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

BETWEEN:

JOHN STEVENSON

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN SECURITY INTELLIGENCE SERVICE

Respondent

REASONS FOR DECISION

Chairperson T.D. 16/01

2001/12/05

PANEL: GUY A. CHICOINE,

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I. INTRODUCTION

[1] On August 1, 1997, the complainant, John Stevenson, an employee of the Canadian Security Intelligence Service (CSIS) working out of the regional office in Vancouver, provided his employer with a medical certificate from his own doctor requesting that he be allowed sick leave for a period of three months. Mr. Stevenson had been expected to report to a new position at CSIS headquarters in Ottawa on September 1, 1997.

[2] While the medical certificate did not state the nature of the illness, it was known by Mr. Stevenson's supervisors that this was in effect a request for a stress leave. A medical evaluation was immediately requested by Mr. Stevenson's supervisors to determine his degree of fitness to carry out his responsibilities within the Service. The chairperson of the health evaluation committee provided the employer with three written reports, the last being dated December 17, 1997, in which she stated that Mr. Stevenson was not able to work in Ottawa at this time.

[3] On January 14, 1998, a letter was sent to Mr. Stevenson advising him that he was being released on a medical discharge effective as at February 14, 1998. As at that date, Mr. Stevenson had been in the employ of CSIS and its predecessor, the Royal Canadian Mounted Police Security Service, for more than 26 years.

[4] On July 15, 1998, Mr. Stevenson filed a complaint with the Canadian Human Rights Commission alleging that his employer had discriminated against him by terminating his employment because of his mental disability, contrary to Section 7 of the *Canadian Human Rights Act* (the *CHRA*).

II. THE EVIDENCE

A. Mr. Stevenson's Work History

[5] John Stevenson was born in Perth, Scotland in 1944 and emigrated to Canada in 1967. By this time he had obtained an Honours Degree in Geography and a post-graduate diploma in Education. He taught school in Saskatchewan for four years before deciding to join the RCMP in 1971. His real interest was in security intelligence and in March of 1974 he joined the Security Service branch. He was stationed continuously in Vancouver until 1984 when the responsibility for security service was transferred to a civilian intelligence service known as the Canadian Security Intelligence Service, or CSIS. Mr. Stevenson chose to move to CSIS so that he could continue doing intelligence work. He held various positions as an intelligence officer, sometimes in a supervisory capacity, but not in management. Mr. Stevenson knew that to advance into a management position he would first require experience in headquarters in Ottawa. He declined

any offer to participate in the management training programs of the Service. His entire career was spent in the British Columbia region.

[6] By all accounts, Mr. Stevenson was an exemplary employee. The performance evaluations presented at the hearing covering the period from November 1, 1992 to October 15, 1996 indicate either fully satisfactory or superior performance in all categories and that he exhibits a high degree of integrity. In 1977 he was presented with the Queen's Jubilee Medal for intelligence work and in 1992 he was awarded the 125th Confederation Medal for intelligence-related work.

[7] On July 26, 1996, Mr. Stevenson wrote in his performance evaluation that he was content with his current posting in BC Region, Human Sources, where he had been posted since June of 1996. He further stated, "Within the next two years, writer will probably be leaving the Service." It is evident that Mr. Stevenson was beginning to contemplate that his long and distinguished career with CSIS was coming to a close. Mr. Stevenson had begun experiencing certain difficulties with his supervisor, which affected his health and his attitude toward work. It is my intention to review the events of the last two years or so of Mr. Stevenson's career in order to put into perspective the defining act which Mr. Stevenson complains was discriminatory, namely, his medical discharge.

B. The Problems Begin

[8] Mr. Stevenson testified that in October of 1995, when he was Head of Internal Security, he had been conducting a very sensitive investigation involving an allegation against one of their own members. He says that he worked very hard at protecting the information on the case, but came to realize that some of the information, which had been passed on to him in confidence, had somehow gotten out into the membership. After trying for three days, Mr. Stevenson finally met with the Director General for BC Region, Mervyn Grierson, on October 11, 1995, to tell him about his concerns, which he did. Mr. Stevenson stated: "Then he completely blindsided me and said, yes, the information is out, and you have leaked it." Mr. Grierson then named the two individuals to whom Mr. Stevenson had allegedly given the information.

[9] According to Mr. Stevenson, Mr. Grierson then went on to advise him that because he had leaked this information, this breach would be reported to the Coordinated Law Enforcement Unit and that the leak of the information and his being responsible had already reached the highest levels of the Service. He also advised him that the Director and the Deputy Director of CSIS were involved. He also expected that the opposition critic in the House of Commons would have the information and that she would attack the Director of the Service in Justice meetings in Ottawa.

[10] Mr. Stevenson says that he completely denied his involvement in the leak and he asked Mr. Grierson to bring one of the fellows to whom he had allegedly given the information into the meeting to confirm that there was no truth to the allegation. Mr. Grierson refused to do this and instead asked Mr. Stevenson if he would be willing to take a polygraph test at CSIS headquarters in Ottawa. Mr. Stevenson agreed to participate in a polygraph test and arrangements were made to fly him to Ottawa the next day.

[11] When questioned about the effect of the allegation, Mr. Stevenson testified that it was the worst allegation which could be leveled against anyone involved in intelligence work. He felt that he was being accused of being a traitor, and moreover, not only was he not believed when he denied the allegation, but he was now being asked to take a polygraph test. He says that when he went back to his office that evening, he was in a state of shock, he could not believe what had happened, and he phoned his wife to come and get him. He reported for the polygraph test on October 13, 1995, and following an internal investigation, he was cleared. Mr. Stevenson says, "I was exonerated, but I was devastated."

[12] Mr. Stevenson recognized that he would require help of a psychological nature to deal with his anxiety and depression. He immediately contacted Mr. Russell King, a registered psychologist, through the Employee Assistance Program. He testified that he essentially became a recluse within the Service. He cut off contact with everyone because he was so ashamed of what had happened to him. He went for coffee by himself, took his lunch break alone at the downtown library, and he went straight home after work. He no longer mentored the new Intelligence Officers like he used to.

[13] Mr. Stevenson's relationship with the Director General of BC Region took another turn for the worse in April of 1996 when Mr. Stevenson used a chance encounter to speak to one of the persons whom he had suspected of making the false allegation the previous October. This lady complained to Mr. Grierson who then called Mr. Stevenson in to berate him for an hour in front of his supervisor, Doug Switzer. He accused Mr. Stevenson of violating his oath of office, of not taking the matter seriously, and then informed him that he was reporting the matter to those at a higher level in Ottawa. A few days later, Mr. Stevenson was transferred out of his position in Internal Security to a position in Human Sources. While this was a lateral transfer, Mr. Stevenson advised Mr. Grierson of his concern that the transfer would appear to others to be punishment for the alleged leak of information. Mr. Grierson advised Mr. Stevenson to "wear it" as he was moving him and that was it.

C. The Transfer to Ottawa

[14] On June 6, 1996, the Director General of Personnel Services, Douglas Outhwaite, sent out a memorandum to all of the regional office directors general reminding them about the annual relocation exercise which would be held in October. He was asking them to identify people within their branches or regions who they feel should be relocated, keeping in mind the objectives of the relocation exercise, which included: 1) to open up spaces in the regional offices for intelligence officers in training; 2) to identify experienced officers in regional offices who did not have headquarters experience and who could make a contribution to headquarters operations; 3) to give other intelligence officers an opportunity to work in other areas or regions; and 4) to provide employees new career opportunities, especially those interested in moving into management.

[15] Mr. Outhwaite's memorandum also stated that a message seeking regional volunteers to identify themselves for a transfer to headquarters had been sent out. Employees were reminded to keep their respective directors general informed of their interest and their biographies updated with their desires reflected.

[16] On July 30, 1996, Mr. Grierson sent a memo to Mr. Outhwaite suggesting that they may wish to consider transferring Mr. Stevenson to headquarters. The memo stated: "Mr. Stevenson is an excellent employee with a wide variety of field experience in [British Columbia Region] but has never had occasion to serve in [headquarters]."

[17] In a working document for the October annual relocation exercise, Mr. Stevenson's name is included and he is described as follows: "Thoughtful, self-motivated with high degree of integrity. Pursues investigations with diligence and ingenuity. Is thoroughly professional known for his discretion. Is an excellent writer and readily accepts additional duties while maintaining effectiveness." The document further states that he should be considered for RAP, which is the acronym for Requirements Analysis Production, one of the operations units in Ottawa headquarters.

[18] By October 18, 1996, Mr. Outhwaite was recommending 35 staffing transactions to his superiors, including the transfer of Mr. Stevenson to RAP effective the Spring of 1997. On October 25, 1996, the various directors general were advised that they should advise the employees of the various transfers.

[19] On October 23, 1996, Mr. Stevenson was on a day of leave when he was requested to return a phone call to Mr. Grierson from home. This is when Mr. Grierson informed Mr. Stevenson of his transfer to Ottawa. Mr. Stevenson testified that Mr. Grierson giggled and expressed regret that he was not present in person "to observe my body language." When Mr. Stevenson went to see Mr. Grierson he indicated that he would have appreciated some advance notice that he was being considered for a transfer, with a wife working part-time and two children in university full-time. He expressed disappointment in not being consulted in the process. Mr. Grierson advised him that since he had not put his own name on the lateral list, no consultation was needed or required. It was at this meeting that Mr. Stevenson found out that he was going into RAP. He was to start his new job in Ottawa on June 30, 1997.

D. Questioning the Transfer

(i) Application for Severance Package

[20] Mr. Stevenson was not getting much support at home for this impending transfer. He decided to apply for a severance package from CSIS through Mr. Grierson's office. In his memo of January 13, 1997, he writes: "As I mentioned in my Performance Evaluation this past year, it was and is my intention to retire within the next two years and my financial planning has been in accordance with this intention. The unexpected transfer order has, as you can appreciate, impacted dramatically on this given my children's attendance at the University of British Columbia. The provision of a package will enable one to retire from the Service this Fall with dignity and some measure of financial security given my current age of 52 years."

[21] When Mr. Stevenson took the memorandum to Mr. Grierson with the request to forward it to headquarters, he was told by Mr. Grierson that: "Nobody was going to make any fucking money off a fucking transfer." On January 31, 1997, Mr. Outhwaite advised Mr. Stevenson that his request for a severance package was denied since the Service was not laying him off and a

position was available for him at headquarters. He further stated that that there was a requirement for experienced intelligence officers at headquarters, that his extensive regional experience will be an asset in headquarters and that they looked forward to his arrival.

(ii) Request for Two Year Deferral

[22] Meanwhile, on January 27, 1997, Mr. Stevenson wrote to Mr. Peter Bulatovic, the Assistant Director of Human Resources at headquarters in Ottawa seeking a deferral of his transfer for a period of two years. Mr. Stevenson told Mr. Bulatovic about his son graduating in May and wanting to continue post-graduate studies at UBC. His daughter was in first year university at UBC. His wife was working part-time at a medical office. None of his family members wanted to move to Ottawa. He also told Mr. Bulatovic that he had considered moving to Ottawa himself but that such a family separation was not financially feasible. He further indicated that throughout his 25 years of service, he had never aspired to be anything more than an intelligence officer and had not participated in any Career Development Streams of the Service. He also mentioned his loyalty and dedication, even when requested to take a polygraph test when a base allegation had been made about him while he was in Internal Security. He concluded by saying that once his children had finished university, he would then move with his wife to Ottawa to continue to contribute to the service.

[23] On February 3, 1997, Mr. Bulatovic denied the request for a two year deferral, and he was advised to transfer to headquarters as ordered.

(iii) Deferral to September

[24] Mr. Stevenson then requested that he be allowed to commence working at his new position in Ottawa at the beginning of September, and on February 28, 1997, this request was granted by his new supervisor at RAP in Ottawa.

(iv) Temporary Dual Residence Application

[25] On March 17, 1997, Mr. Stevenson wrote to Mr. Outhwaite to request temporary dual residence assistance so that he could move to Ottawa himself in early September and leave his family in Vancouver to allow his son to complete his University studies at UBC. On April 10, 1997, Mr. Outhwaite responded that his request had been approved for the period required for his son to complete the required credits.

(v) Stress Leave Inquiry

[26] On April 21, 1997, Mr. Stevenson sent an e-mail to a long time friend and co-worker in the Services, Mr. Emil Spilchak, asking for "off the record" advice with regard to possibly taking a stress leave. Mr. Spilchak was the Chief of Human Resources for CSIS in the Prairie Region. He had met Mr. Stevenson in 1974 when they were both with the RCMP and he was very knowledgeable about personnel matters. Mr. Stevenson and Mr. Spilchak had also had a number of discussions with regard to Mr. Stevenson's transfer to Ottawa and Mr. Spilchak was aware of the difficulties which this ordered transfer were causing for Mr. Stevenson and his family. After

receiving the e-mail, Mr. Spilchak did speak to Mr. Stevenson by telephone and advised him that he would need a medical certificate from his own doctor. He also advised him that the Service would probably accept a leave request for a period of up to three months, but after that period, if he did not return to work, a health evaluation would be requested.

(vi) Cancellation of Transfer on Compassionate Grounds

[27] Mr. Stevenson testified that as events wore through 1997, he felt that his psychological health was not in the best of condition. His family physician also expressed concern about his mental health. Mr. Stevenson requested a meeting with Chantal Plante, a psychologist attached to CSIS Health Services in Ottawa. She met with Mr. Stevenson in Vancouver on June 2, 1997, and they discussed the possibility of his making a request to further delay his transfer on compassionate grounds. On June 18, 1997, Ms. Plante sent an e-mail to Mr. Stevenson advising him that he would need to write a letter requesting the compassionate leave and she offered to write a letter herself summarizing her own observations of his psychological state based on her interview with him. Ms. Plante would also include information she had received from two psychologists whom Mr. Stevenson had already seen.

[28] Near the end of June or early July, Mr. Stevenson spent five days in Ottawa on an accommodation hunting trip. He did not find anything suitable to rent. He decided that he would wait until he started his new job to resume his search and stay in a hotel in the mean time.

[29] On July 17, 1997, Mr. Stevenson sent a request for cancellation of his ordered transfer to Mr. Outhwaite. A memorandum prepared by Ms. Plante was attached, and Mr. Stevenson gave Mr. Outhwaite permission to review the psychological reports from Mr. Russell King and Mr. Paul James. Ms. Plante's memorandum referred to the significant impact which various work events had had on Mr. Stevenson's emotional and psychological well-being over the past two years and the fact that he viewed the transfer as punishment. She mentioned that his self-esteem and self-confidence had been dramatically eroded to the point of eliciting suicidal ideations. She also mentions that Mr. Paul James had diagnosed him as suffering from a major depression of moderate severity. Ms. Plante went on to describe the effect which Mr. Stevenson's deteriorating health and the stress of the impending transfer had had on his family. She concluded that the transfer would not be beneficial to either Mr. Stevenson or the Service as it would increase the risk of further emotional deterioration, affect his performance, and accentuate family and marital distress.

[30] The report of Mr. Paul James, Registered Psychologist, was dated June 23, 1997. Had he bothered to read these reports, Mr. Outhwaite would have learned that Mr. Stevenson had been consulting Mr. James since September of 1996. He described Mr. Stevenson's condition as a Major Depressive Disorder of moderate severity. He attributes Mr. Stevenson's condition, in part, to the impending transfer and his family's reaction to it. He was of the opinion that Mr. Stevenson's depression would be exacerbated if he went to Ottawa before his problems with his family were addressed. He recommended that the transfer be delayed for at least nine months to address these issues with appropriate therapy.

[31] The report of Mr. Russell King, M.A., R.C.C. is dated May 31, 1997. Mr. Outhwaite testified that he did not read this report either as he felt he was not qualified to interpret doctors' reports or any medical diagnostic materials. Had he read the report, he would have learned that Mr. Stevenson's psychological problems were related to the October 1995 incident when his integrity as an intelligence officer was shattered by the allegation that he was the one who leaked certain information. This event affected his relationship with his family, friends and co-workers. He mentions the fact that the re-assignment within the region in the spring of 1996 had a further negative impact. He then goes on to say that Mr. Stevenson's transfer to Ottawa will be extremely disruptive to his son's education and will place considerable stress on his marriage.

[32] On July 28, 1997, Mr. Outhwaite sent an e-mail to Mr. Stevenson in which he advised that he had reviewed the request with Chantal Plante, Linda Dodd (the Chief of Health Services), Jean-Claude Bernais (the Assistant Director of Operations), and Peter Bulatovic (the Deputy Director of Human Resources). Mr. Outhwaite denied the request for cancellation of the transfer to headquarters. In his e-mail he states that he recognizes that transfers are stressful, but that medical resources are available in Ottawa to assist him and his family. He tells Mr. Stevenson that his position with the Service is in Ottawa and provisions are in place to move both him and his family. He further adds that the decision to leave his family in Vancouver is a personal choice.

E. Sick Leave and the Medical Evaluation

[33] On July 31, 1997, Mr. Stevenson obtained a medical certificate from his family physician, Dr. John Hathorn, in which the doctor advised the new Director General for the BC Region, Mr. William Van't Slot, that Mr. Stevenson would have to be off work from August 5, 1997 for a period of three months, provisionally, due to a medical illness. He advised that during this period Mr. Stevenson would be undertaking further specialist evaluation and stabilization on medication.

[34] On August 1, 1997, being the day he received the medical certificate, Mr. Van't Slot forwarded an e-mail to Mr. Outhwaite advising him that Mr. Stevenson was off duty sick. He writes: "Based on what I have learned so far about John's situation, I plan early next week to forward a request to [name deleted] for a Health Evaluation to determine John's capability to perform his duties on a regular and consistent basis."

[35] On August 5, 1997, Mr. Bulatovic sent an e-mail to Mr. Outhwaite in which he states: "There are clearly only three options here: retirement; retirement based on medical grounds; implement transfer to Ottawa. I advised [Mr. Van't Slot] that a Health Evaluation will determine whether he is fit to return to work in Ottawa, there is no job for him in Vancouver."

[36] As he had indicated, Mr. Van't Slot prepared a Request for Health Evaluation and forwarded it to Mr Outhwaite on August 5, 1997. The request ties the refusal to reconsider the request to transfer to headquarters with the provision of the medical certificate. Under the heading, "Accommodations Made", Mr. Van't Slot writes that Mr. Stevenson has assured him that he hoped to return to work once he was deemed medically fit. He also stated that Mr. Stevenson was not interested in "volunteering for a medical pension if indeed it was available." He then

stated: "In view of the lengthy course, i.e. two years, Mr. Stevenson claims his illness has taken and the considerable efforts he has already undertaken to obtain evaluation of present and past psychologists, I would like to have a Health Evaluation undertaken as soon as possible."

[37] The Chief, Health Services, Ms. Linda Dodd, was the person responsible for the overall coordination of health evaluations pursuant to CSIS Human Resources Policy HUM-604. She was also responsible for assessing the findings and recommendations of the health evaluation and preparing a subsequent report for the Assistant Director, Human Resources (Mr. Bulatovic), through the Director General, Personnel Service (Mr. Outhwaite), recommending the employee as "Fit", "Unfit", or "Fit with Limitations" for continued employment with the Service. A letter was sent to Mr. Stevenson on August 13, 1997 requesting his cooperation with the health evaluation.

[38] The physician appointed by CSIS to conduct and to chair the health evaluation team was Dr. H. Patricia Fibiger of Vancouver. This was to be her first health evaluation. She was chosen from a roster of physicians who had already passed security clearance because of the sensitive nature of intelligence work.

[39] On November 18, 1997, Dr. Fibiger sent a four page letter to Ms. Dodd which she referred to as "an interim report on the Health Evaluation of Mr. Stevenson." In her report she mentioned that she had examined Mr. Stevenson on two occasions in October and that she had had the benefit of reviewing his medical file. She confirmed that Mr. Stevenson was suffering from a major depressive illness as well as an anxiety disorder. She described some of the symptoms of these two psychiatric problems experienced by Mr. Stevenson. She stated that Mr. Stevenson is a perfectionist and takes great pride in his high standard of performance at work. She mentioned that Mr. Stevenson was working on his problems with depression and anxiety through psychotherapy and medication. She also indicated that Mr. Stevenson did not want to move away from Vancouver because he viewed the transfer as punishment for his alleged inappropriate behaviour and because of the effect it would have on his son.

[40] Dr. Fibiger stated that resolution of these conflicts would not be rapid. However, she expected that with improvement in these areas, along with the passage of time, and the benefit of antidepressant medication, his depression would become less severe. She wrote: "Mr. Stevenson at this time appears to be totally unfit to carry out his work responsibilities. (...) Hopefully after a few more months of intense therapy Mr. Stevenson will be able to return to his current job. Returning to work in Vancouver seems the most appropriate course to take in re-introducing Mr. Stevenson to the work place. (...) Returning the patient to work in a new and different setting, such as Ottawa, would add strain and not only postpone the time of his re-introduction to the work place, but also make success of his return less likely. After an as yet undetermined time in his present job site, Mr. Stevenson is expected to be confident enough to tolerate a transfer away from Vancouver." The interim report concluded by saying that Mr. Stevenson was being referred to a psychiatrist for a second opinion.

[41] On December 10, 1997, Dr Fibiger sent a second letter to Ms. Dodd advising her that Mr. Stevenson had been unable to keep his appointment with the psychiatrist to whom he had been referred for a second opinion. Dr. Fibiger writes: "My best medical opinion, without the benefit

of this consultation, is that Mr. Stevenson at this time is totally unfit to return to his normal employment. He does not appear to be psychologically well enough to tolerate a transfer away from Vancouver at this time."

[42] Dr. Fibiger also provided the following prognosis: "I expect Mr. Stevenson will need the next six months, with continued intense psychotherapy and psychoactive medication, to improve his mental state. After six months of such therapy Mr. Stevenson should be reassessed as to fitness for full employment with no limitations."

[43] While Dr. Fibiger's second letter seems clear enough, Ms. Dodd wrote to Dr. Fibiger on December 17, 1997 and asked the following question: "Based on your medical opinion, is Mr. Stevenson able to work in Ottawa at present?" Dr Fibiger responded on the same day as follows: "It is my medical opinion that Mr. John Stevenson is not able to work in Ottawa at this time."

F. The Decision to Medically Discharge

(i) The Recommendation of the Chief, Health Services

[44] At the hearing, Ms. Dodd testified that no one but she had seen the interim report that Dr. Fibiger wrote on November 18, 1997. She claimed that the Health Service report that she was to prepare was not to contain any medical or psychological diagnosis. Since Dr. Fibiger had included diagnostic information in her interim report, she decided that no one else should see it because "no one is a doctor to interpret that information, so no one would have access to that, very clearly." She then testified that she returned the interim report to Dr. Fibiger.

[45] Subsequent to receiving Dr. Fibiger's report of December 10, 1997 and the "clarification" on December 17, 1997, Ms. Dodd consulted with Mr. Outhwaite about Dr. Fibiger's "concluding" report. Upon being advised by Mr. Outhwaite that Mr. Stevenson's position was in Ottawa and that there was no position for him in Vancouver, she then prepared her report to Mr. Outhwaite on January 7, 1998, stating: "It is [Dr. Fibiger's] view that Mr. Stevenson is totally unfit to return to his normal employment and occupy a position in [headquarters]. Although it is possible that his medical condition could improve over time, Dr. Fibiger indicated that Mr. Stevenson would require six months of continued intense therapy in order to be reassessed."

[46] That the Director General, Personnel Services (Mr. Outhwaite), had a significant influence on the recommendations made by Ms. Dodd to the Deputy Director of Human Resources (Mr. Bulatovic) is evident in this paragraph of the Health Evaluation: "Further to our recent discussions following Dr. Fibiger's assessment, you (Mr. Outhwaite) have confirmed that Mr. Stevenson's position in RAP has already been vacant in excess of six months and operational requirements preclude the Assistant Director, Operations, from continuing to maintain a position for Mr. Stevenson. As a result of the health evaluation and operational requirements, Mr. Stevenson can no longer be accommodated and a medical discharge is recommended."

(ii) The Decision of the Deputy Director

[47] Ms. Dodd's Health Evaluation was forwarded to Mr. Bulatovic with the following endorsement by Mr. Outhwaite: "I support the recommendation given the length of time Mr. Stevenson has been AOL (absent on leave) and the operational requirements to fill the position."

[48] On January 14, 1997, Mr. Bulatovic wrote a letter to Mr. Stevenson advising him that Dr. Fibiger had rendered a decision in his case and that she was of the medical opinion that, at this time, he was unable to return to his normal employment and occupy a position in headquarters. Mr. Bulatovic advised Mr. Stevenson that his position in RAP had already been vacant in excess of six months to accommodate his needs, and that operational requirements precluded the Assistant Director, Operations, from continuing to maintain a position for him. Mr. Stevenson is then informed that he is being released on a medical discharge effective February 14, 1998.

(iii) Mr. Stevenson's Reaction to the Discharge

[49] Mr. Stevenson received the notice of medical discharge on January 19, 1998. He testified that he was devastated by the news. He immediately called Ms. Dodd to request that she provide him with copies of all documentation on which she had based her decision to recommend a discharge. She advised Mr. Stevenson that he would have to make a formal information and privacy request. This would, of course, take a considerable period of time.

[50] The discharge letter made no mention of any right of appeal. Mr. Stevenson was initially advised by both Mr. Van't Slot and Mr. Outhwaite that he could not grieve the discharge. Both later changed their minds and advised Mr. Stevenson that he did have a right to grieve the decision. On January 25, 1998, Mr. Stevenson wrote to Mr. Bulatovic to request that the release date be extended to April 3, 1998 so that he could obtain copies of the documents used to make the recommendation to discharge through the formal ATIP process and so that he could consult with legal counsel with regard to a formal grievance. Mr. Stevenson was particularly concerned about the effect of signing the forms that had been sent to him regarding the termination of his employment and the pension benefits. On February 2, 1998, Mr. Bulatovic advised Mr. Stevenson that he had reviewed this matter again and that his decision to grant him a medical discharge effective February 14, 1998, would not be delayed.

(iv) The Grievance Procedure

[51] On January 25, 1998, Mr. Stevenson sent a formal grievance under Human Resource Policy HUM-604 2.3 and HUM-502, "Grievance Policy", to the Director of CSIS. Mr. Stevenson's four page letter sets out in detail the events which had transpired since the October 1995 information leak incident, including an allegation of bad faith on the part of Mr. Grierson in respect of his transfer out of internal security and the eventual transfer to Ottawa. Mr. Stevenson mentions the fact that headquarters staff had refused to delay his transfer to Ottawa despite the recommendation of his doctor, two psychologists and the Service psychologist (Ms. Plante). He then points out factual errors in Mr. Bulatovic's medical discharge letter as regards his alleged failure to keep two appointments with a specialist arranged by Dr. Fibiger. He mentions the fact that Dr. Fibiger had told him that she would be recommending a further six month leave but that she also contemplated that he would eventually be able to return to work. He denies that Dr. Fibiger had decided that he was "Unfit" as stated by Mr. Bulatovic. Mr. Stevenson addressed the

issue of an employer's duty to accommodate under Canadian Human Rights legislation. He advises the Director: "As for the argument of holding a position for only six months; with respect, some of us have been around long enough to know that positions in the Service are held for longer than six months to accommodate people for whom there is a possibility of their eventually returning to work."

[52] By letter of February 16, 1998, Mr. Stevenson was advised by the Director of CSIS, Mr. W.P.D. Elcock, that his grievance was denied. He referred to the fact that by the time the health evaluation was concluded, his position within the Service had been vacant in excess of six months to accommodate his needs. He says that as a result of the health evaluation and operational requirements, a medical discharge was recommended. His review had led him to the conclusion that his medical discharge, founded on his medical unfitness, remained valid.

[53] Mr. Stevenson now requests this Tribunal to find that he has been discriminated against on the basis of the termination of his employment because of mental disability contrary to the provisions of the *Canadian Human Rights Act*.

III. LEGAL PRINCIPLES

[54] Mr. Stevenson's complaint is brought pursuant to section 7 of the *Canadian Human Rights Act*[(1)]. Section 7 provides that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. Section 3 of the *Act* designates disability as a prohibited ground of discrimination. Disability has been interpreted to include a wide variety of medical ailments, including mental disability.[(2)]

[55] Pursuant to section 15(a) of the *Act*, it is not a discriminatory practice if any refusal, exclusion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement.

[56] The Supreme Court of Canada has recently revisited the approach to be taken in cases involving *bona fide* occupational requirement and *bona fide* justification in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [(3)] ('*Meiorin*') and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*[(4)] ('*Grismer*'). The historic 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 remains on the 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.[(5)]

[57] 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 has a *bona fide* justification. In order to establish such a justification, the respondent must now prove that:

i) it adopted the standard for a purpose rationally connected to the performance of the job;

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;

iii) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[58] While the term 'undue hardship' is not defined in the *Act*, the Supreme Court did provide considerable guidance in determining when an undue hardship defence has been made out. In *Meiorin*, the Supreme Court observed that the use of the word 'undue' implies that some hardship is acceptable, but that it is only 'undue' hardship that will satisfy the test.[(6)] 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.[(7)] 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.[(8)] In assessing the adequacy of the respondent's efforts to accommodate, regard may be had to the prospect of substantial interference with the rights of others.[(9)] The adoption of the respondent's standard has to be supported by convincing evidence. Impressionistic evidence will not generally suffice.[(10)] 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.

IV. ANALYSIS

A. Is There a *Prima Facie* Case of Discrimination?

[59] Mr. Stevenson alleges that he has been discriminated against by the Canadian Security Intelligence Service because they terminated his employment on a prohibited ground, namely, mental disability, contrary to section 7 of the *Canadian Human Rights Act*. I am satisfied that the complainant has in fact established a strong *prima facie* case of discrimination.

[60] In coming to this conclusion, I am convinced that within days of being advised that Mr. Stevenson had requested stress leave, the wheels were put in motion by his superiors to find a way to terminate his employment. It is significant that as early as August 5, 1997, Mr. Peter Bulatovic, the Deputy Director of Human Resources, had already come to the conclusion that there were only three options to consider in the face of Mr. Stevenson's request for a three month leave of absence on medical grounds, namely, "retirement; retirement based on medical grounds; implement transfer to Ottawa." In addition, Mr. Bulatovic also specifies in the e-mail that he sent

to Mr. Outhwaite on August 5, 1997, that Mr. Stevenson will have to be found fit to return to work in Ottawa, as there is no job for him in Vancouver.

[61] The speed with which the Health Evaluation was requested also indicates a degree of bad faith on the part of Mr. Stevenson's superiors. There was no indication that Mr. Stevenson had abused his sick leave privileges prior to the request made on August 1, 1997. In fact, the Request for Health Evaluation submitted by Mr. Van't Slot to Mr. Outhwaite on August 5, 1997 indicates that Mr. Stevenson had used 7.5 days of sick leave in 1995-96, 10 days in 1996-97, and 5 days from April to July, 1997. One therefore wonders why Mr. Outhwaite suggests that the Health Evaluation should be undertaken as soon as possible "in view of the lengthy course, i.e. two years, Mr. Stevenson claims his illness has taken and the considerable effort he has already undertaken to obtain an evaluation of present and past psychologists."

[62] I am also satisfied that the prerequisite that Mr. Stevenson had to be found fit to take the position that had been allocated to him in Ottawa was contrived. The Human Resources Policy HUM-604 states that the Chief, Health Services, Personnel Services, is to assess the findings and recommendations of the health evaluation and prepare a report recommending the employee as "Fit", "Unfit", or "Fit with Limitations" for continued employment with the Service. Dr. Fibiger had specifically recommended in her initial report of November 18, 1997 that Mr. Stevenson should be allowed to return to work in Vancouver, being the most appropriate course to take in re-introducing him to the work place. She also stated that after a period of time, he would be able to tolerate a transfer away from Vancouver. She repeated this in her report to Ms. Dodd on December 10, 1997, wherein she also indicated that after six months, Mr. Stevenson should be reassessed as to fitness for full employment with no limitations.

[63] Ms. Dodd's memo to Mr. Outhwaite, on the other hand, leaves the impression that Dr. Fibiger had concluded that Mr. Stevenson should be reassessed after six months of continued intense therapy to see if his medical condition had improved. She downplays the possibility, or even the probability, that Mr. Stevenson will be able to return to full employment with no limitations after the six months of continued intense therapy. The question at this point should have been whether Mr. Stevenson should be granted a further six months of medical leave from December 10, 1997, in order to return to full employment with the Service. Instead, Ms. Dodd and Mr. Outhwaite came to the conclusion on January 7, 1998 that Mr. Stevenson was totally unfit to return to his normal employment and occupy a position in headquarters, and that, therefore, he should be medically discharged.

[64] There appears to be a bias, given the way the health evaluation was conducted and subsequently interpreted, against Mr. Stevenson because he is mentally ill. The prognosis for full recovery within a reasonable period of time is ignored. One wonders if the recommendation of the Chief, Health Services, would have been the same if Mr. Stevenson had been diagnosed with some other medical ailment which did not affect his mental capacities.

[65] In the premises, I am satisfied that Mr. Stevenson has established a *prima facie* case that he was discharged on account of his mental disability. The next question to determine is whether his employer has established that the termination was based on a *bona fide* occupational requirement.

B. Is There a *Bona Fide* Occupational Requirement Defence?

(i) The Standard Applied to Mr. Stevenson

[66] The Health Evaluation Policy HUM-604 in section 1.4 specifically states that a health evaluation is undertaken to assess employees' health capabilities to perform their duties on a regular and consistent basis. The duties of an Intelligence Officer are primarily to conduct investigations/analysis by gathering/assessing intelligence on targeted individuals or groups in accordance with CSIS policies; to represent the Service in various forums; to prepare correspondence and reports; to provide advice and recommendations to others; and to mentor new Intelligence Officers. Intelligence Officers must be able to assess risks and assess sources' reliability. These duties necessarily presuppose a certain degree of physical and mental capability, but no particular standard is set out in policy. In fact, the Health Evaluation Policy states that "managers who have reason to believe that employees are no longer capable of performing the duties of their present job, for reasons of ill health or disability, and for which the prognosis for sustained recovery is unknown or doubtful, are responsible for requesting, through their respective Director General or Autonomous Chief, that a health evaluation be undertaken."

[67] The Health Evaluation policy goes on to describe the make-up of the committee of physicians who will prepare the health evaluation report, but it makes no attempt to describe any threshold requirements except to state that "all medical and non-medical information pertinent to an evaluation of employment fitness is examined." The health evaluation report is then submitted to the Chief, Health Services, who assesses the findings and recommendations, and then makes the decision as to whether the employee is "Fit", "Unfit", or "Fit with Limitations". Recommendations with regard to possible accommodation are only requested if the health services report states that the employee is "fit with limitations".

[68] In argument, counsel for the Respondent seemed to suggest that the one of the purposes of having a roster of security cleared, qualified health professionals such as Dr. Fibiger was that these individuals would have access to classified information about the tasks the individual employee is expected to perform, the essential nature of the occupation of the employee, so that they can know what *bona fide* occupational requirements are with respect to any individual employee. In other words, it would appear that the specific occupational requirements are only known to physicians hired by CSIS to conduct the health evaluations. The standard, therefore, appears to be capricious and undefined. It is impossible to determine what standard was applied to Mr. Stevenson since Dr. Fibiger was unable, due to ill health, to testify at the hearing.

(ii) Was "Mobility" Part of the Standard?

[69] Human Resources Policy HUM-412 specifically provides as its objective to ensure that human resources are relocated when and where they are most needed in order for the Service to fulfil its national mandate, meet its organizational requirements and maintain its effectiveness. In this regard, the policy further provides that the Director or his designate has the full authority to redeploy any CSIS employee to any location in order to meet the organizational requirements of the Service.

[70] Both the Commission and the Respondent suggest that mobility is part of the job description for an Intelligence Officer. I have no doubt that Mr. Stevenson was aware from the time that he joined the RCMP Security Service that he may be required to transfer to any geographic location where his services may be required. It also appears that many relocations are initiated by the employee, and in most cases, a mutual agreement would probably be in everyone's best interest. However, it is also understood within an organization such as CSIS that the employer may require an employee to relocate despite the employee's wishes in the matter. In the case before me, I am satisfied that Mr. Stevenson's ability to transfer to headquarters became an integral part of the health evaluation. I am prepared to accept that the mobility requirement was part of the standard against which Mr. Stevenson's capacity to carry out his duties as an Intelligence Officer was assessed. I now propose to determine whether the Canadian Security Intelligence Service has established a *bona fide* occupational requirement defence based on a standard which includes: 1) capability to perform the duties expected, 2) prognosis for recovery, and 3) the requirement of mobility.

C. Application of the 'Meiorin' Approach to this Case

(i) The First Element of the Proposed BFOR Analysis

[71] The first element of the BFOR defence to be proved is that the employer adopted the standard for a purpose rationally connected to the performance of the job. Human Resources Policy HUM-604 begins with the statement that the Service recognizes the important link between employees' health and capabilities, and their performance of duties. A health evaluation may be requested to assess their fitness for continued employment in instances where employees can no longer perform their required duties on a regular and consistent basis because of poor health or a disability.

[72] While it is difficult to determine exactly what the standard is that would apply to an Intelligence Officer, we can surmise that an individual would have to be healthy enough to do the required tasks safely and efficiently. One would also have to include that the requirement that the duties be performed on a regular and consistent basis involves an assessment of how much time off would be reasonable in the circumstances should an employee become ill or disabled, and the prognosis for return to full employment within a reasonable time. The third factor, whether the employee is capable of tolerating a geographic transfer in order to meet the needs of the Service, would raise the bar, so to speak, another notch. However, since the general purpose of the standard as outlined is to ensure the safe and efficient performance of the job - essential elements of all occupations - it is not necessary to assess the legitimacy of this particular standard. I am prepared to accept that there is a rational relationship between the general purpose of the standard and the tasks properly required of an Intelligence Officer.

(ii) The Second Element of the Proposed BFOR Analysis

[73] The *Meiorin* approach requires that once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted that particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. Again, I

am satisfied that the health evaluation policy of the Respondent, while lacking any measurement of physical or mental health standards, was adopted in good faith, as was the requirement that an employee be available for transfer to another geographic location to meet the needs of the Service.

[74] In the present case, the Complainant and the Commission have suggested that Mr. Stevenson's proposed transfer to Ottawa was for a purpose other than meeting the legitimate needs of the Service, such as the need for experienced intelligence officers in the analysis branch in headquarters. However, even if I did agree that there was an element of bad faith in the transfer of Mr. Stevenson to headquarters in this instance, I am not satisfied that this would constitute discrimination on the basis of one of the recognized grounds. The application of the third test - whether the standard is reasonably necessary to the accomplishment of that legitimate work related purpose -- will, in any event, bring into play an element of good faith.

(iii) The Third Element of the Proposed BFOR Analysis

[75] Under the third element of the unified approach suggested in *Meiorin*, the employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. Madam Justice McLachlin, as she then was, states at paragraph 72:

> To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

The burden is on the Respondent to demonstrate that, in the course of accomplishing this purpose, it cannot accommodate individual or group differences without experiencing undue hardship. As was stated earlier, use of the word 'undue' implies that some hardship is acceptable, but that it is only 'undue' hardship that will satisfy the test.

[76] Madam Justice McLachlin further states at paragraph 62 of the *Meiorin* decision:

> It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

She then referred to some of the factors which were enumerated in the *Central Alberta Dairy Pool*[(11)], including the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. She also reiterated that such considerations should be applied with common sense and flexibility in the context of the factual situation presented in each case. [(12)]

[77] Madam Justice McLaghlin also suggested that courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. She states, at paragraph 64:

> The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in the particular circumstances.

She then goes on to give a number of examples of some of the important questions that may be asked in the course of the analysis such as whether alternative approaches that do not have a discriminatory effect were investigated, and if they were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented? However, the question which she proposed and which probably is most applicable to this case is the following: "Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?" (13)

[78] Applying this analysis to the case of the complainant leads one to the conclusion that CSIS did not make the required effort to accommodate Mr. Stevenson once it became aware that he was suffering from a mental disability.

[79] The evidence reveals that Mr. Stevenson's mental health problems began in October of 1995 when his integrity was questioned in relation to the leak of sensitive information. Mr. Stevenson was asked to take a polygraph test, which he passed. A few months later, he was transferred to a different department - a move which he saw as punishment for the alleged leak of information. In October of 1996, Mr. Stevenson was advised that he was being transferred to Ottawa. The manner in which the news was conveyed to him by Mr. Grierson leaves little doubt that there was an element of bad faith involved in this transfer.

[80] In January of 1997, Mr. Stevenson enquired about the possibility of retiring with a severance package, and he was advised in no uncertain terms that he was not going to make money on a transfer. He applied for a two year deferral of his transfer to allow his children to complete their University courses, and that was denied. A deferral to September 1997 was granted, as was a request for dual residency assistance while his son completed University in Vancouver.

[81] Mr. Stevenson continued in his occupation in Vancouver while making preparations for his transfer to Ottawa. In April of 1997, he made what he believed to be a confidential enquiry to an old friend about the possibility of taking a stress leave. In June, he met with a psychologist from CSIS Health Services who suggested that he make a request to cancel his transfer on compassionate grounds. The psychologist supported the application. Mr. Stevenson provided two other psychological reports from his personal psychologists. On July 28, 1997 he received a response denying the cancellation of the transfer and advising him that medical resources are available to him in Ottawa. He is advised that his position is in Ottawa and that he must transfer, with or without his family.

[82] The correspondence between Mr. Stevenson and his superiors clearly indicated by July of 1997 that he was under considerable stress and that he was involved in intense therapy for depression. It is difficult to understand why his supervisors would not make an exception to the mobility requirement for an employee who had by this time provided 26 years of excellent service to the RCMP Security Service and to CSIS. The postponement of the transfer from June to September and the offer of temporary dual residence assistance hardly qualify as accommodation of Mr. Stevenson's disability. The suggestion that medical resources were available to him and his family in Ottawa was gratuitous at best. It was no offer of accommodation at all.

[83] The reaction of Mr. Van't Slot, Mr. Outhwaite and Mr. Bulatovic to the request for a three month leave of absence in August 1997 was extraordinarily swift and negative. It is quite obvious that Mr. Stevenson's supervisors saw this request as an attempt to subvert the ordered transfer to headquarters. Mr. Bulatovic already had his mind made up before the Health Evaluation was completed. Mr. Stevenson should retire, be forced to retire on medical grounds, or he should be forced to transfer to Ottawa. He had already decided that there was no job for him in Vancouver.

[84] The manner in which the Health Evaluation was carried out also raises suspicion that there was a lack of good faith. The interim report sent by Dr. Fibiger to Ms. Dodd on November 18, 1997, covered all of the elements of a proper health evaluation, including capacity to perform the duties of the present job, the prognosis for complete recovery within a reasonable period of time, and the desirability of postponing the transfer to ensure complete recovery in a shorter period of time. The report of December 10, 1997 confirmed that Mr. Stevenson was at that time unfit to return to his normal employment and that he could possibly be fit to return to full employment with no limitations in six months. She also confirmed that he was unable to tolerate a transfer from Vancouver at that time. It is difficult to understand why Ms. Dodd required any further clarification on December 17, 1997, as to whether Mr. Stevenson was able to work in Ottawa as at that date. Her explanation at the hearing that she made this enquiry because there was no position for him in Vancouver indicates that there was no intention of trying to accommodate Mr. Stevenson in relation to the ordered transfer to headquarters despite the recommendation of the Chairperson of the Health Evaluation Committee.

[85] Ms. Dodd was asked in cross-examination whether she had had any discussions with management about the possibility of accommodating Mr. Stevenson and she replied that she did not. Her explanation that she has no involvement in determining whether accommodation can be made flies in the face of Human Resource Policy HUM-604 which specifically states that the Chief, Health Services, is responsible for assessing the findings and recommendations of the health evaluation and submits a final report to the Assistant Director, Human Resources classifying the employee as "fit", "fit with limitations", or "unfit" to continue working with the Service. The policy also requires that in instances where the employee has been classified as "fit with limitations", the report of the Chief, Health Services "incorporates advice to management concerning the possible accommodation of the employee into the workplace". It is incredible that a person in Ms. Dodd's position would fail to understand her role in the health evaluation process and consequently fail to give management any recommendations for possible accommodation.

[86] The evidence indicates that Ms. Dodd had a complete lack of appreciation for the role of the Chief, Health Services, in the health evaluation process. Following are some of the comments she made while under cross-examination:

> I'm not involved in the health evaluation process. I'm a liaison in the sense that - with the employee in the sense of initiating the process, explaining what the process entails, answering any questions about the process or the policy, and asking them to provide us with names of medical representatives. Throughout the process, I'm not at all involved. Once I receive an opinion, at that point, I forward that opinion through.[(14)]

> Once I receive the medical opinion and the information, I'm not involved in the decision making as to whether an individual's functions, (sic) or limitations, or whether there's any accommodation. I'm not part of the consultation process of discussion at to whether there will be an accommodation or not; that's a management issue, that's my DG, with managers.[(15)]

[87] Another rather astounding revelation made by Ms. Dodd is that she gave no consideration to the initial four page report prepared by Dr. Fibiger on November 18, 1997. The reason, she said, is because this was a status report, and not a concluding report. She only works with concluding reports. When asked about the observation made by Dr. Fibiger in her interim report concerning the prospect of Mr. Stevenson being able to return to work and eventually being able to tolerate a transfer away from Vancouver, she says the concluding report did not give this information. If it had, it would have been reflected in her own conclusion. In fact, Ms. Dodd testified that she was the only person who read Dr. Fibiger's November 18, 1997 report. No other person in management reviewed the contents of that report. Her explanation was that this was a status report and that it was returned to Dr. Fibiger because they do not hold status reports on file. She also stated that the report contained diagnostic information, "and no one is a doctor to interpret that information, so no one would have access to that, very clearly."

[88] Failure to use or relate the information contained in Dr. Fibiger's report of November 18, 1997, about the nature of Mr. Stevenson's illness, the prognosis for eventual full recovery in as little as six months, and the suggestion that he be accommodated upon his return by allowing him to work in Vancouver for a period of time, was irresponsible and unjustified. Whether the cause was incompetence or bad faith is irrelevant at this point given the effect that the Health Evaluation played in prematurely ending a distinguished career. In stating this, I put no blame on Dr. Fibiger for this result. This was her first referral from CSIS and I doubt that she expected that her report of December 10, 1997 and subsequent 'clarification' of December17, 1997 would constitute the sum total of her evaluation of Mr. Stevenson's situation.

(iv) Sick Leave as an Element of Accommodation

[89] I have already pointed out the fact that the Health Evaluation policy adopted by the Respondent in respect of the required health standard for continued employment as an Intelligence Officer was devoid of any meaningful or transparent measurement against which an employee could be assessed. This lack of clarity was also applicable to the sick leave

entitlements of its employees. Mr. Stevenson testified that as a former RCMP member who had transferred to CSIS, he was entitled to the same sick leave benefits as the RCMP. This he described as 'unlimited sick leave'. He also testified that in his conversations with Mr. Spilchak, they had both referred to the fact that as ex-RCMP, they were promised that so long as there was a possibility of recovering from illness or injury, they could always return to work. Mr. Spilchak had warned Mr. Stevenson that CSIS had begun limiting the amount of time a person would be allowed to be out on stress leave because there had been some abuse of the unlimited sick leave system. Mr. Spilchak had indicated that the maximum allowed for stress leave may be only six months.

[90] The written sick leave policy of the Respondent does not add any clarification. HUM-718 states that employees have an entitlement of 1.25 days per month with a possible extension of 25 days for injury on duty. Appendix 2 of HUM-718 then goes on to say: "Ex-RCMP grandparented employees are not subject to a sick leave credit system. When unable to work due to illness or injury, sick leave may be granted." There is no limit stated in the policy, and it appears that the only requirement is that sick leave requests of more than 20 consecutive days be approved by the employee's Director General.

[91] At the hearing, Mr. Spilchak was asked what his understanding was of the sick leave policy as it applied to ex-RCMP personnel. He replied: "Well, we have what they refer to as 'unlimited sick leave', which is interpreted as being a - like an insurance policy. So if you are sick, you can have as many days off as you need to recover from your illness, but you don't carry forward sick leave like other employees do." Mr. Spilchak then went on to say that a colleague of his in Edmonton who is with the RCMP has cancer and has been on sick leave for almost 2 years. Because the prognosis is that he will get better and he will be able to come back to work, he is on sick leave with full pay. He also expected that when he does come back to work, it will be on a limited basis.

[92] The testimony of Mr. Spilchak leads one to believe that there is a double standard being applied here. If one is suffering from a physical illness such as cancer, then the sick leave is virtually unlimited so long as there is a possibility of returning to work. On the other hand, if you request stress leave, which involves an element of mental disability, then you are limited to six months. While the evidence in respect of the RCMP member is anecdotal, the fact that HUM-718 refers to 'ex-RCMP grandparented employees' having different sick leave entitlements leads one to believe that the sick leave provisions granted to ex-RCMP employees of CSIS should be better than the newer employees hired on by CSIS. In these circumstances, it is difficult to understand why Mr. Stevenson was not accommodated to the same degree as he would have been if he had been diagnosed with some other illness.

[93] The failure to define 'unlimited sick leave' in Appendix 2 to HUM-718 may be reason in itself to call into question the adequacy of the current workplace standard for the health of CSIS employees. Madam Justice McLachlin in *Meiorin* stated:

> To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard <u>itself</u> is required to provide for

> individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.[(16)]

[94] Mr. Douglas Outhwaite, the Director General of Personnel Services, testified at the hearing on behalf of the Respondent. He stated that if the Health Evaluation report provided by Dr. Fibiger had indicated that Mr. Stevenson would have been able to return to work after any specified period of time, they would have made every effort to find a position and keep something open for him for that period of time. He said this would have been particularly so for an experienced intelligence officer like Mr. Stevenson. While at one point he attempted to describe the effect of Mr. Stevenson's failure to fill the position at headquarters as having a 'severe' impact, making it impossible for the Service to meet its statutory mandate, he did volunteer that Mr. Stevenson's position was filled by another experienced intelligence officer. CSIS is an organization consisting of approximately 2000 employees, a third of whom would be intelligence officers. In these circumstances, it is difficult to imagine that the loss of one experienced intelligence officer for a limited time would have any significant impact on the Service. In my view, the Respondent has failed to prove that retaining a position for Mr. Stevenson would have caused any hardship, let alone any undue hardship.

[95] The Respondent did not attempt to use the excuse of undue economic hardship as a reason for failing to accommodate Mr. Stevenson. With a total annual budget of approximately 171 Million Dollars in 1998, this would not have been credible in any event.

[96] In the circumstances, I am of the opinion that CSIS policy does not adequately address the issue of accommodation when an employee is suffering from a health related disability. The sick leave policy as it applies especially to ex-RCMP members is unclear and open to abuse by management. I am satisfied that in the case of Mr. Stevenson, no serious attempt was made to accommodate his disability. The Respondent has failed to prove that it would have been impossible to accommodate Mr. Stevenson to the point of undue hardship. I am satisfied that Mr. Stevenson was discriminated against in terms of his employment because of mental disability contrary to the provisions of the *Canadian Human Rights Act*.

V. REMEDIES

[97] Having found that Mr. Stevenson was discriminated against in relation to his employment with the Respondent, CSIS, on a prohibited ground, namely, mental disability, it is now incumbent upon this Tribunal to determine the proper remedies. In this regard, I am governed by Section 53 of the *Act*, as well as jurisprudence which has established that in cases of discrimination, the goal of compensation is to make whole the victim of the discriminatory practice, taking into account principles of reasonable foreseeability and remoteness.[(17)]

[98] The Complainant and the Commission seek the following remedies:

a) Damages for lost income, past and future, including pension adjustment and payment of annual leave entitlements, plain clothes allowance and service pay;

b) Out of pocket expenses including but not necessarily limited to health care costs and legal expenses;

c) Interest on all special damages;

d) Damages for pain and suffering in the sum of $20,000.00;

e) Special compensation pursuant to Section 53(3) of the *Canadian Human Rights Act* (as amended in 1998) in the sum of $20,000.00;

f) A letter of apology in a form approved by the Complainant and the Commission;

g) A policy statement that the Respondent shall establish policies and practices to ensure that the discriminatory practice does not occur in the future; that the reforms undertaken in consultation with the Commission are disseminated and enforced throughout the organization; and that appropriate training is put in place to educate management about the duty to accommodate persons with disabilities in the workplace.

A. Lost Income

[99] Section 53(2)(c) of the *Act* provides that if, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may make an order that the person found to have engaged in the discriminatory practice compensate the victim for any and all wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

[100] I am satisfied that Mr. Stevenson should be compensated for all loss of income resulting from his premature termination as an intelligence officer. Counsel for the Commission and the Respondent advised this Tribunal during the course of the hearing that the calculation of the lost income, past and future, would be calculated by an actuary chosen by agreement between the parties. I am prepared to give the parties an opportunity to appoint an actuary and to come to an agreement on the amount of the lost income and benefits subject to the parameters that I will set out herein.

[101] As was stated previously, Mr. Stevenson was released on a medical discharge effective February 14, 1998. At that time, he would have had 26 and one-half years of service. The question now is how many more years of service would Mr. Stevenson have accumulated before retiring voluntarily. Mr. Stevenson had indicated as early as July 1996, in his performance evaluation that he would probably be leaving the service within the next two years. He commenced his medical leave in August 1997, and it can be fairly assumed that Mr. Stevenson would not have voluntarily retired while he was on medical leave with full pay. At the hearing,

Mr. Stevenson did testify that he probably would have retired in two years, but that he did have the option to continue beyond that, especially in view of the fact that six months after he was discharged, all levels of intelligence officers were upgraded with a corresponding increase in salary. He stated that this might have impacted on his decision as to when to leave. The maximum length of time that he could have worked to obtain the maximum pension was 34 years plus a day.

[102] I am satisfied that Mr. Stevenson would not have stayed on to reach 34 years plus a day, but I also believe that to limit him to two more years would also be unfair given possible changes in circumstances, such as the increase in remuneration paid to intelligence officers and his probable return to good health. In the circumstances, I have decided that Mr. Stevenson should be compensated as if he had worked a total of 30 years plus a day, which is approximately a year and a half longer than the planned two years more that Mr. Stevenson said he would have liked to work.

[103] In awarding compensation for lost wages, whether in a civil case or under Human Rights legislation, a court or tribunal must consider whether the plaintiff or complainant has made any attempt to mitigate his or her loss of wages by seeking other employment and remuneration. Mr. Stevenson testified that he did find alternate employment from time to time. While there was limited evidence of the efforts made to find other employment after the dismissal, I am also mindful that the onus of proof lies on the defendant in a wrongful dismissal case to satisfy the court that the plaintiff has failed to take reasonable steps to mitigate his loss.[(18)] I am satisfied, in any event, that Mr. Stevenson made reasonable efforts to mitigate his loss. In the circumstances, there shall be deducted from the award for lost wages only the actual amounts earned by Mr. Stevenson during the period until he would have reached 30 years plus a day of service.

[104] In relation to his loss of income and keeping in mind that the Complainant should be wholly compensated for the loss of income sustained, I am of the view that Mr. Stevenson is entitled to receive any adjustment required to put him in the same position *vis a vis* his pension, Canada Pension, Employment Insurance, supplementary health care plan and any other benefit, reimbursement or remuneration that he would have received had he worked for 30 years plus a day and then voluntarily retired.

[105] The Complainant is also entitled to receive a gross-up amount to compensate for the tax consequences of receiving a lump sum in one year.[(19)]

[106] The costs associated with the hiring of an actuary to calculate the past and future loss of income should be borne by the Respondent. The parties should come to an agreement on a mutually acceptable actuary within 21 days of the date of this decision, and the actuary shall complete the assessment of the lost income and benefits within 60 days of his or her appointment.

B. Out of Pocket Expenses

[107] The Complainant submitted a list of expenses which he claims were directly attributable to the discriminatory conduct to the Respondent and for which he seeks reimbursement (Exhibit

HR-3). One of the items on the list is in respect of dental expenses incurred after his termination. These amounts are recoverable under the Lost Income heading above as a benefit to which Mr. Stevenson was entitled as an employee of CSIS. Another item is in respect of salary loss for the period of the hearing before this Tribunal. Given that the loss of salary awarded to Mr. Stevenson will extend beyond the date that the hearing was held, and that only actual wages earned will be deducted from the award, it follows that the Complainant is being compensated for salary loss during the period of the hearing. He is not entitled to double compensation which is what he would receive if I were to make an extra award under this head.

[108] The balance of the amount claimed is for legal expenses, postage, photocopying, faxing, and courier charges. The claim for legal fees is in the amount of $3,994.64. It should be noted at the outset that Mr. Stevenson was not represented by his own counsel at the hearing. He relied on the services of counsel for the Commission to represent his interests as well as the public interest. It is not uncommon for a Canadian Human Rights Tribunal to award legal costs when a complainant is represented by his or her own counsel.[(20)] I am of the opinion, however, that awarding legal costs in this case would be justified, but not in the amount claimed. The copies of the accounts of the Complainant's solicitors indicate that Mr. Stevenson did seek legal counsel in relation to his dismissal prior to making the Human Rights complaint and that some of the services rendered were in relation to the submissions made to the Canadian Human Rights Commission. I am also mindful of the fact that the Complainant commenced and then abandoned a grievance before the Public Services Staff Relations Board. This Tribunal deems the compensation of any cost related to a pursuit of rights in a different forum to be outside of the jurisdiction of this Tribunal. I am satisfied, however, that the Complainant did have a right to consult counsel with regard to the possibility of making a complaint to the Canadian Human Rights Commission and that the legal assistance given him in respect of the submissions made to the Commission was necessary. These expenses were a reasonably foreseeable outcome of the discriminatory conduct. In the circumstances, I am prepared to award some legal costs to the Complainant which I fix in the amount of $2000.00, inclusive of the claim for postage, photocopying, faxing and courier charges.

C. Interest

[109] Human Rights Tribunals will award interest to ensure that the victim is adequately compensated.[(21)] I am of the opinion that Mr. Stevenson should receive simple interest on the net wage loss from the time of his dismissal to the date of this decision. The interest rate shall be the Canada Savings Bond rate.

D. Compensation for Hurt Feelings

[110] Counsel for the Commission has suggested that this Tribunal can award compensation in an amount up to $20,000.00 for pain and suffering that the victim experienced as a result of the discriminatory conduct pursuant to Section 53(2)(e) of the *Canadian Human Rights Act* as amended in June of 1998. Prior to being amended, Section 53(3) provided that a Tribunal could award compensation to a victim not exceeding $5000.00 if the Tribunal found that a respondent had engaged in a discriminatory practice wilfully of recklessly or if the victim had suffered in respect of feelings or self-respect as a result of the practice. Counsel for the Respondent argued

that this Tribunal could not award special compensation in excess of the limits prescribed in the *Act* as at the date the discriminatory conduct occurred.

[111] For the reasons stated by Tribunal Chairperson Mactavish in *Nkwazi v. Correctional Services Canada*[(22)], I am also of the opinion that the amendments to the *Canadian Human Rights Act* that came into effect on June 30, 1998 do not apply retrospectively to discriminatory actions which occurred in January or February 1998. These amendments are substantive and not exclusively procedural. While I am of the opinion that the limit of $5,000.00 set out in Section 53(3) of the *Act* prior to amendment is totally inadequate in this case, I am not able to consider awarding any larger amount. That being said, I find that Mr. Stevenson should receive the sum of $5000.00 as compensation for suffering in respect of feelings and self-respect. I am satisfied that the discriminatory conduct of the Respondent has exacerbated Mr. Stevenson's mental health problems. Mr. Stevenson is a proud individual who gave excellent service to his employer over many years. The actions of the Respondent caused Mr. Stevenson much pain, and serious injury to his feelings and self-respect. The maximum award permissible is fully warranted in this case.

[112] While interest is payable on awards for damages for special compensation, the payment of interest cannot bring the award over the $5000.00 limit prescribed in the legislation.[(23)] Having already awarded Mr. Stevenson the maximum permissible, I make no order for the payment of interest on the award of special compensation.

E. Special Compensation Pursuant to Section 53(3)

[113] Section 53(3) of the *Canadian Human Rights Act* provides for special compensation in an amount not exceeding $20,000.00 when a Tribunal finds that a person is engaging or has engaged in the discriminatory practice wilfully or recklessly. This section also came into being with the amendments of June 30, 1998. For the same reasons referred to above in respect of compensation for pain and suffering under Section 53(2)(e), I am not able to award any amount under this provision either. Compensation for engaging in discriminatory conduct wilfully or recklessly was formerly provided for in Section 53(3)(a) and was subject to the same $5000.00 monetary limit. Had the new Section 53(3) been in effect as at the date that discriminatory practice occurred in this case, I would have been inclined to award a substantial amount under this heading also.

F. Letter of Apology

[114] Mr. Stevenson requests that the Tribunal order CSIS provide him with a letter of apology. In cases where the conduct of a respondent has been marked by insensitivity, human rights Tribunals have ordered that apologies be provided.[(24)] I have found that the conduct of the staff and management involved in Mr. Stevenson's health evaluation and dismissal to be irresponsible and unjustified and that a distinguished career was prematurely terminated either through incompetence or bad faith. I therefore order that the Director of CSIS provide a formal written apology to Mr. Stevenson within 30 days of this decision. The Director shall consult with and obtain the approval of the Commission with regard to the form and content of the letter of apology.

G. Policy Changes

[115] Counsel for the Commission requests that this Tribunal order the Respondent to amend its Human Resources policies so that a discriminatory practice such as occurred in this instance never reoccur. In addition, the Commission suggests that the policy changes be made in consultation with the Commission and be disseminated and enforced throughout the organization. The Commission also suggests that management should be educated about the duty to accommodate persons with disabilities. I am in agreement with these suggestions, and I therefore order that the Respondent work with the Commission towards improving its policies in these areas and apply them accordingly.

H. Retention of Jurisdiction

[116] I will retain jurisdiction in the event that the parties are unable to agree with respect to the implementation of any of the remedies awarded under this decision or with regard to the amount of compensation payable thereunder.

VI. OTHER MATTERS

[117] On the first day of the hearing of this matter, counsel for the Commission and the Respondent were asked to comment on the application, if any, of the decision of Madam Justice Tremblay-Lamer of the Federal Court of Canada, Trial Division, in *Bell Canada v. CTEA, Femmes Action and Canadian Human Rights Commission*[(25)] which had just been released four days earlier. This decision stated that the Canadian Human Rights Tribunal was not institutionally independent and impartial, with the result that the *Bell Canada* matter was ordered to be stayed until the legislation establishing the Canadian Human Rights Tribunal was amended. Counsel for the Commission took the position that the *Bell Canada* decision had no application to the case before this Tribunal. Counsel for the Respondent, on the other hand, argued most strenuously that the hearing before this Tribunal be adjourned for the same reasons set forth by Madame Justice Tremblay-Lamer in the *Bell Canada* case. I ruled that the *Bell Canada* decision did not affect the jurisdiction of this Tribunal and that the hearing should proceed despite the objections of counsel for the Respondent.

[118] The entire issue became moot with the release of the decision of the Federal Court of Canada, Appeal Division, on May 24, 2001, whereby the appeal of the Canadian Human Rights Commission was allowed and the decision of Madame Justice Tremblay-Lamer was set aside.[(26)] This Tribunal had and continues to have jurisdiction to hear and determine the complaint of Mr. Stevenson.

VII. ORDER

[119] For the reasons stated, I declare that Mr. Stevenson's rights under the *Canadian Human Rights Act* have been contravened by the Respondent, and order that:

> i) Mr. Stevenson be compensated by CSIS for all loss of income resulting from his premature termination as an intelligence officer. Such loss shall be calculated with the assistance of an actuary appointed by the parties by mutual agreement within 21 days of this decision, with the calculation to be completed within 60 days of the appointment of the actuary. Such loss of income shall take into account all adjustments to pensions, employment insurance, any supplementary health care plan and any other reimbursement or remuneration to which Mr. Stevenson would have been entitled had he worked for 30 years plus a day and then voluntarily retired. Only amounts actually received by Mr. Stevenson from employment during the period until he would have reached 30 years plus a day of service will be deducted from this award. An amount sufficient to cover the additional income tax liability that will ensue as a consequence of receiving a lump sum for the loss of income referred to above will be added to this award;
>
> ii) CSIS pay to Mr. Stevenson the amount of $2000.00 in satisfaction of his claim for out of pocket expenses;
>
> iii) Simple interest be paid on the net wage loss at the Canada Savings Bond rate;
>
> iv) CSIS pay to Mr. Stevenson the amount of $5000.00 as compensation for suffering in respect of feelings and self-respect;
>
> v) The Director of CSIS provide to Mr. Stevenson a letter of apology within 30 days of this decision in a form approved by the Commission;
>
> vi) CSIS work with the Commission towards improving its policies to prevent a recurrence of this type of discriminatory practice and to educate management about the duty to accommodate persons with disabilities;
>
> vii) Jurisdiction is reserved to this Tribunal in the event that the parties are unable to agree with regard to the implementation of any the remedies awarded or with regard to the calculation of the amount of compensation payable.

Guy A. Chicoine, Chairperson

OTTAWA, Ontario

December 5th, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T568/2600

STYLE OF CAUSE: John Stevenson v. Canadian Security Intelligence Service

PLACE OF HEARING: Vancouver, British Columbia

(November 6 to 10 and November 13, 2000)

DECISION OF THE TRIBUNAL DATED: December 5th, 2001

APPEARANCES:

John Stevenson On his own behalf

Daniel Pagowski For the Canadian Human Rights Commission

James Mathieson For the Canadian Security Intelligence Service

1. Mr. Stevenson's complaint relates to matters occurring prior to the amendments which came into effect with the passage of Bill S-5, assented to May 12, 1998. As a result, insofar as I am dealing with matters of substantive law, I will be relying on the *Act* as it stood prior to the 1998 amendments.

2. See *Bernard v. Waycobah Board of Education* [1999] C.H.R.D. No. 2, No. T.D. 2/99 at page 12.

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

4. [1999] 3 S.C.R. 868

5. *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985] 2 S.C.R. 536 at 558.

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

7. *Grismer*, supra., at para. 32.

8. *Grismer*, supra., at para. 42.

9. *Meiorin, supra., at para. 63.*

10. *Grismer*, supra., at paras. 41 and 42

11. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* 1990 2 S.C.R. 489 at pages 520-21.

12. *Meiorin*, supra, at para. 63.

13. *Meiorin*, supra, at para. 65.

14. Transcript, at pages 432-3

15. Transcript, at pages 433-4

16. *Meiorin*, supra, at para. 68.

17. *Canada (Attorney General) v. McAlpine*,[1989] F.C. 530 (C.A.)

18. Levitt in The Law of Dismissal in Canada (Aurora: Canada Law Book, 1985) at page 234 states: "The onus is on the employer to prove, first, failure to mitigate on the employee's part and secondly, that the employee would have found another comparable position if one had been searched for."

19. *Singh v. Canada (Statistics Canada),* (1999) 34 C.H.R.T. D/203

20. *Grover v. Canada (National Research Council), (1992) 18 C.H.R.R. D/1; Bernard v. Waycobah Board of Education, (2000) 36 C.H.R.T. D/51.*

21. *Canada (Armed Forces) v. Morgan* (1991) 21 C.H.R.R. D/87 (F.C.A.); *Bernard v. Waycobah Board of Education*, supra, at note 20.

22. *Beryl Nkwazi v. Correctional Services Canada*, (2001) T.D. 1/01, at para. 257 to 270.

23. *Hebert v. Canada (Canadian Armed Forces),* (1993) 23 C.H.R.R. D/107

24. *Canada(Attorney General) v. Uzoaba*, (1995) 2 F.C. 5f69 (T.D.); *Hinds v. Canada (Employment and Immigration),* (1998), 24 C.C.E.L. 65, 10 C.H.R.R. D/5935 (C.H.R.T.);

Grover v. Canada (National Research Council) (1992) 18 C.H.R.R. D/1, aff'd (1994) 80 F.T.R. 256.

25. *Bell Canada v. Canada (Human Rights Commission)* (T.D.), [2001] 2 F.C. 392; [2000] F.C.J. No. 1747

26. *Bell Canada v. Canada (Human Rights Commission)* (C.A.), [2001] 3 F.C. 481; [2001] F.C.J. No. 776; 2001 FCA 161