Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Raymond Irvine

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Decision

Member: Shirish P. Chotalia
Date: February 12, 2004
Citation: 2004 CHRT 9

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I. Introduction

[1] This Tribunal rendered a decision on November 23, 2001 ["the 2001 decision"]. Further to a judicial review of that decision, Mr. Justice Noël issued a ruling dated May 27, 2003 (2003 FCT 660).

II. Federal Court Decision

[2] In his decision, Mr. Justice Noël ruled:

> "The Tribunal referred in passing to the universality of service principle as it was in 1996 when the decision to release Mr. Irvine was made. In my opinion, it failed to recognize the existing jurisprudence of that period, confirming that the issue of universality of service is a *bona fide* occupational requirement. More importantly, the Tribunal dismissed the fact that this jurisprudence was the Federal Court of Appeal's interpretation of a statute. The Tribunal had to consider the applicable law in 1996 and determine if there had been direct discrimination against Mr. Irvine, and if so, whether the medical standard required of him was a *bona fide* occupational requirement by which the CAF would be exempted from the duty to accommodate."
> [para 25]

The Federal Court observed that in 1995 and 1996, when the CAF made the decisions concerning Mr. Irvine's career in the military, the law was as stated by the Federal Court of Appeal in *Canada (Attorney General) v. St. Thomas and Canadian Human Rights Commission*[1], *Canada (Human Rights Commission) v. Canada (Armed Forces)*[2], and *Canada (Attorney*

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[1] *Canada (Attorney General) v. St. Thomas and Canadian Human Rights Commission* (1993), 109 D.L.R. 671 at 677

[2] *Canada (Human Rights Commission) v. Canada (Armed Forces); Husband, mise en cause,* [1994] 3 F.C. 188; application for leave to appeal dismissed [1994] S.C.C.A. No. 269

General) v. Robinson[3] [respectively "*St. Thomas*, *Husband*, *Robinson"*] and by the Supreme Court of Canada in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* 1990 2 S.C.R. 489 ["Central Alberta Dairy Pool"].

Further to this jurisprudence, at that point in time, there was no duty to accommodate in cases of direct discrimination. In Mr. Irvine's case, the discrimination constituted direct discrimination. Therefore, further to the jurisprudence of that time period, the CAF had no legal duty to accommodate Mr. Irvine. Furthermore, Mr. Justice Noël observed that the requirement for a member to be liable to perform combat duty or to be a "soldier first" was recognized as a statutory obligation in *Robinson*. Therefore, according to the trilogy of cases which applied in 1996, the universality of service principle required every CAF member to be fit at all times for combat duty. Thereafter, this was recognized by Parliament in its 1998 amendments to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, with the addition of subsection 15(9). Noël J. ruled that this Tribunal had correctly applied *Meiorin* retroactively, but that it failed to analyze it in the context of the universality of service principle. This principle was found by the Federal Court of Appeal to have a statutory source in the *National Defence Act* R.S.C. 1985, c. N-5. Noël J. was troubled by the minimal wording used by this Tribunal in discussing universality of service principles and found that this Tribunal insufficiently addressed this issue. The Federal Court concluded that the Tribunal ought to have considered, in its analysis and application of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3, also known as *Meiorin*, the intention of Parliament and the Court's interpretation of the legislation establishing and implementing the universality of service principle at the time of the decision in 1996.

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[3] *Canada (Attorney General) v. Robinson*, [1994] 3 F.C. 228; application for leave to appeal dismissed [1994] S.C.C.A. No. 309. *See* also *Canada (Attorney General) v. Hebert et al.* (1996), 122 F.T.R. 274 (T.D.)

[3] With respect to alleged errors of fact, Mr. Justice Noël chose not to address these in light of the above decision. In granting the judicial review application, he ordered that the matter be sent back for re-determination without costs.

III. Re-determination

[4] This decision constitutes a re-determination of the case further to the said order of the Federal Court of Canada. Oral submissions and written submissions were received from the Commission, Mr. Irvine and the respondent, Canadian Armed Forces ("CAF").

A. Tribunal Decision 2001 – Re-Determination In Light Of Universality of Service

[5] In the 2001 decision, I made findings of fact contained in paragraphs 3 - 102. I had outlined legal principles in paragraphs 103 - 113 and analysis in paragraphs 114 - 163. Within this prior grouping, I had made evidentiary findings in paragraphs 122 - 124. My conclusion and remedial award are found at paragraphs 164 - 165.

[6] In this re-determination, for the reasons cited below, I place no weight on facts contained in paragraphs 36 - 57 and I find that paragraphs 151 and 154 - 163 of my analysis are no longer pertinent.

(i) Findings of Fact

[7] The Commission submits that the Federal Court did not rule with respect to the facts and that therefore the facts as originally found are to be left undisturbed. The Commission submits that this Tribunal is bound by its previous findings of fact and that this Tribunal has no jurisdiction to disturb them: this would require the Tribunal to sit as an appellate court in review of its own decision. Thus the Commission argues that paragraphs 3 - 102 of the original decision are not to be disturbed. The respondent argues that each of the paragraphs that address and apply universality of service, including paragraphs 36 - 57 and 125 - 163, must be re-considered.

[8] In dealing with paragraphs 36 - 57 [facts pertaining to General Military Duties and Universality of Service Principles; CAF December 1999 Universality of Service Policies; CAF Pre-December 1999 Accommodation Policies and Post December 1999 Policies; CAF November 2000 Accommodation Policies; CAF General Military Duties and Universality of Service], I note that these paragraphs address post-1996 policies, policies concerning the assignment of occupational factors (the "O" factor), and post-termination CAF accommodation policies. These facts are based upon the evidence adduced at the hearing, but I place no weight on these in my re-determination of the 2001 decision as only the "G" factor is at issue in Mr. Irvine's case, and the post-termination policies, particularly with respect to CAF accommodation are not relevant.

[9] In dealing with paragraphs 58 - 102 ["Mr. Irvine's Particular Circumstances" and "Relevant Medical Data"], I continue to find that these paragraphs contain the facts of Mr. Irvine's case.

(ii) Legal Principles

[10] In addressing paragraphs 103 - 113 ["Legal Principles"], I amend those that address universality of service to include my comments on these principles set out below.

[11] Regarding paragraphs 114 - 121 ["Analysis"], I continue to find that the Commission and Mr. Irvine established a prima facie case of discrimination on the basis of disability against Mr. Irvine both in its termination of Mr. Irvine, contrary to s. 7 of the *Act*, and in its policies and procedures as applied to Mr. Irvine, contrary to s. 10 of the *Act*.

[12] Regarding paragraphs 122 - 124 ["Evidentiary Issues"], the Commission argues that I should continue to be bound by the original decision. The Respondent has not taken specific exception to the same. I have reviewed the same and continue to maintain the same findings.

[13] In dealing with paragraph 125 [“Universality of Service”], I reconsider it as per my discussions on Universality of Service below.

[14] In dealing with paragraphs 126 - 132 [“Identifying the Standards Leading to Mr. Irvine’s Release”], I continue to find that these three dispositive medical assessments of Dr. Kafka, the CAD Committee and the Career Board assessed against the CAF standards being the 1979 CAF Policies and Bridging Policies, and the September 1995 Guidelines, regarding assignment of employment limitations, are at issue in this re-determination.

[15] In addressing paragraphs 133 - 136 wherein the analysis outlined in *Meiorin* was conducted [“Rational Connection” and “Was the Standard Adopted in Good Faith”], I continue to find that the CAF standards were rationally connected to its goal of requiring that Mr. Irvine be a “soldier first”. As well, I continue to find that both the standards and the medical / career assessments, including the CAD Committee assignment of employment limitations, were made in good faith.

[16] In addressing paragraphs 137 - 140 [the “Reasonable Necessity and Accommodation” portion of the *Meiorin* test], I continue to find that the Bridging Policies were not as accommodating as the September 1995 Guidelines. My findings in these paragraphs remain intact.

[17] In addressing paragraphs 141 - 148 [“Dr. Kafka’s Assessment”; “CAD Committee and Career Board Assessments”], I continue to find that the concerns I expressed in these paragraphs are pertinent to the re-determination. In accordance with *Meiorin*, the standards for assessing universality of service must be as accommodating as possible, or in other words, “individualized”. Having found as such, a discussion of the crux of Mr. Irvine’s case and my reasons are reiterated below.

[18] With respect to paragraphs 149 - 150 [“Proportionate and Measured Expectations of Those With Disabilities”], I continue to find that CAF’s individual testing of Mr. Irvine was

applied more vigorously to exclude him from service when he was disabled than other testing was applied to able bodied members. I continue to find that the CAF should have provided Mr Irvine with further opportunity to take another EXPRES test, to the extent that such testing would have assisted with prediction of mortality and morbidity.

[19] With respect to paragraph 151 of the 2001 decision, I find that it is superfluous because it deals only with the occupational factor ("O" factor) which was not determinative in Mr. Irvine's release.

[20] With respect to paragraphs 152 - 153 ["Subjective Nature of Assignment of Limitations and Category"], I continue to find that the "inexact" nature of category assignment by the CAF is a factor that further casts doubt upon the validity of the CAF's category assignment of Mr. Irvine (further elaborated upon below).

[21] With respect to paragraph 154 ["Imposition of Medical Conditions"], I do not find it necessary to maintain this concern in disposing of Mr. Irvine's complaint, as Mr. Irvine's access to medical information about his condition was not determinative in this case.

[22] With respect to paragraphs 155 - 163 [dealing with accommodation of unfit members, deployability, retention, and costs of accommodation], I find that these paragraphs cannot be sustained in light of universality of service principles.

[23] With respect to paragraphs 164 - 165 ["Conclusion" and "Remedies"], I maintain my original ruling as set out below.

[24] The prior analysis is made with the express acknowledgement that a member of the CAF is liable for combat duty. I have reconsidered each paragraph of the 2001 decision in light of universality of service principles more thoroughly canvassed below.

B. Reasons

(i) Party Submissions Regarding Direction of the Federal Court

[25] The Commission and Mr. Irvine submit that the Federal Court's decision herein is based upon a narrow and discreet issue of law: the Court has asked the Tribunal to reconsider its decision having regard to the principle of universality of service. Given that the Federal Court has directed the Tribunal to re-consider its decision in accordance with the principles of universality of service, the Commission argues that the Court has also conversely confirmed that the Tribunal has correctly applied *Meiorin* retroactively. The Commission submits that the only issue for the Tribunal to decide is whether the CAF has met the third part of the *Meiorin* test.

[26] With respect to the CAF's duty to accommodate, the Commission submits that the exemption which the CAF enjoys pursuant to universality of service is as follows: once a CAF member is found not to meet the medical standards, and thereby does not satisfy the principles of universality of service, the CAF is not under an obligation to prove that it would suffer an undue hardship if it was required to accommodate the member through whatever means available. The Commission submits, however, that in all other respects the *Meiorin* test applies. In other words, the CAF still bears the onus of showing that its medical standards are reasonably necessary for the achievement of their general purpose. In this respect, the medical standards themselves must allow for individual assessment and be applied in a procedurally fair manner.

[27] Conversely, the respondent argues that the medical limitation at issue, being "*G4*" "physician services required" was reasonably necessary to protect the complainant and the CAF from the risks of heart failure and to preserve the principle of universality of service. It argues that the medical standard at issue constitutes a BFOR because the complainant was at a serious risk of another cardiac event. Thus, the CAF was not required to accommodate the complainant following his diagnosis of coronary artery disease ("CAD") with significant risk of another event.

[28] Secondly, the CAF further argues that the individual assessment conducted by the CAF's medical officers for the purpose of diagnosing the complainant's medical condition and estimating the risk of event recurrence is not reviewable by this Tribunal. It cites the decision of *Canada (Attorney General) v. Anvari* [1993] F.C.J. No. 317 (C.A.) ["*Anvari*"] as authority for this argument.

[29] I will now address these arguments in re-determining this case.

C. Universality of Service

[30] Universality of service in the Canadian Armed Forces requires every member to be fit to be "a soldier first". Universality of service is the term given to a set of principles which govern the service of members in the CAF. The Federal Court of Appeal articulated the principles in three cases decided in the early 1990s, *St. Thomas*, *Husband* and *Robinson.* Each of these cases turned on the issue of whether a military employment standard constituted a *Bona Fide* Occupational Requirement ("BFOR").

[31] Universality of service is comprised of three essential principles:

1. Whatever their trade or profession might be, members of the CAF are soldiers first and foremost.

2. The duty of a soldier is to be ready to serve at all times in any place and under any conditions.

3. The duty is universal in that it applies to all members of the CAF.

[32] In each of these trilogy cases, the Court of Appeal held that the medical standards at issue were reasonably necessary to assure the efficient and economical performance of universal military duties. As such, they were BFORs. These cases were adjudicated under the pre-*Meiorin*, bifurcated analysis of direct versus indirect discrimination arising out of *Central Alberta Dairy Pool*. In these cases, because the discrimination was direct discrimination, once a

BFOR was established, the CAF was not obliged to accommodate the particular employees. The CAF had no duty to accommodate persons who did not comply with the principles of universal service.

(i) The Duties of a Soldier

[33] Regarding the second principle, the respondent submits that, as soldiers, members of the CAF play a unique role in Canadian society. I agree. Sections 31 and 33 of the *National Defence Act*, R.S.C. 1985, c. N-5, provide that any member of the Canadian Forces may be placed on active service by reason of emergency for the defence of Canada, and is at all times liable to perform any lawful duty.

[34] The Federal Court of Appeal emphasized the importance of this military context in *St. Thomas* at p. 677:

> "In my view, examination of this issue must take account of a contextual element to which the Tribunal did not give sufficient consideration. It is that we are here considering the case of a *soldier*. As a member of the Canadian Forces, the respondent, St. Thomas, was first and foremost a soldier. As such, he was expected to live and work under conditions unknown in civilian life and to be able to function, on short-notice, in conditions of extreme physical and emotional stress and in locations where medical facilities for the treatment of his condition might not be available or, if available, might not be adequate. This, it seems to me, is the context in which the conduct of the Canadian Forces in this case should be evaluated."

(ii) The Duties Are Universal

[35] The duties of a soldier are universal in the sense that every member of the CAF must be able to perform them. In *Robinson*, the Court of Appeal quashed a Tribunal decision that a "seizure-free" medical policy could not be justified because the Forces had not shown that it was

likely that the complainant would be assigned to a combat position. The Court of Appeal held, at p. 238, that the Tribunal had erred in requiring such proof:

> "…[T]he tribunal erred in the way it dealt with the applicant's argument. That argument was neither "hypothetical" nor "specious". The statute rendered Mr. Robinson liable for combat duty. It is an obligation well understood within the Armed Forces. Those serving in support roles are not exempt. Performance of the obligation depends neither on a "transfer" to a combat role nor on remustering. The Tribunal's view to the contrary led to the rejection of the applicant's argument and to the conclusion, erroneous in my view, that somehow the applicant was required to adduce additional evidence showing the number of non-combat personnel transferred to combat functions over a period of time. That view simply ignores that the obligation is one that is imposed by statute. Administrative practice cannot work a modification. The statute binds."

The Court of Appeal went on to hold that the CAF was not obliged to show that the complainant was likely to be deployed to a combat role.

[36] I find that the CAF was entitled to require that every member of the CAF meet these principles of universality of service. This conclusion is underscored by the stated jurisprudence, the prior human rights jurisprudence of direct discrimination relevant to the actions of the CAF in 1995 and 1996, and the direction of Mr. Justice Noël. In other words, once the CAF established a BFOR in the context of combat duty, the CAF is exempted from its duty to accommodate Mr. Irvine in non-combat duties.

D. *Meiorin*

[37] However, this finding does not end the inquiry into Mr. Irvine's case. While the CAF is entitled to require that every member be a "soldier first", it must still demonstrate, in accordance with *Meiorin*, that the standards that it has developed to assess universality of service allow for individual testing. I have already found, in my original decision, that the CAF has met the first two criteria of the *Meiorin* tests in that the 1979 Policies, the Bridging Policies and the September 1995 Guidelines were rationally connected to the CAF's goal of requiring that

Mr. Irvine be able to safely and efficiently perform his duties as a soldier, and that these standards were adopted in good faith.

[38] The third portion of the *Meiorin* analysis requires that the impugned standards be reasonably necessary for the employer to accomplish its purpose; i.e. the safe and efficient performance of the job. The CAF must establish that it cannot accommodate the complainant and others adversely affected by the standard without experiencing undue hardship. The CAF must ensure that the procedure, if any, to assess the issue of accommodation, addressed the possibility that it may discriminate unnecessarily on a prohibited ground. Second, **the substantive content of either a more accommodating standard which was offered by the CAF**, or alternatively the CAF's reasons for not offering any such standard must be assessed. As I have already found at paragraph 139 of the 2001 decision, the September 1995 guidelines, to the extent that they allowed for individual assessment, were reasonably necessary to accomplish the CAF's goal of ensuring that members meet universality of service. Thus they evidenced a more accommodating standard in assessing members suffering from CAD than the prior 1979 standards and bridging policies. Yet the CAF failed to use a more individualized accommodating standard, such as that found in the September 1995 guidelines, in assessing Mr. Irvine, (further elaborated upon below).

E. *Anvari*

[39] The respondent submits that as per *Anvari*, the diagnostic testing of the CAF is beyond the expertise and jurisdiction of this Tribunal. This point of law is not cited by Noël J. as a basis for the judicial review of the original decision. For that matter, it was not argued before me at the original hearing. Thus, I do not believe that this argument is properly before me. Even if I am wrong on this point, I find that *Anvari* must be read in the context of the totality of the jurisprudence of the Federal Court in this area.

(i) The Direction in *Anvari*

[40] I have carefully reviewed *Anvari,* a case dealing with the medical inadmissibility of a potential immigrant further to the federal *Immigration Act*. In this case, the complaint was framed on the basis of s. 5, being the provision of goods, services, facilities or accommodation customarily available to the general public. The Court ruled that a Tribunal cannot require as a part of the *bona fide* justified defence that the respondent demonstrate that the standard had been applied in a reasonable fashion, or that its application was justified in the particular case.

[41] *Anvari* must be read in conjunction with other Federal Court jurisprudence in the area. For example, in *A.G. v. Levac* [1992] 3 F.C.463 (F.C.A.), a case dealing with s. 7(a) discrimination wherein the CAF tried to establish a BFOR, Mr. Justice Décary, ruled that the Tribunal had not committed a reviewable error in its assessment of the medical evidence, nor reached a conclusion that it could not reasonably reach in preferring the evidence of the complainant's physician, who had examined him, to that of the CAF's physician, whose evidence had been based upon a review of his medical record, rather than upon an examination. Décary J.A. expressly upheld the Tribunal's analysis of the CAF's medical assessment. In *Canada (A.G.) v. Beaulieu* [1993] F.C.J. No.174, 103 D.L.R. (4th) 217 (C.A.), another case dealing with the CAF's BFOR defence in the context of both a complaint based upon sections 7(a) and 10 of the *Act*, the Federal Court of Appeal held that a Tribunal could not find a complaint of discrimination invalid merely because it was persuaded that a diagnosis of disability was **incorrect**. Yet, the Tribunal could have been further satisfied that, either, the diagnosis was arrived at imprudently, in which case it could perhaps have spoken of a disguised discrimination and a false and hasty perception, or that the requirement was not a BFOR. For that matter, *Anvari* speaks of the ability of the Tribunal to deal with the discriminatory application of a standard or practice. Mahoney J.A. writes:

> "…For jurisdiction to arise under the CHRA, the provision must have been applied in a discriminatory fashion. Unless a prima facie case of a discriminatory practice on the part of the medical officers in reaching their opinion were established, there was no onus on them to show that their opinion was bona fide justified. It may have been reached wrongly as a matter of law or it may have

> been reached in the teeth of the evidence and, if it was, a remedy exists elsewhere but, unless a discriminatory practice is established in the application of subsection 19(1)(a), no remedy exits under the CHRA. Put another way, the discriminatory practice mandated by subsection 19(1)(a) being bona fide justified, the question for decision under the CHRA was not whether their opinion was probably right but whether, in carrying out their duties, the medical officers engaged in a discriminatory practice that is not likewise bona fide justified."

In other words, analogizing this ruling to Mr. Irvine's case, medical officers and committees must carry out their duties in a non-discriminatory fashion. In Mr. Irvine's case, as set out below, the officers and committees in favour of assigning him a "*G4*" category, failed to provide Mr. Irvine with an individual assessment consistent with the most accommodating policies of the CAF. Their individual assessments did not adhere to the letter or the spirit of the individualized approach mandated by the CAF September 1995 guidelines. Their pattern of decision making and their decisions regarding employment limitations discriminated against him on the basis of disability and are caught within the purview of both sections 7 and 10 of the *Act*.

[42] In a subsequent decision concerning s. 7 of the *Act*, the Federal Court Trial Division in *VIA Rail Canada v. Mills* [1997] F.C.J. No. 1089, in distinguishing *Beaulieu*, upheld the jurisdiction of the Tribunal to find that the respondent had not performed an adequate and comprehensive investigation into the medical evidence. Mr. Justice Teitelbaum wrote:

> "There is also no suggestion in the Tribunal's decision that it did not have regard to the material before it. The Tribunal carefully examined Mr. Mills' rather involved medical history and did not confine its discussion of the varied consultations and medical opinions to the primary August 1991 incident. The Tribunal analyzed and sifted through a diversity of relevant medical opinions, including those expressed before, during and after the August 1991 injury and abortive return to work in October 1991....
>
> The Tribunal's finding that VIA had not performed an adequate and comprehensive investigation into the medical evidence does not therefore warrant judicial review."

Here, the Court held that it was open to the Tribunal to give more weight to the opinion of a particular physician over that of another, and to prefer the evidence of physicians who had

examined the complainant over that of those physicians who had "conducted only a paper review".

[43] Based upon the totality of the jurisprudence, and the statutory provisions of s.7 and s. 10 of the *Act*, it appears that the Tribunal has jurisdiction to deal with both discriminatory, and arbitrary, hasty, imprudent or inadequate medical assessments in the application of standards proffered as BFORs. To state otherwise, would be to undermine the entire purpose of human rights legislation. For example, a respondent could establish that a standard constitutes a BFOR, and then despite discriminatory, hasty or deliberate misapplication of the standard to the complainant, justify the complainant's dismissal. In other words, the respondent would accomplish indirectly, what it is prohibited from doing directly.

(ii) Application to Mr. Irvine's Case

[44] In Mr. Irvine's case, the issue of attacking the diagnosis of CAD does not arise. The diagnosis is not in dispute. Rather, the issue remains that of whether the CAF conducted a non-discriminatory, adequate and comprehensive investigation into the medical evidence sufficient to justify its "*G4*" employment limitation categorization and its *prima facie* discriminatory discharge of Mr. Irvine on the ground of disability. Did the CAF's individual assessment of Mr. Irvine, categorizing him as "*G4*" (subject to discharge) versus "*G3*" (retainable for service as a soldier), meet the requirement of individual testing consistent with the most accommodating standard available as per *Meiorin* and the stated Federal Court jurisprudence?

[45] In Mr. Irvine's case, as per my findings of fact outlined in the 2001 decision at paragraphs 69 - 80, **the CAF's physicians** recommended contradictory employment limitation categories for Mr. Irvine. Some recommended "*G3O3"*, while others, including the CAD Committee, recommended "*G4O3"*. This difference in geographic factor between "*G3"* versus "*G4"* was the determinative factor in Mr. Irvine's release. For example, the CAF's consultant and Chief of Medicine, Dr. Buchholtz, examined Mr. Irvine in November 1994. Thereafter Mr. Irvine performed "exceedingly well" on a treadmill test. Mr. Irvine exhibited no chest

discomfort or ischemia, had lost 35 pounds, and was completely asymptomatic. Dr. Buchholtz was "tempted" to recommend a *"G3O3"* category which he believed was **"justified in the long term"** [para 70-71]. However, Dr. Buchholtz wrote that Mr. Irvine's cholesterol level was normal, when in fact in October 1994, a laboratory report confirmed that it was still high. Then on January 16, 1995, the CAF's Dr. MacKinnon, a base examining physician, recommended a *"G3O3"* for Mr. Irvine, finding him fit for promotion. Thus at this point, Mr. Irvine was categorized by the CAF's physician as fit for retention and promotion.

[46] However, Mr. Irvine's case was brought to the attention of Dr. Kafka, the base surgeon. On February 7, 1995, Dr. Kafka, the base surgeon, **reviewed Mr. Irvine's chart** from the perspective of risk factor control. Dr. Kafka expressed concerns about the *"G3"* portion of the assessment. Dr. Kafka noted that Mr. Irvine was a former smoker; that in spite of significant weight reduction after the heart attack he was still heavier than he had been in 1990; and that his more recent cholesterol test showed higher cholesterol levels than those reviewed by Dr. Buchholtz in December 1994. Dr. Kafka confirmed that he had recommended a *"G3"* category for a:

> "small group of patients who, post bypass surgery, have no evidence of ischemia, have limited disease and have excellent control of their risk factors. W.O. Irvine will need to better control his diet and with the use of medication get his cholesterol down lower."

Dr. Kafka felt that if Mr. Irvine could reach a targeted LDL level (2.6), then a *"G3"* category would not be unreasonable subject to the provision that Mr. Irvine was to be assessed with an exercise Mibi and that Mr. Irvine be given an angiography in another year. So even at this point, Dr. Kafka was prepared to recognize a conditional *"G3"* category. While it was conditional upon Mr. Irvine's LDL level, his performance on another type of treadmill test (being an exercise Mibi), and an angiography, this was the view of the CAF's own physician. This view contemplated Mr. Irvine's retention.

[47] Then, on July 4, 1995, Dr. Buchholtz again observed that Mr. Irvine had achieved an "excellent exercise program" and had been seen by the Dietary unit. Mr. Irvine's total

cholesterol was lowered, although his LDL, being a specific type of cholesterol, was still above the target of 2.6. Dr. Buchholtz acknowledged Dr. Kafka's view and agreed that if risk factors were not modified, a "*G4*" would be warranted. However, he noted that Mr. Irvine was exercising and following his diet. He felt that as long as he continued with his exercise program and risk modification, he would be fit for all activities, and a "*G3*" would reflect his posting ability to both isolated and foreign duty. Thus, at this point, Dr. Buchholtz, with the benefit of Dr. Kafka's view, and the benefit of accurate medical data, contemplated a "*G3*" category for Mr. Irvine based on his current exercise and diet program. Indeed, on July 11, 1995, Mr. Irvine was geographically upgraded to "*G3O3*" with the notation "medical condition requiring closer medical supervision".

[48] Thus, the CAF's consultant and Chief of Medicine, Dr. Buchholtz, contemplated a "*G3O3"* category for Mr. Irvine and Mr. Irvine was assigned this category. With this category, Mr. Irvine was entitled to retention in the CAF and met CAF Universality of Service criteria.

[49] However, immediately thereafter, Mr. Irvine's career officer brought his file to the attention of other CAF staff, and his medical category was placed on hold pending a review of his file by the CAD Committee at DHTS. A new change of category form was issued with a "*G3O3*" rating, but which indicated that the category was to be reviewed by the CAD Committee.

[50] On August 30, 1995, a CAD Committee reviewed Mr. Irvine's medical file and noted that the consultant had recommended a "*G4O3*", but if lipids come down, "*G3*", and that a base surgeon had recommended "*G3O3*" - "closer medical supervision". Thus, the CAD Committee had two potentially conflicting employment limitation category assignments before it: one made by Dr. Buchholtz, Chief of Medicine, who had examined Mr. Irvine, and one made by Dr. Kafka, who had conducted a paper review of Mr. Irvine's file. There is little or no evidence that the CAD Committee carefully considered that Dr. Kafka was prepared to recommend a "*G3*" category on the basis of better LDL levels, a new exercise Mibi and an angiography. There is little or no evidence that the CAD Committee carefully considered the extent of the congruence

of the two opinions and their respective bases. There is little or no evidence that the CAD Committee chose to take measures to explore whether Mr. Irvine could have met the "*G3*" rating, contemplated by its own physicians. Rather, the CAD Committee summarily and arbitrarily assessed him as unfit for two or more specific military environments and recommended a permanent medical category of "*G4*".

[51] Further, as per the 2001 decision, this CAD decision was made in accordance with the 1979 Policies for category assignment of the CAF [para 13 - 19] and / or the Bridging Policies [paragraph 18]. These 1979 standards and bridging policies, dealing with evaluation of medical condition and assignment of employment categories, did not provide for the individualized approach contemplated by the September 1995 Guidelines [para 20 -26, 138, 139]. The September 1995 Guidelines contemplated consultation amongst CAF staff in category assignment. Specifically in relation to CAD cases, they provided that NOT all members with coronary atherosclerosis were to be released. Thus, the CAF expressly, through its physicians and its policies, **contemplated that a group of CAD patients was eligible for retention and could meet Universality of Service.** As well, those September 1995 Guidelines contemplated, in cases of CAD, that many factors were to be used to identify the extent of disease and the functional capacity of the member, including the seven factors set out at paragraph 25 of my initial decision. I found that the respondent did not proffer sufficient evidence of the careful consideration of at least those seven factors, by the CAD Committee, in particular, the factors that Mr. Irvine did not have ischemia; that Mr. Irvine had performed well on prior treadmill testing and ought to have been given an opportunity to perform another one pre-release, in accordance with Dr. Kafka's early conditional assessment; that while Mr. Irvine exhibited a number of risk factors, he did not possess others such as hypertension or diabetes. Nor, is there sufficient evidence that the Committee obtained and considered carefully Mr. Irvine's ejection fraction which would have been helpful in determining both his **functional capacity** and the likelihood of another event, particularly if considered in conjunction with the results of an exercise Mibi [paragraphs 93 - 95, 144 - 146]. Thus, I had already found that the respondent led insufficient evidence that the CAD Committee, in its August 30, 1995 decision, and thereafter, adhered to the most accommodating and individualized standard available in assessing persons

with CAD, such as that found in the September 1995 Guidelines. As per *Meiorin* the CAF had the duty of applying a more accommodating standard and / or had the onus of explaining satisfactorily its failure to use such an individualized approach.

[52] In contrast, Dr. Buchholtz, who after examination and follow-up of Mr. Irvine, contemplated a "*G3*" based on his individual and careful assessment of Mr. Irvine's condition. The CAD Committee decision struck me as having been made in a mechanical and impressionistic manner. I maintain my initial views expressed at paragraphs 143 - 150 of the 2001 decision to the extent that they relate to the "geographic" factor. Based on the views of Dr. Buchholtz and for all the reasons set out above, I continue to find the CAD Committee's decision discriminatory and based upon a hasty and inadequate consideration of Mr. Irvine's file.

[53] As I have already ruled, the April 1996 Career Board review of Mr. Irvine's file did not correct these problems. Again, this Board simply accepted the CAD Committee recommendation in mechanical fashion and assigned Mr. Irvine the permanent medical category of *"G4O3"*. It failed, as did the CAD Committee, to provide for a current individualized assessment even though the September 1995 Guidelines were in force [para 143 - 148].

[54] The respondent argues that neither further testing, nor additional time, nor different testing would have reduced or eliminated the risks posed by Mr. Irvine's cardiac condition. In so far as this argument addresses the **liability** of the CAF for discrimination, it fails to acknowledge that **the CAF retained a group of cardiac patients post event as being capable of fulfilling combat duties**. The CAF was required to take all steps possible pre-release to ensure that Mr. Irvine's ability to fall within this group was fully considered. The CAD Committee had to make thorough and careful consideration of at least the seven factors outlined in the September 1995 Guidelines, including current ejection fraction reading, assessment of the same in conjunction with an exercise Mibi, and thorough consultation with its own physicians including Dr. Buchholtz. The CAF's evidence itself established that additional testing would have been helpful to the CAD Committee; i.e. exercise Mibi and angiogram as per Dr. Kafka. In Mr Irvine's case, there was a very thin wedge between the assignment to him of a *"G3"*and a

"*G4"* rating. The CAF had to take all possible measures to fairly assess his ability to obtain a "*G3"* pre-release and meet universality of service principles. The CAF had the onus of demonstrating that more probably than not Mr. Irvine would have received a "*G4"* rating had such measures been attended to. Based on the facts of this case, I do not accept that the CAF met this onus.

IV. Conclusion

[55] For all of the reasons cited I continue to find that the CAF adversely differentiated against Mr. Irvine during Mr. Irvine's employ, on the basis of his disability, in the stated identified policies governing Mr. Irvine as a member with coronary artery disease and in its medical assessments of his condition and in its assignments of employment limitations to him. The CAF was entitled to require that Mr. Irvine meet universality of service principles: indeed each of its standards were based on the requirement that members be fit to be "soldiers first". However, the CAF failed to establish that it applied those very standards to him in a discriminatory free manner. It thus failed to establish on a balance of probabilities a BFOR with respect to either the section 7 or section 10 complaints.

V. Remedies

[56] Again, as per the 2001 decision, I decline to address the issue of damages at the request of the parties but retain jurisdiction to hear evidence on the same if the parties cannot reach consensus.

Signed by

Shirish P. Chotalia
President

Ottawa, Ontario
February 12, 2004

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T584/4200

Style of Cause: Raymond Irvine v. Canadian Armed Forces

Decision of the Tribunal Dated: February 12, 2004

Date and Place of Hearing: November 5, 2003

Edmonton, Alberta

Appearances:

Raymond Irvine, for himself

Patrick O'Rourke, for the Canadian Human Rights Commission

Sanderson A. Graham, for the Respondent

Reference: T.D. 15/01
November 23, 2001