Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

PATRICK E. QUIGLEY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

OCEAN CONSTRUCTION SUPPLIES

Respondent

REASONS FOR DECISION

T.D. 06/02

2002/04/03

PANEL: Shirish P. Chotalia

TABLE OF CONTENTS

I. INTRODUCTION

[1] Mr. Quigley is a cook by profession. Since December 1988 he worked as a cook on board tugboats. These tugboats towed barges in the British Columbia waterways. These tugboats were owned by Ocean Construction Supplies Ltd., Marine Division, ("Ocean"). From January 1991 onwards Mr. Quigley suffered from various medical disabilities that prevented him from working regularly. Between the years 1991 and 1996 he took five disability leaves.

[2] In 1993, he was diagnosed as suffering from thoracic outlet syndrome (TOS) for which condition he underwent corrective surgery in January 1994. In August 1996 Mr. Quigley requested that he be given an opportunity for a work trial as a deckhand. The purpose of the work trial would have been to determine whether he was fit to re-commence work in the new position. Ocean refused this request for safety reasons and terminated Mr. Quigley's employment.

[3] At issue in this proceeding is whether Ocean's decision to terminate Mr. Quigley was because of his physical disability and if so, whether this decision was legally justifiable.

II. FACTS

A. Ocean's Business

[4] Ocean Construction Supplies is a large company that has offices in North America, Europe and Asia. It has a construction aggregate division. It also has a marine division (singularly referred to as "Ocean" in this decision) that transports cement products to various customers using river barges. The barges are filled with sand, gravel and cement products at various originating docks, such as those at Vancouver. Tugboats haul the barges to various ports where they are docked and then emptied. The tugboats leave the stocked barges at the ports, and return to the port of origin with "an empty" being an empty barge to be restocked and re-hauled. Ocean operates such transportation circuits or "runs" between various destinations. Some destination ports are close to Vancouver, such as Granville Island, or Victoria. Some destinations are farther away, such as Seattle or Alaska.

[5] For this reason Ocean operates "outside" and "inside" boats. Of its 5 tugboats, 4 tugboats are known as "outside" boats and 1 tugboat is known as an "inside" or "shift" boat. During the relevant years, the "outside" boats operated off shore for 14 to 15 days before returning to shore. Thus, its crew had to live and sleep aboard the outside boats for at least 14 days prior to returning to shore. The crew on these outside boats consisted of 4-5 personnel: 1 Master who supervised the over-all operation; 1 Mate who assisted the Master; and, 2 cook-deckhands who handled the docking, tying up and release of barges, as well as cooking and cleaning. Sometimes the crew

included an optional engineer to supervise the engine room. While on board, the crew worked for 6 hours, rested for 6 hours, then worked for 6 hours, and again rested for 6 hours. For example, the Captain "stood watch" from 12:00 p.m. to 6:00 p.m. Then he rested, and the Mate took over these duties from 6:00 p.m. to 12:00 a.m. Similarly, the 2 cook-deckhands worked 4 alternating 6-hour shifts, relieving each other every 6 hours.

[6] Ocean's *one* inside boat, the Evco Crest, operated on a different schedule. It operated for 24 hours a day, but left shore for 12 hours and returned thereafter with an empty from the closer destinations, such as Granville Island. A crew change was made every time it returned to shore, being every 12 hours. Thus, the crew had to be on board for a period of 12 hours before returning to shore. Its staff consisted of 1 Master to supervise the operation and only 1 deckhand to handle the barge work. The deckhand aboard this ship was on duty for the entire 12-hour period. There were no bunking facilities on the ship. There were no cooking facilities on this ship. The 2-person crew brought their lunches. The inside boat operated from Monday to Fridays. Its shift pattern was "5 days on and 2 days off". Thus, a deckhand on board this boat could return to shore every day and sleep in his own bed.

[7] Ocean's total marine division was comprised of about 50 employees being Masters, Mates and a few engineers who were licensed officers and belonged to a specific guild. Cook-deckhands and deckhands were unlicensed non-officers and belonged to a different union. Ocean employed 3 steady deckhands and 3 steady Masters to man the Evco Crest inside boat: 1 for the dayshift; 1 for the nightshift and 1 to cover the weeks that the former 2 crews were not scheduled for work. Ocean had three 2-person crews that were dispatched together. Dispatchers tried to ensure that these 2-person teams had experience working together and had a good interpersonal relationship. This was important for safety reasons. For example, a particular Master may have preferred to have his boat steered away at a certain distance from a bridge; a deckhand would understand the particular Master's practice over time. A particular Master may have preferred that barges be shackled to the stern in a particular manner. On a stormy or foggy day or on rough waters, an experienced Master and deckhand team, that had worked together before, operated more safely than an inexperienced team or a team that had not worked together in the past.

B. Lay-days

[8] Ocean's crew worked 12 hours per day. Ocean negotiated payment of a monthly salary with the staff's union. Ocean paid its staff members as if they had worked an 8-hour day. To compensate employees for the extra hours of work, Ocean scheduled each employee with the requisite "lay-days". An accounting system tracked whether employees had "black days", meaning that the company owed them money, or "red days", meaning that they owed the company hours of work. Given that the inside boat, the Evco Crest, was sometimes not used, its crew often had "red days". It was difficult for its staff to build up lay-days. Further, given the limited staff for the Evco Crest, and given that it had continuous runs, employees who worked on this ship were obligated to take their lay-days as per the company's schedule.

C. Duties of a Deckhand

[9] The operation of a tugboat often involved manoeuvering through tempestuous weather. It was disparate from driving a vehicle down a highway. Often the seas were turbulent and dangerous. The duties of a deckhand involved moving heavy steel cables called bridles. The bridles, 1 ¼ inch steel lines, were about 65 feet long with a 3-foot eye. Handling bridles required a fair amount of strength. Bridles were used to hook and unhook barges. Overall, deckhand duties were physically onerous. Employees were required to be physically fit. The shorelines had to be put ashore, with the tugboat holding the barge into the dock, while the deckhand took off the lines and put them into shore. The deckhand, then, with a pike pole, was to pull up the bridles to connect them with the bollards, which were steel upright canisters used to tie up shorelines. Often empty barges were exchanged with full barges in the middle of the ocean. It was more difficult to perform these duties in rough weather. Deckhand duties involved heavy lifting, upward pulling underneath the chest, and simultaneous grasping and holding, downward reaching and bending, often in the dark, upward, and downward climbing upon free swinging ladders at high elevations over the ocean or dock. The work was such that the arms were in front of and overhead of the body. In short it was physically demanding and involved awkward repetitive heavy reaching, pulling and bending, often without light.

[10] The deckhand duties on the Evco Crest were the same as the deckhand duties on the outside boats. However, on an outside boat, the singular position of a deckhand did not exist. Rather, employees on outside boats held the position of a cook-deckhand. As stated, this position involved both cooking/cleaning and deckhand duties. The major differences between the two positions were in the volume of deckhand duties. On an inside 12-hour boat, the single deckhand had to perform deckhand duties continuously for 12 hours. While there were periods of non-activity, it was conceivable that the deckhand would be performing the heavy duties of a deckhand for a substantial portion of the time. On an outside boat, a cook-deckhand expended roughly equal amounts of time cooking and in performing deckhand duties. On the outside boats, in the case of emergency, an additional deckhand, the Mate and Captain were available to assist. Sometimes, an engineer was also available. On the Evco Crest, the sole deckhand was required to be more competent and to be more capable of facing challenge and emergencies than a cook-deckhand working on an outside boat. The deckhand job on board the Evco Crest was a more onerous one than that of the cook-deckhand working on an outside boat.

[11] In general, the marine industry was an industry notorious for workers' compensation claims. Back strain was the most common type of injury. Accidents included ones where employees were crushed between barges and boats. Other accidents included slip and falls. If an employee was injured close to shore, then a water taxi was dispatched. Otherwise, depending upon the shift time, a 2nd tugboat was dispatched to replace the tugboat at sea.

D. Scheduling Crew for the Crest

[12] Given the small crew complement available for the Crest, the company required reliable deckhands and masters. Non-attendance created scheduling problems, as the Evco Crest would be delayed in departing on time for the next shift. In the event that a deckhand could not attend for scheduled work, due to sickness or otherwise, the company dispatcher attempted to call the third deckhand who was on lay-days to fill the position. If this deckhand were not available, the dispatcher would contact the union hiring hall and request an experienced deckhand to fill the

shift. It took at least several hours to fill the position through the union. Dispatchers, particularly in the case of the Crest, sought experienced persons to work as deckhands.

E. Administrative Process for Medical Assessment

[13] When an injured employee sought return to work, and the employee had been away from work due to disability for an extended time period, the company's procedures for return to work were as follows:

> 1. The employee was to obtain a letter from his family physician confirming that in that physician's opinion, the employee was fit to return to work in his pre-injury position.
>
> 2. Then, the employee was seen by the company physician who rendered his opinion as to whether the employee was fit to return to work in that position.
>
> 3. If there were a disagreement between physicians, the collective agreement provided that an independent physician acceptable to both the employee's union and the company was to make the final determination.
>
> 4. If the employee was determined to be fit for work, then the employee was scheduled for work.

These policies were well known throughout the company and were consistent with industry practice and *The Shipping Act of Canada*.[(1)] *The Shipping Act* required all boats to be manned with a crew sufficient and efficient from the point of view of safety of life for the purpose of its intended voyage, and during the voyage, to be kept so manned. Non-compliance with this provision constituted an offence.

[14] However, the procedure in the tugboat industry surrounding medical certification changed in about 1996. From that date onwards, deckhands were to be certified by designated Department of Transport Canada physicians, rather than their own physicians, as being fit to return to work. This remains the current procedure pursuant to the *Canada Shipping Act* and its regulations.

F. Mr. Quigley's Particular Circumstances

[15] Against the backdrop of these practices and policies, I will now examine Mr. Quigley's particular circumstances.

i) General History

a) Introduction

[16] Today, Mr. Quigley is 43 years of age. He is a father and a husband. He has a grade 10 education. He has worked in various jobs such as a retail sales clerk, a restaurant cook, a

dishwasher and a busboy. He began working for Ocean as a cook in December 1988, and later became a cook-deckhand.

[17] Unfortunately, since childhood he has suffered from pain, mainly in the areas of his chest, back and arms. These pains were exacerbated by a 1983 motor cycle accident. Although he was young and frustrated with the extent of his disability, he was determined to work to support himself and his family.

[18] While working at Ocean, between the years 1991 and 1996, he took 5 long-term disability leaves. Each of these leaves were funded by the same insurer, Martime Life Assurance Company ("Maritime").

b) Leaves #1- #3

[19] In 1989, Mr. Quigley's mother passed away and he took bereavement leave from early December 1989 to April 14, 1990 (leave #1). He returned to work on April 15, 1990. Due to his wife's stillbirth and his knee surgery, he took a second leave from mid October 1990 to March 2, 1991 (leave #2). During this absence, in November 1990, all cook and deckhand positions at Ocean were re-classified to cook-deckhand positions. Accordingly, his position was re-classified to that of a cook-deckhand.

[20] Mr. Quigley returned to work on March 3, 1991 in his new position as a cook-deckhand on an outside boat. At the end of March 1991, he took a further disability leave (leave #3) and returned to work on May 6, 1991. While on leave, on April 30, 1991, Mr. Quigley wrote to the company stating that he was not given training for the new cook-deckhand position. He requested the company to provide him with formal training (on a ship and in marine school) to ensure that he could safely perform deckhand duties. In response, Ocean sent Mr. Quigley for 1 day of training as a deckhand in 1991 with Captain Harold Forward. He trained as a 3rd person on an inside 2-person boat.

c) Leave #4

[21] Subsequently, Mr. Quigley fell down some stairs and injured his elbows and knees and developed ulnar palsy. In November 1991, he made a disability claim due to elbow injury complications. He was awaiting corrective surgery and was under stress. In 1991, he worked 115 days in the cook-deckhand position. On November 12, 1991, Dr. Gordon, a physician, completed the disability form, indicating that Mr. Quigley was totally disabled from performing the duties of his position and that he would likely return to work at the end of March 1992. The company retained Mr. Quigley as an employee while he took disability leave from December 5, 1991 to April 4, 1993 (leave #4). Sometime in 1991, he was also diagnosed with seasonal affective disorder (SADS) manifesting with the following symptoms: irritation, confusion, fatigue, and social withdrawal.

[22] During this leave, Mr. Quigley underwent elbow surgery in April 1992. When it became apparent that this surgery had failed to resolve his symptoms, Mr. Quigley consulted with a thoracic surgeon, Dr. Nelems. On July 30, 1992, Mr. Quigley completed a pain questionnaire for

Dr. Nelems wherein he recorded extensive pain symptoms. During an August 1992 examination, Dr. Nelems asked Mr. Quigley to perform a series of thoracic outlet maneuvers, such as raising his arms above his head and back and forth. Each of these actions promptly reproduced his symptoms. Mr. Quigley also had discomfort when moving his neck, although he had a full range of neck movement. He had tenderness in his pectoral regions bilaterally. Dr. Nelems diagnosed him as suffering from thoracic outlet syndrome (TOS) bilaterally. This meant that, congenitally, he had extra rib tissues and fibrous band materials in his cervical rib area, which were pinching the nerves that led to his arm. As Mr. Quigley manipulated his arms and shoulders, the clavicle (collar bone) rubbed against his nerve plexus, which was pushed abnormally high into the collar bone. A cycle of nerve inflammation began. Thus, he experienced pain over his post-occipital musculature, across the back of his shoulder region, and down into his arms. His right side was worse than his left. He experienced numbness in all of his fingers. This was worsened by activities such as working with his arms elevated or carrying heavy objects. He had right inner forearm tingling and pain, and driving his car was problematic. He had difficulty sleeping. He had to forego many of his hobbies, such as golf, hockey, swimming, and water-skiing. He experienced a mild decrease in the right and left biceps power and the right grip power. Dr. Nelems surmised that more than likely he would opt for surgery wherein the relevant rib and the fibrous band would be removed.

[23] Mr. Quigley began intensive and ongoing physiotherapy.

[24] In November 1992, Mr. Quigley obtained a second medical opinion. Dr. Luoma confirmed that he was experiencing right-sided TOS. He confirmed that overhead activity would worsen his symptoms as would any vigorous activity involving strength. In his opinion, Mr. Quigley would be unable to return to work without surgical intervention.

d) 1993 Work Trials

[25] Understandably, given that his physicians confirmed to him the risks of surgery and that it was not a "sure cure", Mr. Quigley was reluctant to undergo major surgery. In the spring of 1993, Mr. Quigley requested Ocean for a work trial in the hopes of returning to work. He was highly motivated to continue employment. He produced a letter from his family physician confirming that he was fit for work.

[26] In accordance with Ocean's return to work practices, given that he had been cleared by his family physician, Mr. Chapman, Ocean's Marine Manager, directed Mr. Quigley to report to the company doctor, Dr. Troffe, for his opinion with respect to Mr. Quigley's fitness. Dr. Troffe examined Mr. Quigley. He found that because the power in his arms was virtually normal, a two-week work trial was safe at the time. However, Dr. Troffe predicted that Mr. Quigley would have ongoing problems when he was pulling heavy bridles, that his forearm would worsen, and that he would eventually decide to have surgery, or to switch to a less physically demanding job. Dr. Troffe recommended that Mr. Quigley retire from the marine industry and find a sedentary job. Dr. Troffe opined that this would prevent aggravation to the cervical rib and assist with avoidance of surgery.

[27] At this time, Ocean's human resource manager recommended that Mr. Quigley be terminated. However, in accordance with Dr. Troffe's assessment, Mr. Chapman agreed to give Mr. Quigley a work trial. In his mind, a work trial was equivalent to a return to work. Mr. Chapman based this decision on the fact that Mr. Quigley had obtained the requisite clearance from his family physician and from the company's physician. Thus, he gave Mr. Quigley 4 work trials in his pre-injury position as a cook-deckhand on the outside boats. These were on April 9, 1993, April 18, 1993, May 9-24, 1993, and July 22, 1993.

[28] After these 4 trials, Mr. Quigley complained to Mr. Chapman about his inability to sleep sideways on the narrow bunks on the outside boats. Mr. Quigley indicated to Mr. Chapman that he had to sleep on his back, and that this was not possible in the small beds on board the outside boats. He requested that he be allowed to try working as a deckhand on the inside boat. His reasoning was that he could work for 12 hours. Then he could return to his home and sleep in his own bed comfortably. He would have time to take his pain medications and relax to prepare for the next day's work.

[29] Mr. Chapman accommodated this request. He allowed Mr. Quigley to try working as a deckhand on a shift boat. On August 19, 1993, Mr. Quigley was given a trial under Captain Northcott on the Evco Crest. The Master rated him as having performed poorly to satisfactory in 5 different categories.

[30] In sum, the results of the 5 different trials on the 2 boats under 5 different Masters were as follows:

- 2 of the 5 Masters recommended against retaining Mr. Quigley;
- 1 Master recommended his retention and 2 did not provide an opinion on this issue
- 4 of the 5 Masters indicated that he had a poor attitude
- 1 Master specifically noted that Mr. Quigley had a problem with numbness in his arm and hand.
- all 5 Masters indicated that he had a lack of knowledge and skill as a cook-deckhand and/or deckhand;
- all 5 rated him as satisfactory to poor in physical fitness;
- Captain Northcott rated his performance on the Evco Crest as falling between poor and satisfactory.

[31] Mr. Chapman did not show these evaluations to Mr. Quigley at the time or obtain his input with respect to them because they were not disciplinary in nature. However, based on these evaluations, and in particular, upon Mr. Quigley's trial on the Evco Crest, Mr. Chapman was not convinced that Mr. Quigley ought to be promoted to the position of deckhand on board the Evco

Crest. After this last work trial, Mr. Chapman spoke with Mr. Quigley to attempt to discuss with him what course of action would be in Mr. Quigley's best interests. They discussed whether Mr. Quigley should have surgery for TOS. Mr. Quigley told Mr. Chapman that he was afraid of undergoing surgery because he did not know the full extent of his medical difficulties. At the same time, Mr. Quigley did not seek to work on any of the boats because of the past problems he had experienced on the outside boats, in light of their shift schedules. At the end of the conversation, the parties discussed the fact that long term disability benefits were an option for Mr. Quigley. Mr. Quigley asked Mr. Chapman for the disability forms. Mr. Chapman provided them to Mr. Quigley.

e) Leave #5

[32] Mr. Quigley saw his family physician, Dr. Lacroix. She completed the disability benefits forms indicating that his condition caused him pain and weakness in his shoulders, arms and neck, that negatively affected his ability to work. She wrote that Mr. Quigley was "totally disabled/unable to work" in his job from August 25, 1993 onwards. She could not provide the company with an anticipated date of return to work. Thus, Mr. Quigley took disability leave from August 20, 1993 to August 1996. (leave #5).

[33] On August 26, 1993, Dr. Nelems, Mr. Quigley's thoracic surgeon, wrote to Dr. Lacroix confirming the risks of surgery. He advised that post-surgery, 50% of patients were completely improved; 30% were improved but had significant ongoing symptoms and 20% had no improvement at all. On the same date, he also wrote to Mr. Chapman to explain TOS to him. Dr. Nelems provided Mr. Chapman with a scientific paper about TOS and Mr. Chapman read the same. Dr. Nelems confirmed that Mr. Quigley had muscle spasm in his arm and shoulder regions. He confirmed that surgery was elective and that Mr. Quigley was not disposed to the same. Of the two shift choices available on Ocean's tugboats, based on the information he had from Mr. Quigley, Dr. Nelems preferred that Mr. Quigley work on the 12-hour inside boat shift.

[34] For a number of reasons, Mr. Quigley eventually decided to pursue surgery for his TOS. He could not continue to work without surgery. In fact, in his discussions with Mr. Chapman, he had contemplated that he would take long-term disability benefits, perhaps have surgery, and then try to return to work at Ocean.

f) Surgery and Post-Surgery Medical Condition

[35] During this disability absence, in January 1994, Mr. Quigley underwent corrective surgery for his right-sided TOS. Then, he had a long post-operative recovery period. Dr. Nelems continued to monitor him post-surgery. While Dr. Nelems reported Mr. Quigley's medical status to the disability insurer, he did not report the same to Mr. Chapman or anyone at Ocean.

[36] Mr. Quigley's post-operative progress was as follows: In July 1994, Dr. Lacroix saw Mr. Quigley who complained of aching discomfort over his arm and tingling in his fingers. He was unable to perform any lifting and even light gardening and housework duties increased the soreness in his arm and shoulders. Dr. Lacroix was hopeful that he could return to full-time work in 1995. In February 1995, Dr. Nelems remained optimistic that Mr. Quigley could try to return

to work given that Mr. Quigley reported to him that he was 60% improved. However, he continued to have pain and some weakness in grip. Still, his numbness had resolved favourably, and his general status was good. Even though Mr. Quigley complained of increased pain with repetitive motion, Dr. Nelems suggested that he could return to work in April 1995, pending clearance by his family physician, Dr. Lacroix. At no time did Mr. Quigley explain the specific duties of either a deckhand or a cook-deckhand to Dr. Nelems, or how the two jobs were distinguishable from each other. Based on his general understanding of the work environment, as gleaned from Mr. Quigley's comments, Dr. Nelems favoured a monitored return to work for Mr. Quigley on the 12-hour shift boat, being the Evco Crest.

[37] Mr. Quigley began exercising to prepare for return to work, but developed pain while swimming and skating. Dr. Lacroix recommended a work-conditioning program to Martime, the disability insurer. Mr. Quigley began such a program at the Westbank Physiotherapy Center as of May 8, 1995. At this time Mr. Quigley presented with right neck, shoulder, and arm pain. The pain constituted an ache, the severity of which increased in sharpness with increased use of his arm. He also had frequent migraine headaches and paraesthesia (numbness) in his right hand and all fingers. He was having sleeping difficulties. He was tested for strength and aerobic conditioning and scored poorly. However, in July 27, 1995, his physiotherapist, Randy Goodman, found that Mr. Quigley had progressed well. He recommended 4 more weeks of weight training and occasional physiotherapy to systematically decrease his pain. While Mr. Quigley was able to perform more duties at home, such as lawn moving and lifting boxes, his arm still fatigued quickly. He required 12 hours for symptoms to settle before being able to work again.

[38] Dr. Nelems saw him in September 1995. He observed that Mr. Quigley had lost 10 pounds. Mr. Quigley reported that his upper body and shoulders were much better, but that his elbow region and lower body were slow to improve. He was not yet ready to return to work.

[39] On October 10, 1995, Dr. Nelems wrote to Dr. Lacroix confirming that if Mr. Quigley undertook vigorous repetitive activities such as lawn mowing or vacuuming, these could aggravate his symptoms. On October 23, 1995, Dr. Lacroix wrote to the disability insurer confirming that Mr. Quigley was having continuing problems with his right hip, knee and elbow. She also stated that he had seen an orthopaedic surgeon, who was dealing with his hip bursitis. She was hopeful that he could return to work in a few months.

g) Termination of Long-Term Disability Benefits

[40] On May 17, 1996, the disability insurer, Maritime, terminated Mr. Quigley's benefits. Initially the benefits ceased as of July 15, 1996, but eventually extended to September 1996. Maritime's position was that, in the next 4 to 6 weeks, Mr. Quigley was fit to return to work in a job that paid 60% of the wage of his job. Maritime benefit provisions stated that for the first 3-year period, a claimant had to prove that he was not fit to perform the duties of his job, being those of a cook-deckhand in Mr. Quigley's case. Thereafter, the claimant had to prove that he was incapable of performing *any job* in which he could earn 60% or more of his wage payable for his job. Maritime copied this letter to Mr. Chapman.

h) Request for 1996 Work Trial

[41] On July 6, 1996, Dr. Lacroix wrote to Maritime seeking an extension of the benefits. She advised that Mr. Quigley had developed some ear infections causing dizziness, that had curtailed his visits to the gym. Therefore, he had not progressed as quickly as she had hoped towards a return to work.

[42] Later, in the same month, Roy Gillespie, physiotherapist, spoke to Maritime. He indicated that Mr. Quigley had participated in an intensive rehabilitation and work conditioning program. He stated that Mr. Quigley ought to be given a work trial.

[43] Neither Mr. Quigley, nor his physicians or physiotherapists, communicated with Mr. Chapman about Mr. Quigley's medical condition from August 1993 to August 1996. Mr. Chapman was not provided with medical reports or status updates until he received a letter from Dr. Nelems dated August 6, 1996.

[44] On that day, Dr. Nelems saw Mr. Quigley. He had not seen him for almost 1 year. On August 6, 1996, Dr. Nelems, wrote a letter to Dr. Lacroix, which he copied to Mr. Chapman. In this letter, Dr. Nelems confirmed that Mr. Quigley reported that he was about 60% better on his right side, but that he had not fully recovered. He confirmed that Mr. Quigley had reached his "plateau" in terms of improvement on the right side. Dr. Nelems' observation of his symptoms was that he had "good days and bad days". His prognosis was that Mr. Quigley would require ongoing physiotherapy and exercise programs. He confirmed, that if Mr. Quigley had a particularly problematic activity, the pain returned. Dr. Nelems found that while he had improved, he would continue to have ongoing problems. In addition, Dr. Nelems also found that now Mr. Quigley's "left side" thoracic problem had worsened and these needed to be followed over time. Dr. Nelems wrote:

> "Pat's biggest dilemma at the present time is whether or not he should attempt a trial of return to work on the tug boats on a part time basis. Only Pat will know what best to do and only Pat will be satisfied with the success or failure of such a trial. It will be entirely up to him to make those considerations."
>
> At the time, Dr. Nelems confirmed that Mr. Quigley required continued analgesic medications to control his pain. Dr. Nelems wrote:
>
> "With respect to any potential return to work his company would have to be quite flexible in terms of his hours. If they were not capable [of] being flexible in terms of his frequency and amount of work then clearly he will not succeed at his attempt at returning to work."

[45] When Mr. Chapman read this letter, he became concerned that the operation had not been successful, and that Mr. Quigley's condition had deteriorated. He had now developed thoracic problems on his left side. In spite of these concerns, Mr. Chapman remained open to meeting with Mr. Quigley, and to discussing his condition and potential return to work. Mr. Chapman met with Mr. Quigley in the week of August 13, 1996. At this meeting, Mr. Chapman agreed

with Mr. Quigley that he appeared in "good [physical] shape". Mr. Quigley told Mr. Chapman that he could not work in his job as a cook-deckhand, on the outside boats, because of the hours of work and the length of time it took for his medication to wear off. Instead, Mr. Quigley requested that he be allowed to work as a deckhand on board the Evco Crest. However, Mr. Chapman discussed the concerns that he had arising from Dr. Nelems report. Mr. Chapman indicated that it did not appear to him that Mr. Quigley was fit to work as a deckhand on the Evco Crest. Mr. Quigley responded by asking Mr. Chapman to speak to Dr. Nelems directly about his letter. He also requested that Mr. Chapman speak with his union representative, Mr. Al Engler. Mr. Chapman agreed to both these requests to accommodate Mr. Quigley.

[46] On August 28, 1996, Mr. Chapman spoke to Dr. Nelems. In this conversation, Mr. Chapman explained to Dr. Nelems the workings and requirements of the Evco Crest. He advised Dr. Nelems that this was a 2-person 12-hour shift boat. He asked Dr. Nelems if a person in Mr. Quigley's condition could be capable of working on a vessel such as the Evco Crest. While Dr. Nelems continued to support a work trial on the Evco Crest, Dr. Nelems agreed with Mr. Chapman's analysis, being that placing Mr. Quigley on such a 2-man boat would not be safe. Mr. Chapman's reasoning was that in the event that Mr. Quigley could not perform his duties, the boat would be understaffed. There was a real potential for failure. The crew and vessel would be jeopardized.

[47] After this conversation, believing that Dr. Nelems concurred with his reasoning, Mr. Chapman spoke to Mr. Engler about Mr. Quigley's situation. He read portions of Dr. Nelems' letter to Al Engler, and indicated that based on Dr. Nelem's diagnosis, he had no choice but to terminate Mr. Quigley at this time. Mr. Chapman also consulted with the Company's human resource manager.

[48] After these consultations, Mr. Chapman believed that Mr. Quigley was unfit to return to work or for a work trial as a "deckhand". He considered it unsafe to send him on a trial as a deckhand on the Evco Crest based on the following logic:

- Mr. Quigley did not have a clearance from his family physician or specialist confirming that he was able to return to his pre-injury position as a cook-deckhand as required by law and by industry practice. Mr. Quigley had had such a clearance in 1993 before returning to work to perform his work trials.

- Mr. Quigley had not performed satisfactorily as either a cook-deckhand or as a deckhand in the 1993 trials pre-surgery. Captain Northcott's report, of his 1-day trial on the Evco Crest, rated Mr. Quigley as marginally satisfactory with indication that Mr. Quigley could have personality conflicts with others. Captain Guy had specifically noted that Mr. Quigley reported numbness in his arms, during his July 1993 work trial on an outside boat. Mr. Chapman believed that he was potentially chronically unreliable.

- Dr. Nelems was now confirming that the surgery had not successfully resolved Mr. Quigley's TOS, that Mr. Quigley's condition had reached a plateau, and further that Mr. Quigley had developed TOS on the left side of his body. Also, Dr.

Nelems confirmed, that if Mr. Quigley had a particularly problematic activity, the pain returned.

- Mr. Quigley had never worked as deckhand other than his one day 1993 trial, and during a 1- day training session in 1991 with Captain Forward. The position of deckhand was a more demanding job than Mr. Quigley's position as a cook-deckhand. Mr. Quigley was refusing work on the outside boats and sought return only to the Evco Crest to work in a more physically onerous job. For that matter, Mr. Quigley, a cook by trade, had not worked extensively as a cook-deckhand, had received limited training, and had been absent, for medical reasons, from work from 1993.

[49] Mr. Chapman testified candidly that if Mr. Quigley had had a medical certificate of fitness from his physician, and the company physician had concurred in this opinion, Mr. Chapman would have returned him to his pre-disability position. If the position were not vacant, then Mr. Chapman would have discussed with the union a means to accommodate him. This could have included offering him another job for which he had training or could be trained.

[50] At this time, Mr. Chapman did not explore other work positions for Mr. Quigley in the company because Mr. Quigley was resolute in his desire to return to the one position of deckhand on the Evco Crest.

[51] Based on the above factors, Mr. Chapman made a decision to terminate Mr. Quigley. He wrote a termination letter dated August 29, 1996 confirming that he had spoken to Dr. Nelems and Mr. Engler about Mr. Quigley's request to return to work on a trial basis on the Evco Crest. At this time, Mr. Chapman did not send Mr. Quigley to the company physician, as he was of the view that there was no basis for the same, given that Mr. Quigley did not have a confirmation from his physician that he was fit for return to work.

[52] The company prepared his record of employment stating that Mr. Quigley had been on sick benefits and was unable to return to his cook-deckhand position on the outside boats, and that the company did not have another position to offer him.

ii) Mr. Quigley's Post-Release Condition

a. Dr. Nelems' Post-termination Clarifications

[53] On September 13, 1996, Dr. Nelems saw Mr. Quigley again, unaware that he had been terminated. He again wrote to Mr. Chapman confirming his conversation with him of August 28, 1996. Dr. Nelems acknowledged that Mr. Chapman would have a safety problem if one of the two people on a 12-hour shift boat were on a re-activation program. "The logic was that if one man were on trial, then the potential for failure was real." Dr. Nelems now confirmed that Mr. Quigley was prepared to have a work trial as a third person on a two person vessel, at his own expense. At some time, Mr. Quigley offered to sign a waiver of liability and to undergo a work hardening program without pay.

[54] Mr. Chapman did not respond to this letter as Mr. Quigley was no longer employed by Ocean. Further, he did not consider the information provided as constituting new information. In 1993, when he experienced only right sided TOS, Mr. Quigley had been given a trial as a 3rd person on the Evco Crest. However, Dr. Nelems, had been unaware that Mr. Quigley had been given such a pre-surgery trial when he wrote this letter.

b. Termination of Long-Term Disability

[55] On September 4, 1996, Maritime, finally, cancelled Mr. Quigley's long-term disability ("LTD") benefits. Its position was, that, while he was not able to return to his position as a cook-deckhand, he could work in other alternative jobs, such as in the job of a cook.

c. Grievance

[56] On September 11, 1996, Mr. Quigley requested his union to grieve the company's refusal to return him to work. Mr. Engler was supportive of Mr. Quigley. He discussed Mr. Quigley's options with him. These included the filing of a grievance against the company and appealing the insurance company's decision to terminate his LTD benefits. Mr. Engler told Mr. Quigley that the union did not have standing with the insurance company, and advised Mr. Quigley to retain a lawyer to appeal the decision. Mr. Quigley sought legal advice. Mr. Engler advised Mr. Quigley not to pursue both the filing of a grievance and the appeal of his LTD benefits as this was inherently contradictory, and that such action would not be in his best interests. He recommended the latter course of action. On October 31, 1996, the union advised Mr. Quigley that given Mr. Quigley's circumstances and medical condition, it would not proceed with his grievance.

[57] Mr. Quigley was unhappy with this decision and he filed a complaint before the Canada Labour Relations Board alleging that his union had acted in bad faith towards him in two ways:

- the union had not adequately and forcefully represented him before the insurance carrier with respect to his request for reinstatement of his LTD benefits;

- the union had failed to pursue a grievance in which he sought to be returned to his employment after he was cut off LTD benefits.

[58] The union argued that the medical evidence revealed that Mr. Quigley was totally disabled from returning to any job, and that it was only Mr. Quigley's unrealistic determination to work that had led to Maritime's determination that he could work in any job.

[59] During this complaint process, Mr. Engler, in good faith, appealed to Maritime asking it to reconsider its decision to terminate Mr. Quigley's benefits.

[60] On December 24, 1997, the Canada Labour Relations Board ruled that the union had met its duty of fair representation to Mr. Quigley. It found that Mr. Quigley was the "author of his own misfortune in view of the fact he was attempting to reach two conflicting goals, that is, the restoration of his LTD benefits and his return to work." [(2)]

d. Continued Requests for Work Trials

[61] Dr. Nelems continued to request Mr. Chapman for a work trial until October 1996. Surprisingly, he continued to be unaware of Mr. Quigley's termination from Ocean. In November 1996, Dr. Nelems observed Mr. Quigley's emotional distress and recommended that he undergo an ergonomic assessment to determine the kind of work he was capable of undertaking. Dr. Nelems candidly acknowledged that he did not have such expertise.

[62] In December 1996, to support his disability claim, Dr. Lacroix wrote that Mr. Quigley was incapable of working due to his medical condition. Later, by way of letter dated April 22, 1997, Dr. Lacroix wrote that Mr. Quigley "would not have been able to work at a different line of work earning sixty percent of his previous wage without re-training since July 15, 1996." She confirmed that Mr. Quigley wanted to return to work then. She concluded by writing:

> "However, even though the doctors, his specialists and myself, were supportive of his wishes to return to work we felt that, medically speaking, he was not able to return to work and that he would likely never be able to return to his difficult work on the boats."

[63] On April 21, 1997, Dr. Lacroix's notes indicate that she encouraged Mr. Quigley to quit his work on the boats. She wrote, "I told him this FLAT OUT accept this and move on in his life and take a course of something he can do."

[64] Dr. Nelems continued to see Mr. Quigley and did not recommend surgery for the left- sided TOS given the limited success he had had in ameliorating his right-sided TOS. On September 16, 1997, Dr. Nelems confirmed that he did not believe Mr. Quigley to be genuinely employable unless he could work at the one identified work site, being the 12-hour shift boats. To this point he had not as yet, been advised of Mr. Quigley's termination.

e. Maritime's Medical Assessment

[65] On November 13, 1997, Mr. Quigley underwent a medical assessment by Maritime's physician, Dr. Hirsch. Dr. Hirsch noted that Mr. Quigley complained of constant daily pain involving the shoulders, elbows and wrists, with a sensation of fatigue in between these joints. The pain in his upper extremities was described as a jabbing or burning sensation. Mr. Quigley reported that he could have "good days and bad days". His shoulders at all times felt like they were separated. He also experienced constant numbness in his hands and arms. He stated that when he was gripping objects firmly, it felt like he had "hit a funny bone". He reported left and right sided neck pain, and pain involving the entire back, extending to his buttocks, and sometimes to his knee and toes. He experienced numbness in his toes and hips. He reported that these symptoms, in particular the neck and arm pain, originated around 1982. Notwithstanding these painful symptoms, Dr. Hirsch felt that Mr. Quigley could work at the time, at least part-time and probably full-time, as a cook-deckhand or deckhand.

[66] Dr. Hirsch found no evidence of TOS or of related nerve problems. He diagnosed Mr. Quigley as suffering from pain amplification syndrome. The validity of this assessment is currently the subject of a civil suit against Maritime by Mr. Quigley.

f. CHRC Complaint

[67] Mr. Quigley filed the within complaint on February 27, 1998. In spite of the delay, the CHRC resolved to deal with the complaint because he had contacted the Commission within 1 year of the last allegation of discrimination, and had been erroneously advised to file with the British Columbia Human Rights Commission.

g. Fibromyalgia

[68] In March 1998, Mr. Quigley was diagnosed with fibromyalgia by a rheumatologist, Dr. Jones. He again attended physiotherapy in 1998. His physical condition had deteriorated from 1996. Yet, he still wished to return to work.

h. Statement of Claim

[69] Mr. Quigley filed a statement of claim against Maritime on October 14, 1998, alleging that Maritime had improperly terminated his LTD benefits as of July 15, 1996. The pleadings claimed that he was incapable of performing any employ from that date onward, and that in addition to TOS, Mr. Quigley also suffered from resultant fibromyalgia, and that the TOS surgery of January 1994, exacerbated his headaches, fatigue, bowel irritation, paraesthesia, and depression.

[70] In 1999, Mr. Quigley's new counsel amended the statement of claim, alleging that *in or about January 1991*, Mr. Quigley, due to sickness, became wholly and continuously disabled from performing his regular work for Ocean, and that he remained so disabled to date. It confirms that Mr. Quigley made a claim from January 1, 1991 for long-term disability benefits which were paid by the Maritime until September 1996.

i. Transport Canada Fitness Certificate

[71] On his own accord, Mr. Quigley made an appointment, on September 10, 1999, with Dr. Klarke, a physician approved by Transport Canada to determine fitness to return to work. Dr. Klarke assessed Mr. Quigley as being fit to work as a deckhand, delineating the only limitation as being that Mr. Quigley wear glasses.

j. Work Evaluation Report

[72] In May 2001, a work capacity evaluation report was prepared by an occupational therapist for Maritime. This report recited Mr. Quigley's account of activities in daily living and leisure that caused him difficulty. The lengthy list included reaching upwards as causing shoulder pain, increasing neck pain and causing tingling in his fingers. He scored poorly in the fitness testing in flexibility, upper abdominal musculature, cardiovascular aerobic performance, and body mass

index. Based on Mr. Quigley's description of the jobs of a cook and of a deckhand, and NOC job ratings[(3)], the report found that Mr. Quigley could perform both the jobs. The conclusion of the report was that he would be able to perform work in the sedentary, light and medium strength category jobs. However, the report erroneously classified deckhand as a "medium" strength job, when, in fact, the appropriate NOC rating fell within the category of "deck crew, water transport". This job outlined that the strength element required to perform the job was "heavy".

k. Work History & Household Work

[73] Mr. Quigley did not work in any other job from 1994 to present with the exception of two interests: He assisted his father-in-law in a small business that sold maple syrup. This job often involved lifting and transporting heavy maple syrup kegs. He also worked for a short time in the pipeline field in July 2000. He did not make any attempts to seek out work as a cook because he believed that the job of a deckhand was a more valuable one.

[74] With respect to household work, he had difficulty handling the lawn mower because of the vibrations.

III. LAW

A. Human Rights Law

[75] Subsequent to the filing of Mr. Quigley's complaint, the Supreme Court of Canada reconstructed the approach to be taken in discrimination cases in its decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[(4)] [also known as "*Meiorin*"] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [also known as "*Grismer*"].[(5)] The classic distinction between direct and indirect discrimination has now been replaced by a unified approach to the adjudication of human rights complaints. Under this unified approach, the initial onus is still on a complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. [(6)]

[76] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy is a *bona fide* occupational requirement ("BFOR"). The BFOR defence arises out of section 15 of the *Canadian Human Rights Act*[(7)] which governed the within termination. In order to establish a BFOR, the respondent must prove that:

> i) it adopted the standard for a purpose or goal that is rationally connected to the function being performed. At this stage the focus is not on the validity of the particular standard, but on the more general purpose, such as the need to work safely and efficiently to perform the job. Where the general purpose is to ensure

> the safe and efficient performance of the job it will not be necessary to spend much time at this stage.
>
> ii) it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, with no intention of discriminating against the claimant. Here the analysis shifts from the general purpose of the standard, to the standard itself; and
>
> iii) the impugned standard is reasonably necessary for the employer to accomplish its purpose; i.e. the safe and efficient job performance. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. The Court ruled that it may often be useful as a practical matter to consider separately, first the procedures, if any, which were adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard.

[77] The *Act* in effect during the relevant times did not legislate 'undue hardship' which concept arose out of the jurisprudence.(8) However, *Meiorin* and *Grismer* provide instruction in arriving at a determination of whether or not a BFOR defence has been established. In *Meiorin*, the Supreme Court observed that the use of the word 'undue' implies that some hardship is acceptable: it is only 'undue' hardship that will satisfy the test.(9) An uncompromisingly stringent standard may be ideal from the employer's perspective. Yet, if it is to be justified under human rights legislation, the standard must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

[78] The Supreme Court has further observed that in order to prove that a standard is reasonably necessary, a respondent always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship.(10) It is incumbent on the respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship.(11) In some cases, excessive cost may justify a refusal to accommodate those with disabilities. However, one must be wary of putting too low a value on accommodation. It is all too easy to cite increased cost as a reason for refusing to accord equal treatment.(12) The adoption of the respondent's standard has to be supported by convincing evidence. Impressionistic evidence of increased cost will not generally suffice.(13) Innovative and practical non-monetary avenues of accommodation ought to be considered. Finally, factors such as the financial cost of methods of accommodation should be applied with common sense and flexibility in the context of the factual situation under consideration.(14) As observed by Cory J. in *Chambly v. Bergevin* [1994] 2 S.C.R. 525, what may be entirely reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession.

B. Use of Post-Discharge Evidence

[79] In a labour law context, *ex post facto* evidence is admissible only if it is relevant to the case or "sheds light" on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented[(15)]. The Court propounded, that as a general rule, an arbitrator reviewing a decision by the Company to dismiss an employee, should uphold the dismissal where he is satisfied that the Company had just and sufficient cause for dismissing the employee at the time that it did so. To hold otherwise would be to accept that the result of a grievance concerning the dismissal of an employee could vary depending on when it is filed and the time lag between the initial filing and the final hearing by the arbitrator. Furthermore, it would lead to the absurd conclusion that a decision by the Company to dismiss an alcoholic employee could be overturned whenever that employee, as a result of the shock of being dismissed, decides to rehabilitate himself, even if such rehabilitation would never have occurred absent the decision to dismiss the employee. Such evidence can be prejudicial to one of the parties and distort the proper analysis of the case[(16)]. In a human rights context, the use of such evidence has been rejected.[(17)] Paradoxically, in some labour law cases, it has been held, that not only would it have been reasonable for arbitrators to consider such evidence, but also, that the failure to consider such evidence constituted a serious error.[(18)] In spite of this jurisprudence, the relevance of such evidence is questionable.

IV ANALYSIS

A. *Prima Facie* Case

[80] I find that Mr. Quigley has met his initial onus of establishing a *prima facie* case of discrimination on the basis of disability. Mr. Quigely's medical condition was at least one factor in Ocean's ultimate decision to release him contrary to s. 7 of the *Canadian Human Rights Act*. He was terminated on the basis that his disability prevented him from returning to work. The onus shifts to Ocean to establish a BFOR.

B. Identifying the Standards Leading to Mr. Quigley's Release

[81] The facts in this case are not akin those in either "*Meiorin*" or "*Grismer*". In *Meorin*, a particular aerobic standard was being advocated by the government for firefighters. In *Grismer*, a particular visual field was required of applicants seeking a driver's license. In those cases, the Court propounded the test whereby the rationality, good faith and necessity of the standard is to be judged. In this case, Ocean's standard ensured that Mr. Quigley was individually assessed by his own physician. The company's physician could accept or reject this assessment. In the event of disagreement, the company had a provision for independent examination by a physician jointly selected by the company and the employee's union. Neither, Mr. Quigley nor the Commission seriously argued that the company's procedure of assessing medical fitness for a return to pre-disability work was inherently discriminatory. The Company's practice of requiring employees seeking to return to work after prolonged illness to demonstrate their fitness for work, was consistent with the industry standard and the *Canada Shipping Act*. The Company's goal was to ensure that Mr. Quigley could safely and efficiently perform the tasks of his occupation. The procedure was adopted in good faith. It was reasonably necessary in that it ensured that

Mr. Quigley was tested against a realistic standard that reflected his unique capabilities and inherent dignity up to the point of undue hardship. The procedure encompassed individual testing.

[82] Rather, I interpret the arguments of Mr. Quigley and the Commission as follows:

> • That, in fact, Mr. Quigley was fit to return for a *work trial* and work hardening, as a deckhand, after his extended disability absence;
>
> • That, in fact, Ocean breached its duty to accommodate Mr. Quigley, pre-termination, by failing to accommodate his disability to the point of undue hardship. Ocean did not raise with Dr. Nelems the possibility of Mr. Quigley performing the trial as a 3rd person on the Evco Crest prior to termination. By failing to do so, it inappropriately obtained the tacit approval of Dr. Nelems to terminate Mr. Quigley. Dr. Nelems' agreement with Mr. Chapman that it would not have been safe to have Mr. Quigley perform a work trial as a member of a two-person team, was, in the circumstances, insufficient to discharge Ocean's obligations to creatively accommodate Mr. Quigley. From Mr. Quigley's perspective, Dr. Nelems' post-termination September 13, 1996 letter, supporting a work trial for Mr. Quigley as a 3rd man on the Evco Crest, provided evidence that such accommodation was possible, and ought to have been offered to Mr. Quigley in the first instance, pre-termination.

[83] Before dealing with these arguments, I note that neither Mr. Quigley, nor the Commission, argued that Ocean ought to have accommodated him in any other job than that of deckhand. Negligible evidence of the extent of Ocean's other divisions and ventures was tendered before the Tribunal. Thus, this case is limited to very narrow factual determinations of whether Ocean ought to have and could have accommodated Mr. Quigley in the deckhand position.

[84] I find that Ocean accommodated Mr. Quigley from 1991 to 1996 in a judiciously fair and reasonable manner. I heard from Mr. Chapman. At all times, he sought the due accommodation of Mr. Quigley. Indeed, he chose to retain Mr. Quigley as an employee in 1993, even though Ocean's human resource manager recommended that Mr. Quigley be terminated. As well, in 1993, he gave Mr. Quigley, not one, but several work trials. When these were not successful, he met with Mr. Quigley to understand his needs and to determine how to proceed in protecting his best interests. In 1993, Mr. Chapman received and read the medical information from Dr. Nelems, and chose to support Mr. Quigley's further disability claim.

[85] From 1993 to 1996, he retained Mr. Quigley as a company employee and awaited his return to work post-surgery.

[86] He also treated him fairly when Mr. Quigley sought a return to work in 1996. When he received Dr. Nelems' August 6, 1996 letter, Mr. Chapman was rightfully concerned. Dr. Nelems wrote that, according to Mr. Quigley, he was only 60% better on his right side, and that he had not fully recovered. Dr. Nelems confirmed that Mr. Quigley had reached his "plateau" in terms of improvement on the right side. Dr. Nelems, also, confirmed that Mr. Quigley had "good days

and bad days". Dr. Nelems confirmed that if Mr. Quigley had a particularly problematic activity, his pain returned. Dr. Nelems found that while Mr. Quigley had improved, he would continue to have ongoing problems. Dr. Nelems, also found, that now, Mr. Quigley's "left side" thoracic problem had worsened and needed to be followed over time. In this letter, Dr. Nelems, placed the decision of whether Mr. Quigley ought to have a work trial entirely on Mr. Quigley. In fact, this cannot be the case. The company has a responsibility to ensure that the worker and his co-workers are duly protected. Dr. Nelems wrote that the company would have to be flexible to accommodate Mr. Quigley in terms of frequency and amount of work. Mr. Chapman made efforts to determine what such accommodation might entail.

[87] Mr. Chapman made every reasonable effort to accommodate Mr. Quigley, who failed to acknowledge the seriousness of his medical condition. It was Mr. Quigley who insisted that he be allowed to work in a more onerous job than his pre-disability job of cook-deckhand. It was Mr. Quigley who insisted that he be given a work trial as a deckhand and thereby curtailed the possibility of accommodation in another job. Mr. Quigley's request was simply unrealistic: deckhand duties involved heavy lifting, upward pulling underneath the chest, and simultaneous grasping and holding, downward reaching and bending, often in the dark, and upward and downward climbing upon free swinging ladders at high elevations over the ocean or dock. The work was such that the arms were in front of and overhead of the body. It was physically demanding work involving awkward repetitive heavy reaching, pulling and bending. There was insufficient evidence before Mr. Chapman, that Mr. Quigley could perform these duties as a component of cook-deckhand work, let alone for 12 hours per day as a deckhand.

[88] Yet, in spite of the clear implications of Dr. Nelems' medical assessment, Mr. Chapman met with Mr. Quigley to discuss how to accommodate him. When Mr. Chapman voiced his concerns, arising from Dr. Nelems report, to Mr. Quigley, Mr. Quigley asked Mr. Chapman to speak to Dr. Nelems directly. He also requested that Mr. Chapman speak with his union representative, Mr. Al Engler. Mr. Chapman agreed to both these requests. I find that he continued to search for ways to accommodate Mr. Quigley.

[89] When Mr. Chapman spoke to Dr. Nelems, Dr. Nelems confirmed the contents of his letter. Dr. Nelems was unable to state that Mr. Quigley was capable of working as a deckhand. Dr. Nelems also testified before this Tribunal. I found him to be a physician of ideal integrity, compassion and intellectual acumen. Yet, even in his ardent desire to support Mr. Quigley, the best that he could say of Mr. Quigley's condition pre-termination, was that Mr. Quigley ought to have been given a *work trial*. Dr. Nelems, was scrupulous in insisting that in 1996, he had not advocated that Mr. Quigley was fit for return to work. In supporting a work trial, Dr. Nelems, acknowledged that at the time, he had been unaware of the 1993 trial on the Evco Crest, and he freely acknowledged that he did not possess specialization in ergonomics. Rather, Dr. Nelems agreed, that the Company had greater knowledge of the cook-deckhand and deckhand jobs and their requirements. Finally, in their conversation, Dr. Nelems agreed with Mr. Chapman, that it would be unsafe to send Mr. Quigley on a work trial as a deckhand as part of a two-person team. Given that Dr. Nelems' information about the job came from Mr. Quigley, who at no time explained the cook-deckhand and deckhand jobs to Dr. Nelems in necessary detail, I am not satisfied that Dr. Nelems had sufficient understanding of the deckhand job to credibly advocate a work trial for Mr. Quigley in the position. Indeed, in April of 1995, Dr. Nelems suggested that

Mr. Quigley could return to work *pending* clearance from Dr. Lacroix, Mr. Quigley's family physician.

[90] In sum, I find that Mr. Chapman reasonably assessed Mr. Quigley as being unfit to perform a work trial as a deckhand. His assessment was consistent with those of Dr. Nelems, Dr. Troffe and Dr. Lacroix, pre-termination. Although the Commission argues that Mr. Chapman's assessment was impressionistic, I do not agree. His assessment was based on a number of factors. These included the fact that deckhand duties were more onerous than those of the cook-deckhand and that Dr. Nelems' 1996 assessment of Mr. Quigley's medical condition was poor. Mr. Chapman also based his assessment on Mr. Quigley's marginal performance in the 1993 work trial, pre-surgery. Given that the surgery had been only 60% effective at best, and given that he now had left sided TOS, and the other medical difficulties, it was logical to believe that his abilities would have been, at best, similar to those in 1993, pre-surgery.

[91] While, I do not place excessive weight on the civil pleadings, in his civil case against Maritime, I do note that they are also consistent with the evidence that Mr. Quigley was wholly and continuously disabled from at least July 15, 1996 onward, if not from 1991 onward. In the pleadings, Mr. Quigley claimed that the insurer, Maritime Life, ought to pay him disability benefits, as he was unable to perform any job at 60% of his former rate of pay, which job would include that of a cook. When I specifically asked Mr. Quigley about these pleadings, he stated that he has always taken the position, that he could perform deckhand duties, but not cook-deckhand duties. His position was that he could perform the job of deckhand, but no other job. While I sympathize with Mr. Quigley, I cannot accept this position as being logical. How could he be physically fit enough to perform the job of a deckhand, yet concomitantly, be physically unfit to work in the less physically onerous jobs of cook-deckhand or cook?

[92] The Commission and Mr. Quigley argue that the health care professionals who assessed Mr. Quigley, explain that shift work as a deckhand is particularly suited to someone coping with TOS, because, *inter alia*, the shift work allows for extended periods of time of rest and medication, and it is not a sedentary job, such as a cook's job, which would be more difficult for the complainant to tolerate. I do not find this position logical. The duties of a deckhand, in particular, are at best onerous and physically demanding. While Mr. Quigley may be prepared to perform the duties in pain, experience of pain would decrease his ability to perform competently in the event of an emergency. Indeed, the 1993 work trials confirm that he was experiencing both pain and numbness on the job, which he continued to experience post-surgery.

[93] Mr. Quigley argues that the cook, the cook/deckhand, and the deckhand positions are interchangeable because of the November 1990 job reclassification. I understand Mr. Quigley to be arguing that since he was unable to perform a work trial as a cook-deckhand, the company should have offered him a trial as a deckhand, as the duties were the same. While, I agree that the company offered cooks and deckhands the cook-deckhand position in 1990, this does not mean that the duties were identical. To the contrary, as already indicated, I find that the cook-deckhand position is a less onerous one than that of the deckhand.

[94] Penultimately, the Commission argues that Ocean could have further accommodated Mr Quigley. I do find that Mr. Chapman, and the company, had better information about the

extent of Ocean's work force in other positions, and the nature of various jobs available. Yet, as already noted, neither the Commission, nor Mr. Quigley, sought accommodation of Mr. Quigley in any position other than that of the deckhand on the Evco Crest. In this case, Ocean's obligation was limited to considering how to accommodate Mr. Quigley in succeeding to work as a deckhand on the Evco Crest. I do not find that any further accommodation was possible in the deckhand job.

[95] At this point, I wish to deal with the issue of post-termination evidence adduced in this hearing. As discussed, the use of post-termination evidence has not been unequivocally endorsed by the courts. Thus, I place no weight on it. Further, even if I were to place any weight on the same, I do not find it particularly helpful to Mr. Quigley's position. The Commission and Mr. Quigley argue that this evidence supports a finding that Mr. Quigley could work as a deckhand. I do not agree. First, while a Transport Canada physician did certify Mr. Quigley as fit to perform a deckhand job in 1999, Dr. Lacroix, in her 1997 assessment of Mr. Quigley, did not agree. Dr. Nelems himself, showed deference to Dr. Lacroix, Mr. Quigley's general practitioner. Dr. Lacroix's post-termination assessment of Mr. Quigley's condition, by way of letter of April 22, 1997, is consistent with Dr. Troffe's 1993 assessment, that Mr. Quigley ought to have retired from the marine industry. In this 1997 letter, Dr. Lacroix wrote that Mr. Quigley was unable to return to work as a cook-deckhand, or in any other job. In making this assessment she observed, that from a medical perspective, he was unable to return to his difficult work on the boats. On April 21, 1997, Dr. Lacroix indicated that she encouraged Mr. Quigley to quit his work on the boats. Second, Dr. Hirsch's 1997 report was not helpful for a number of reasons. Dr. Hirsch appears to have been retained by Maritime to support its position that Mr. Quigley was capable of returning to work after Maritime terminated his disability benefits, and it contradicts the findings of Dr. Lacroix, and the extensive medical evidence tendered in this hearing. Lastly, I do not find the Martime work evaluation report of May 2001, helpful for some of the same reasons. As well, it listed his many functional difficulties, and based its conclusion on the wrong NOC category. Thus, the post-termination evidence is of limited assistance to Mr. Quigley.

[96] Finally, the Commission may argue, that there was one last step that Mr. Chapman could have taken in this case, before terminating Mr. Quigley. He could have sent Mr. Quigley to the Company's physician for his assessment as to whether Mr. Quigley was fit for a *work trial* on board the Evco Crest. At this juncture, I note that Mr. Chapman testified that he placed more reliance on Dr. Nelems' assessment than he did on that of the Company physician, Dr. Troffe. Given Dr. Nelems' statements pre-termination about Mr. Quigley's poor medical condition, there was no need at this time to send Mr. Quigley to Dr. Troffe. Based on all the evidence before me, in particular Mr. Quigley's deteriorated medical condition, I do not find that there was any possibility that the company's physician would have authorized Mr. Quigley for a work trial in 1996 as a deckhand. In the event of further arbitration by an independent physician, I do not find sufficient evidence to support the possibility that such physician would have found Mr. Quigley as being physically fit to work as a deckhand at the time, or at any reasonable time in the foreseeable future.

VI CONCLUSION

[97] I find that Ocean terminated Mr. Quigley on the basis of his disability. However, Ocean began a series of accommodating measures from 1991 onward. It finally fulfilled its obligation of attempting to accommodate Mr. Quigley, to the point of undue hardship, in 1996, when Mr. Quigley insisted that he be accommodated with respect to the deckhand position. While I sympathize with Mr. Quigley's painful and difficult disability, and I admire his fortitude and desire to continue to work, I must dismiss the complaint.

"Original signed by"

Shirish P. Chotalia

Ottawa, Ontario

April. 3, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T582/4000

STYLE OF CAUSE: Patrick E. Quigley v. Ocean Construction Supplies

PLACE OF HEARING: Vancouver, British Columbia:

October 9. 10, 11, 12, 2001 &

November 13, 13 & 15, 2001

DECISION OF THE TRIBUNAL DATED: April 3, 2002

APPEARANCES:

Patrick Quigley On his own behalf

Daniel Pagowski and Carla Qualtrough For the Canadian Human Rights Commission

Michael Hunter For the Respondent, Ocean Construction Supplies

1. [1] 1986, Chap. S-9, S. 335.

2. [2] Exhibit HR-2, Tab 44, Page 5

3. [3] National Occupational Classification of various jobs prepared by Human Resources Development Canada, Exhibit R-5.

4. [4] [1999] 3 S.C.R. 3

5. [5] [1999] 3 S.C.R. 868

6. [6] Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd. [1985] 2 S.C.R. 536.

7. [7] At the relevant time s. 15 read as follows: "It is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement…"

8. [8] Central Alberta Dairy Pool v. Alberta (Human Rights Commission) [1990] 2 S.C.R. 489.

9. [9] *Meiorin* adopts the decision in *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 984.

10. [10] *Grismer*, *supra*, at para 32.

11. [11] *Grismer*, *supra*, at para 42.

12. [12] *Grismer*, *supra*, at para 41.

13. [13] *Grismer*, *supra*, at paras 41 and 42.

14. [14] *Meiorin*, *supra*, at para 63. See also *Chambly v. Bergevin* [1994] 2 S.C.R. 525 at p. 546.

15. [15] Cie minière *Québec Cartier v. Quebec (Grievances Arbitrator)*, [1995] 2 S.C.R. 1095 Once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he/she cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and

equitable. In these circumstances, an arbitrator would be exceeding jurisdiction if he/she relied on subsequent-event evidence as grounds for annulling the dismissal.

16. [16] *Farber v. Royal Trust Co.* [1997] 1 S.C.R. 846: the Court held that the trial judge erred in admitting *ex post facto* evidence when its relevance to the case had not been established, and found that moreover, its admission prejudiced the appellant since, in the Court's view it distorted the trial judge's analysis.

17. [17] *Conte v. Rogers Cablesystems Ltd.* (1999) 36 C.H.R.R. D/403 (CHRT).

18. [18] *Toronto (City) Board of Education v. O.S.S.T.F., District 15* [1997] 1 S.C.R. 487.