TD 2/ 86 Decision rendered July 8, 1986

TRANSLATION FROM FRENCH

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN BELL CANADA APPELLANT, Respondent

and BRIAN VILLENEUVE RESPONDENT, Complainant

BEFORE DENIS LEMIEUX, Chairman
MONICA MATTE
ALDEA LANDRY

DECISION OF REVIEW TRIBUNAL

APPEARANCES:

RENÉ DUVAL, Counsel for the Complainant and the Canadian Human Rights Commission
LINE THIBAULT Counsel for the Respondent

>1. THE FACTS

The Complainant, Brian Villeneuve, worked as a splicer for the Respondent, Bell Canada. This work requires climbing telephone poles for the purpose of connecting telephone wires.

Mr Villeneuve was found, on medical examination, to have a varicocele. In light of the nature of this condition and the nature of his work, Mr Villeneuve had to stop working and eventually underwent an operation.

The parties agree that Mr Villeneuve was no longer suited or work as a splicer by virtue of his physical condition; the decision by the employer Bell Canada to withdraw him from work as a splicer is not therefore being questioned in this appeal.

After Mr Villeneuve ceased work as a splicer, he sought to obtain a transfer to a position compatible with his physical condition. He did, in fact, apply for a variety of positions by filling out the appropriate transfer applications.

He was, however, unable to obtain transfer to any of the positions sought, as it appears that he did not possess the necessary qualifications for them. These refusals of transfer are not the object of this complaint.

> - 2 Moreover, the Respondent, Bell Canada, took steps along with the complainant to find employment within the company which would be satisfactory from both the financial and the occupational points of view.

According to the evidence, the Complainant refused some of the positions offered on the grounds that the working conditions were unsuitable, considering his former employment as a technician, either because the pay was too low or because the work was too far removed from his area of training.

An employee of the Company's Employment Centre mentioned the possibility of a transfer to a Materielman III position to the Complainant. It appears from the evidence that contacts were in fact made with the Materiel Service responsible for this position. According to the Complainant's file, however, it appears that the Manager of the Materiel Service felt that Mr Villeneuve was unable to do the Materielman III job because of his physical condition.

The evidence appears to be somewhat lacking as to the content of this file as far as the medical reports are concerned. Undeniably it does contain a report by the Complainant's attending physician, Dr Guy (sic: Translator) Tremblay. In that report, Dr Tremblay sets as a job limitation that the Complainant could no longer climb poles. He was of the opinion that working in such a position without walking was a factor in Mr Villeneuve's symptomology. Another piece of evidence on file originates from a Bell Canada staff physician, Dr Pilon.

> - 3 This report stipulates that the Complainant can no longer climb poles. It is highly likely that other medical documents were also oh Mr Villeneuve's file, but if this is the case, they were not used as evidence.

After this negative estimation of Mr Villeneuve's ability to do the work of a Materielman III, this transfer possibility was not pursued and no formal application was made by Mr Villeneuve.

Since no other position was available, Mr Villeneuve was laid off by the Respondent in September 1981.

In May of 1982, after filing and then abandoning a grievance under the applicable collective agreement, Mr Villeneuve filed a complaint wih the Canadian Human Rights Commission.

The complaint states that the Complainant (translation): (has) "reasonable grounds to believe that Bell Canada has engaged in a discriminatory practice by dismissing me because of my physical handicap, which occurred on the job. Bell Canada refused me employment in other departments where I could perform the duties required of the positions. This is contrary to the provisions of sections 3 and 7 of part I of the Canadian Human Rights Act". Despite the very general wording of the complaint, we have seen that, with the agreement of both parties, it has been limited to

the Materielman III position. > - 4 Subsequent to an enquiry and an attempt at reconciliation of this complaint, the Canadian Human Rights Commission appointed a Tribunal to hear the case.

That Tribunal, chaired by Nicole Duval Hesler, found that the complaint was justified. It found that the Complainant had been refused the possibility of a transfer to a Materielman III position by virtue of his physical handicap, whereas he could, in the Tribunal's opinion, have performed the duties required by that position. The Respondent was ordered to pay the Complainant an

amount of $83 467.25, minus certain deductions, plus an additional $2 000.00 for damages in respect of feelings and self- respect.

Bell Canada was also ordered to offer the Complainant a position of Materielman III, as soon as such a position becomes available.

Bell Canada appealed that decision, leading to this hearing. 2. POINTS IN DISPUTE

The points in dispute on which this Tribunal must rule are essentially as follows:

> - 5 A. Did the Tribunal of first instance err in finding that the Respondent refused, directly or indirectly, to employ or continue to employ the Complainant or, in the course of employment, to differentiate adversely in relation to him on the grounds of his physical handicap, in contravention to Section 7 of the Canadian Human Rights Act?

B. Is the refusal, exclusion or restriction based on bona fide occupational requirements under Section 14(a) of the Act?

If the answer to both questions is in the negative, the Respondent has therefore committed a discriminatory act prohibited by Section 7 of the Act and may then be subject to the sanctions set out in Section 41 of the Act.

3. THE EXISTENCE OF A REFUSAL OR UNFAVOURABLE TREATMENT DUE TO A PHYSICAL HANDICAP

The Respondent has always held that Mr Villeneuve was never refused a transfer to a Materielman III position because he never made an official application for transfer to that position. The action of which the Respondent could be accused under the terms of Section 7 of the Act could not, therefore, have occurred.

The Complainant, according to his own testimony (Transcript 151), did indeed make four applications for transfer, none of which was for Materielman III. He himself states that he did not make any request for transfer to this position.

> - 6 The Director of the Appellant's Employment Centre, Mrs Bureau, however, has testified to the effect that Mr Villeneuve had been considered for that position (Transcript 192).

Mrs Bernier, another employee of that same Employment Centre, also attempted to assist the Complainant in obtaining a transfer. She has stated that when she spoke to Mr Villeneuve concerning the Materielman III position, he was a bit reticent because the pay was less, but did not say that he would not accept it (Tr 199). Mrs Bernier also stated that the Complainant had been considered unofficially and that his name had been referred to Mr Gannon's section, ie Materiel Service, with an inquiry as to whether he could perform the duties of the Materielman III position (Tr 200).

As for Mr Gannon, he stated that from an examination of the Complainant's file at the Employment Centre he could not see how Villeneuve could perform the work (Tr 229). Mr Gannon indicated that he had considered a Mr Mantha, who had filled out a request for transfer, and Mr Villeneuve for the vacant Materielman III position (Tr 234). He rejected the Complainant as the result of a preliminary examination of the file (Tr 235). Mr Gannon added that he had found out about Villeneuve in case the latter should decide to make an official request for transfer (Tr 239).

As for the grounds for refusing to consider, even at a preliminary or exploratory stage, the possibility of Mr Villeneuve's being awarded the Materielman III position, this is completely clear.

> - 7 In his testimony, Mr Gannon, who seems to have been the person responsible for authorizing the transfer, states that he refused to consider Villeneuve because of the medical restrictions in his file (Tr 230). Although he denies later that Villeneuve was refused on these grounds, he adds immediately that (translation) "even if Mr Villeneuve had done so, ... he could not have been given the position because he could not do the work (Tr 236). Mr Gannon stipulated that the restriction of not working standing up for long periods was incompatible with the requirements of the position (Tr 237).

In her decision, Nicole Duval Hesler was of the opinion that Mr Gannon's actions were an act covered by Section 7, although Villeneuve had not submitted an official request for transfer within the meaning of Section 10.08 of the collective agreement between Bell Canada and its employees.

Ms Duval Hesler indicated that another clause of the agreement, Section 10.07 (f) allowed the employer to redeploy employees "where transfers are required because of health or physical handicap".

However, the employer did not exercise that right in this instance, and the evidence shows that the issue in question is instead the transfer procedure, from the points of view of both Bell Canada and Mr Villeneuve.

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- 8 What is more, section 10.7(f) of the collective agreement came into effect only in March of 1982, whereas all of the facts in the case occurred in 1981. The 1979 collective agreement governing both parties at that time does not make any mention of this unilaterial transfer procedure for reasons of health.

Counsel for the Defendant argued before the Review Tribunal that Section 10.08 was imperative and could not be avoided by either the employer or the employee.

We are of the opinion that we need not rule on this issue, as we feel that the legislator used the very general terms of Section 7 of the Canadian Human Rights Act by design. This listing has as its intent, we feel, to prevent limiting the scope of the prohibition by using the formality of

regulation, directive and collective agreement with respect to hiring, transfer, suspension and dismissal.

To limit Section 7 to cases of official negative decisions by the employer would be tantamount to allowing the perpetuation of situations in which persons would be denied the right to apply for a position by virtue of their sex, age and so on. Not having the possibility of making the request would mean that the person would never be officially refused. Such an interpretation seems to us to be incompatible with the Act and the very terms used by the legislator in Section 7.

> - 9 Despite the general nature of the terms of Section 7, it addresses very specific situations:

"It is a discriminatory practice, directly or indirectly, a) to refuse to employ or continue to employ any individual, or b) in the course of employment, to differentiate adversely in relation

to an employee on a prohibited ground of discrimination." It is admitted that subsection (b) does not apply to the case at hand, since Mr Villeneuve was no longer in his employment as a splicer. There has also been an admission to the effect that Bell Canada was, at that time, no longer able to continue to employ Mr Villeneuve as a splicer.

What remains to be determined is whether Mr Villeneuve was refused another position. On this point, the evidence shows that Mr Villeneuve never applied for the position of Materielman III, although a Bell Canada employee mentioned this position to him and there was exploration of this possibility by another employee of the appellant.

What is more, Mr Villeneuve was never made aware of any decision refusing the Materielman III position or even of the possibility of applying for it.

After the meeting with Mrs Bernier, it appears from the evidence that Mr Villeneuve never made enquiries as to what had become of the possibility that had been mentioned to him.

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- 10 When he filed a grievance under the collective agreement, there was once again no mention whatsoever of the Materielman III position. His complaint to the Canadian Human Rights Commission does not identify this either. Only at the Commission hearing was the position of Materielman III brought up.

We are of the opinion that, before there can be a refusal to employ, there must have been an application for employment. The evidence does not, unfortunately, allow us to state that this is the case. We therefore feel that, even if Bell Canada has considered Mr Villeneuve's physical handicap in an unfavourable light at an exploratory stage, it was important that Mr Villeneuve apply for the position of Materielman III if we are to speak of refusal of employment.

This first conclusion would be sufficient to settle the appeal at hand; however, we feel that it is important for the parties involved that we also settle the second disputed point.

4. THE EXISTENCE OF A BONA FIDE OCCUPATIONAL REQUIREMENT Section 14(a) of the Canadian Human Rights Act stipulates that refusal to consider a person for a position on grounds such as physical handicap is not a discriminatory practice if such refusal or differential treatment is justified by bona fide occupational requirements.

> - 11 It was therefore necessary to verify, as the Tribunal of first instance did, whether Mr Villeneuve's physical handicap, which was caused by the varicocele, prevented him from fulfilling the requirements of the position.

The Materielman III position was clearly described by two witnesses, Messrs Fournier and Bélanger. Both indicated to the court what the conditions of this position were.

Mr Fournier stated that the work included an administrative component performed sitting down. Another portion consisted of physical materiel handling activities performed walking around (Tr 30).

Mr Bélanger felt that the position required considerable physical effort (Tr 212). He indicated that the work of a Materielman III was more physical than that of a Materielman I position, which had a larger administrative component (Tr 216). He stated that 90% of the job involved materiel handling (Tr 219).

The latter testimony was confirmed by Mr Gannon (Tr 227), in whose opinion it was also mainly a materiel handling position.

This handling, however, is done using equipment and it does not seem from the evidence that the employee needs to lift heavy materiel alone and without assistance. On the other hand, it is incontestable that this work is more physical than administrative, that more time is spent standing than sitting, and that the employee must move about and perform various tasks involving the handling of objects.

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- 12 - Once the physical characteristics of the Materielman III position have been established, it remains to be determined whether Mr Villeneuve could perform the duties.

On this we have the testimony of several physicians. According to Dr Tremblay, Mr Villeneuve's attending physician, the varicocele caused pain when he was standing, and disappeared when he was lying down (Tr 55). Pain increases with prolonged standing (Tr 56). If a person with a varicocele moves about, the situation will improve. What must be avoided is to remain standing for a prolonged period of time without changing position (Tr 57 and 62). According to Dr Tremblay, Mr Villeneuve could perform the duties of a Materielman III as described by witness Fournier (Tr 63). It was only important that he not be constantly on his feet (Tr 96). Dr Tremblay did, however, admit that a varicocele may be painful even when walking, and if one remains on his feet for a long time, the pain may increase (Tr 104 to 106). He also stated that abdominal pressure may be increased by making an abnormal effort such as lifting heavy objects, which would affect the veins.

From Dr Tremblay's testimony we can conclude that in principle the type of work done by a Materielman III was not contraindicated for a person with varicocele. Fatigue and abnormal effort such as lifting heavy objects might result in pain, however.

> - 13 Dr Pilon, staff physician at Bell Canada, indicated that the restriction related to the varicocele is that Villeneuve cannot remain in a standing position for a long period of time (Tr 248), nor can he climb poles any longer or overexert himself (Tr 249). The latter two restrictions appear to be admitted by Dr Tremblay. Dr Pilon added that walking can aggravate symptoms, as can physical effort (Tr 276 to 278).

Finally another physician, Dr Coulonval, felt that movement was not an aggravating cause for a person with varicocele. He admitted that walking could be a factor but less significant than remaining in an immobile standing position (Tr 312).

Dr Coulonval felt that walking and physical effort could increase pain (Tr 315), and also that Villeneuve could not do the work as described by witness Bélanger (Tr 322). He also indicated that problems could recur after an operation for varicocele (Tr 325).

Dr Racine's testimony contained the same type of nuances as the others. Reading of these various testimonies leaves a certain amount of doubt as to the actual ability of a person suffering from varicocele, such as the Complainant, to perform the duties of a Materielman III.

> - 14 It must be kept in mind, moreover, that the only medical documents brought out as evidence in the Villeneuve file are: 1) the form filled out

by Dr Tremblay (Exhibit R- 3) in which he makes the comment that working in a standing position without moving about is an important factor in the symptomology of varicocele and 2) Dr Pilon's report (Exhibit R- 5) in which Dr Pilon recommends that an attempt be made to transfer Brian to another job where he will no longer have to climb poles. If other exhibits were consulted by Mr Gannon, they do not appear in the evidence.

The Complainant has never been evaluated on an individual basis in order to determine whether, in his particular case, the varicocele was a hindrance to performing the duties of a Materielman III. The testimonies by the various physicians clearly indicate that varicocele and its sequelae may involve varying degrees of pain and inconvenience, depending on individual circumstances. This could not be determined from the contents of the file as submitted to the Tribunal and upon which Mr Gannon based his decision to refuse, at an exploratory or preliminary stage, to proceed with the possibility of transferring Mr Villeneuve.

The decision brought down by Judge Sidney Lederman in Rodger v Canadian National, before the Canadian Human Rights Tribunal, July 24, 1985, and the references thereto, clearly demonstrate the necessity for the employer to make such an individual evaluation before rejecting the possibility of considering a person for employment on the grounds of a physical handicap.

> - 15 In her decision, Duval Hesler feels that Villeneuve could fulfil the duties of a Materielman III position, and that henceforth any refusal to consider the possibility of employing him in such a position could be based only on bona fide occupational requirements.

What is involved is an evaluation of the facts which, barring substantial error, is normally left to the Tribunal of first instance.

It may be that Mr Villeneuve was not in a position to be able to perform the duties of the position at the time Mr Gannon examined the file. Can we, however, state that Bell Canada did indeed properly ensure that this was the case? The two reports on file contain no restrictions incompatible with the requirements of a Materielman III position, as these have been described by the witnesses. If additional restrictions were imposed in light of Mr Villeneuve's physical condition at that time, these do not appear among the exhibits submitted as evidence. We cannot assume the existence of more detailed reports containing such restrictions.

In our opinion, the court of first instance was therefore justified in concluding that the medical restrictions contained in the Complainant's file did not prevent the latter from occupying a Materielman III position.

> - 16 5. CONCLUSION

In light of the foregoing, the Tribunal regretfully upholds the appeal. Since, although the Complainant did not, according to the evidence, express an interest in applying for the Materielman III position, the Appellent appears also to have been negligent in evaluating the actual physical capacities of the Complainant. We therefore recommend to Bell Canada that it

offer Mr Villeneuve, who is now recovered, any available position which he would be capable of performing.

FOR THE ABOVE REASONS, THE TRIBUNAL UPHOLDS the appeal by the Appellant, Bell Canada SETS ASIDE the decision brought down by the tribunal chaired by Nicole Duval Hesler on May 31, 1985.

DENIS LEMIEUX, Chairman

ALDEA LANDRY, MONICA MATTE, Members