment to the "provisions" of a pension plan must be considered as a form of "action" under Subsection (a). Therefore, the actions taken by the Board of Directors of the Respondent Company in approving the 1978 and 1979 Amendments were "actions" within the meaning of paragraph (a) of Section 65. Pursuant to the terms of Section 65 (a), these actions are exempt from complaint if the other elements of paragraph (a) are satisfied.

"Provided that it does not Increase Discrimination" The exemption from having complaints dealt with under Part III is not a blanket protection with respect, to all actions a person might take. The exemption only applies to actions, which are taken in accordance with the provisions of a pension plan, that do not have the effect of "increasing discrimination". Counsel for the Commission argued that the action taken by the Respondent Company in approving the 1979 Amendment to the Pension Plan had the effect of "increasing discrimination" because it gave an advantage, based on age, to some employees but not others. I have already found that the 1978

and 1979 Amendments did not constitute adverse differentiation on a prohibited ground of discrimination, namely, age and therefore those Amendments could not have had the effect of increasing discrimination.

"Taken by a person" The reference to "person" in paragraph (a) would also include a corporation pursuant to the Interpretation Act, R. S. C., 1970, Chap. I- 23, s. 28. Therefore a corporation such as the Respondent Company would be entitled to claim the protection of subsection (a) with respect to any actions taken by it during the two year period specified in Section 65.

"Taken... before the expiry of two years after the commencement of that Part"

Protection against complaints is given for actions taken before the expiry of two years after the commencement of "that Part". The only Part of the Act that could have been intended was "Part III" which came into force on March 1, 1978. Therefore the protection in relation to actions taken in accordance with the provisions of a pension plan extended for two years after March 1, 1978 to March 1, 1980. I have already found that both the 1978 and 1979 Amendments were formally approved by the Board of Directors of the Respondent Company within the two year period referred to in Section 65.

On the basis of my interpretation of paragraph (a) of Section 65 and its application to the circumstances of this case, I have concluded that the complaints, in so far as they are based on the 1978 and 1979 Amendments, cannot, in the words of Section 65, be dealt with under Part III of the Act.

PARAGRAPH (b) Paragraph (b) of Section 65 provides that no complaint may be dealt with under Part III that relates to any provision of any pension plan or fund described in paragraph (a) before the expiry of two years after the commencement of Part III. The interpretation of paragraph (b) gives rise to several questions.

First, a literal interpretation of paragraph (b) might suggest that the paragraph only provides a two year "freeze" during which time no complaints may be dealt with by a Tribunal and that after the expiration of the two year period, complaints could be heard. I think that it is clear that Parliament intended paragraph (b) to provide a two year period of grace during which period those persons who were responsible for the terms of pension plans could bring their plans into conformity with the Act. In other words, pension plans and funds had until March 1, 1980 to bring their plans into compliance with the Act. If they did so, no complaints could be brought in relation to any lack of compliance during the two year grace period.

Second, does paragraph (b) provide an exemption from complaints in relation to any amendments which were made during the two year grace period? I do not think that it does. In my view, the exemption provided by paragraph (b) only applies to "... any provision of any fund or plan described in paragraph (a)..." Therefore, a reference must be made to paragraph (a) in order to ascertain which provisions are included within the exemption provided by paragraph (b). Paragraph (a) refers, in subparagraph (i), to any pension fund that is applicable to employees "... on the commencement of that Part...". The "Part" referred to is Part III which commenced on March 1, 1978. Therefore, only those pension plans which were in existence on March 1, 1980

are dealt with in paragraph (a). Consequently, the exemption from complaint provided by paragraph (b) only applies to the provisions of a pension plan which was in existence on March 1, 1978.

On the basis of my interpretation of paragraph (b) of Section 65 and its application to the circumstances of this case, I have concluded that the complaints, in so far as they are based on the pre- Canadian Rights Act version of Rule 8 or other Rules of the Pension Plan, cannot, in the words of Section 65, be dealt with under Part III of the Act.

CLAIM IN RESPECT OF FEELINGS OR SELF- RESPECT

A claim was made on behalf of the claimants pursuant to Section 41 (3) (b) of the Act for compensation for suffering in respect of feelings or self- respect as a result of the alleged discriminatory practice. The amount of compensation which was requested was $1,000. for each of Mr. Gell and Mr. Phillips.

I have found that the Respondent Company did not commit a discriminatory practice and consequently there is not any basis for an order of special compensation pursuant to Section 41 (3)(b). Nevertheless, I shall deal with this issue in case, an appeal is taken from my decision.

Mr. Gell testified that he had experienced frustration and anger as a result of the Respondent Company's denial of his request to participate in the Pension Plan in 1978 and as a result of not having the option to purchase back pension benefits which were granted by the 1979 and 1982 Amendments. Under cross- examination, Mr. Gell testified that the frustration began in 1978 when he learned that some employees of CP Rail were being allowed to join the Pension Plan but he was not within the definition of those employees who were permitted to join the Pension Plan at that time. Mr. Phillips testified that he experienced frustration as a consequence of the Respondent Company's denial of his request to participate in the Pension Plan in 1978 and as a consequence of not being able to participate in the option to buy back of pension benefits which was provided by the 1979 Amendment. There is no evidence and neither Mr. Gell nor Mr. Phillips gave any testimony which indicated that either had suffered any loss of self- respect by reason of their ineligibility to join the Pension Plan prior to March, 1980 or their ineligibility to buy back pension benefits.

Therefore, in order for this Tribunal to make an order for compensation on the basis of the evidence in this case, the Tribunal would be required to find, pursuant to section 41 (3)(b) of the Act, that the complainants had "suffered" in respect of "feelings" as a result of a discriminatory practice. The first question is whether the legal meaning of the word "feelings" extends to frustration or frustration and anger in the context of the discriminatory practice which has been alleged in this case.

Counsel for the Commission referred the Tribunal to the case of Via Rail Canada Inc. v. Butterill et al. 1982] 2 C. F 830 (Fed. C. A.) as being the only authority wherein the meaning of special compensation under Section 41 00) had been considered. In that case compensation under Section 41(3)(b) had been claimed by the complainants in the amount of $1,000 for one complainant and $500 for each of the other two complainants. Although the Chairman of the

Human Rights Tribunal in that case found that Via Rail had contravened the Canadian Human Rights Act and he made certain orders against Via Rail, he did not make any order for compensation of the Complainants under Section 41 (3) or other sections of the Act.

The Commission appealed the decision of the Chairman of the Human Rights Tribunal to the Review Tribunal. In an Interim Decision, the Review Tribunal concluded that the complainants were entitled to compensation under section 41(3)(b), but the Review Tribunal did not make a decision on quantum apparently for two reasons. First, the Review Tribunal did not find sufficient, evidence on the record of the Human Rights Tribunal upon which to base a decision on quantum. Furthermore, at the beginning of the hearing before the Review Tribunal, counsel for the Complainants and the Commission sought to introduce further evidence on the subject of compensation. Counsel for the Respondent objected because he had not received any prior notice and he was not prepared to meet this new evidence with rebuttal evidence. Nevertheless, the Review Tribunal proceeded to hear testimony from two of the complainants while reserving the right of counsel for the Respondent to call rebuttal evidence at some subsequent time if he felt that it was necessary. Consequently, the Review Tribunal adjourned the matter sine die with the expressed hope that the parties could settle any issue of quantum. Without any further hearing, the Review Tribunal issued an Interim Decision.

On appeal to the Federal Court of Appeal, the Court of Appeal concluded that there had been a denial of natural justice by the Review Tribunal in that it had pronounced a decision on the issue of liability for compensation under Section 41(3)(b) before affording Via Rail the opportunity to adduce rebuttal evidence on the issue. Consequently the Court of Appeal set aside the Interim Decision of the Review Tribunal in so far as the Review Tribunal had concluded that the complainants Butterill and Foreman were entitled to compensation under Section 41(3)(b) of the Act. The matter was referred back lo the Review Tribunal for determination after affording Via Rail an opportunity to lead evidence in rebuttal to that given by those complainants.

Although the Federal Court of Appeal set forth much of the reasoning of the Review Tribunal on the subject of compensation under Section 41 (3) (b), the Court did not express an opinion upon whether it approved or disapproved of the interpretation which the Review Tribunal had placed on Section 41 (3) (b). The criticism of the Court of Appeal was restricted to the lack of procedural fairness. In these circumstances, I have concluded. that, if the Federal Court of Appeal had disapproved of or had reservations about the Review Tribunal's interpretation of Section 41(3)(b) the Court would have stated it was not to be taken as expressing any opinion on the correctness of the Review Tribunal's interpretation. Therefore, I shall proceed on the assumption that the Federal Court of Appeal implicitly approved the interpretation of the Review Tribunal.

In its Interim Decision, the Review Tribunal expressed the following views on the interpretation of Section 41 (3) at page 15 of its Decision:

"We are also of the opinion that the compensation referred to in Section 41(3) should, like that under Section 41(2) be available as a matter of course where 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 that 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.... If it has been established either by direct evidence or by inference that the circumstances referred to in Subsection (3) exist, compensation should be awarded for these nonpecuniary losses as readily as it is awarded for pecuniary losses under the preceding section."

In relation to the quantum of compensation the Review Tribunal stated the following opinion at page 18 of its Decision:

"It is our view, however, that at least so far as the claim for compensation for suffering in respect of feelings or self- respect under paragraph (b) is concerned, we should be seeking an appropriate monetary equivalent (subject to the five thousand dollar limit) for the suffering involved on the part of each of the Complainants, not just an arbitrary nominal sum."

What does the word "feelings" in Section 41(3)(b) mean? "Feeling" is defined in the Shorter Oxford English Dictionary, 3rd edition, as being:

"1. Sentient; capable of sensation. 2. Accessible to emotion; sympathetic, compassionate; of language: Indicating emotion. 3. That is deeply or sensibly felt or realized, heart felt."

Webster's 3rd New International Dictionary defines "feelings" as including the following meaning:

"... d: a reaction consisting of or combining hostility, distrust, dislike, opposition, resentment or hatred and usually marked by belligerence..."

Neither of these definitions expressly include "frustration" or "anger" within their respective meanings.

The Shorter Oxford English Dictionary, defines "frustration" as 'The action of frustrating; disappointment; defeat." and Webster's 3rd New International Dictionary, defines it as "... to induce feelings of frustration..."

The Shorter Oxford English Dictionary, defines "anger" as 'That which pains or afflicts, or the feeling which it produces;" and Webster's 3rd New International defines it as "... a strong feeling of displeasure and usually of antagonism."

On the basis of these definitions, I have concluded that both frustration and anger are encompassed within the word "feeling" in Section 41(3)(b).

The second question is whether and to what extent either or both of the complainants or "victims", to use the word in section 41(3)(b), has "suffered" from these 41 Feelings as a result of the alleged discriminatory practice? I do not think that the feelings of frustration and anger experienced by the complainants in this case are anywhere near to the level of feelings of degradation, humiliation and embarrassment which a person would suffer who had been discriminated against in public on the basis of race or colour. Frustration is a feeling which many

people experience as part of the daily experience of life. There are, of course different degrees of frustration and anger. There may be cases where, for example, there has been a frequent repetition of incidents which have brought the frustration to the forefront of the mind of the victim on a daily basis and where the degree of the frustration has produced physical or mental symptoms of the stress.

There is not any evidence that the frustration experienced by the complainants in this case has led to any physical or mental symptoms of stress or that it was a matter which preyed on their minds on a daily basis.

If I had found that the Complainants were victims of a discriminatory practice, I would have made an Order that the Respondent Company pay each of them $250. as compensation for their suffering in respect of their feelings.

The issue in these proceedings is whether the Respondent Company engaged in a discriminatory practice, in the course of its employment of the Complainants, contrary to Section 7 of the Act. I have found, for the reasons stated above, that the Respondent Company has not engaged in a discriminatory practice contrary to the Act. This Decision does not purport to determine whether or not either of the Complainants and particularly Mr. Phillips has a valid claim, based on the construction of the terms of the Pension Plan including the various Amendments to the Pension Plan. It is not appropriate, in proceedings under the Canadian Human Rights Act, to attempt to answer the question of whether Mr. Phillips was entitled to rejoin the Pension Plan pursuant to the 1978 Amendment, and thereafter exercise any "buy- back" options, the basis that his reinstatement within two years after his dismissal in March 1966 did not, pursuant, to the pre-Act version of Rule 8 (a) of the Pension Plan, constitute a break in the continuity of his service with the Company. The only question to be answered in these proceedings is whether the Respondent Company engaged in a discriminatory practice on a prohibited ground of discrimination and I have found that it did not.

The complaints of Dennis Gell and J. Stewart Phillips are hereby dismissed.

Signed in Victoria, British Columbia, this 3rd day of October, 1986.

Lyman R. Robinson, Q. C.