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

BETWEEN:

HELEN McALLISTER-WINDSOR

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HUMAN RESOURCES DEVELOPMENT CANADA

Respondent

REASONS FOR DECISION

T.D. 2/01

2001/03/09

PANEL: Anne Mactavish, Chairperson

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[1] Federal Employment Insurance ('EI') legislation places a 30 week limit or cap on the number of weeks for which an individual may receive maternity, sickness and parental benefits (known collectively as 'special' EI benefits). Helen McAllister-Windsor alleges that this cap, known as the 'anti-stacking' rule, has a discriminatory effect on her in the provision of a service customarily available to the public, by reason of her sex and disability.

I. Ms. McAllister-Windsor's Employment Insurance Claim

[2] Ms. McAllister-Windsor suffers from a permanent medical condition known as an incompetent cervix, which makes it difficult for her to carry a child to term. She testified that she twice became pregnant, only to lose each child in the course of the pregnancy. When Ms. McAllister-Windsor became pregnant for the third time, her obstetrician advised her that she would have to stay in bed for the duration of her pregnancy if she hoped to be able to carry the baby to term.

[3] In December, 1995, Ms. McAllister-Windsor stopped working, and on January 12, 1996 she applied for Employment Insurance benefits.[(1)] Ms. McAllister-Windsor collected 15 weeks of EI sickness benefits, and then began collecting benefits under her employer's long term disability plan. On July 1, 1996, Ms. McAllister-Windsor gave birth to a daughter. After the birth, she collected 15 weeks of EI maternity benefits.

[4] At the time that Ms. McAllister-Windsor applied for EI benefits, she was advised that there was a 30 week limit on the special benefits that she could receive, and that she would not

therefore be eligible for parental benefits under the EI plan. Nevertheless Ms. McAllister-Windsor applied for parental benefits as well. Although she was initially advised that she was entitled to one week of parental benefits, Ms. McAllister-Windsor was subsequently told that she was not entitled to any parental benefits, as she had already received 30 weeks of special benefits. Ms. McAllister-Windsor was ultimately given one additional week of regular EI benefits, apparently on a gratuitous basis, as a result of the confusion surrounding her claim. On October 21, 1996, Ms. McAllister-Windsor returned to work. She never received any parental benefits.

[5] Ms. McAllister-Windsor alleges that denying her parental benefits because she had already received 30 weeks of sickness and maternity benefits amounts to discrimination on the basis of sex and disability, and violates the *Canadian Human Rights Act*. Ms. McAllister-Windsor testified that:

> All the other moms at work always gloated about being off for six months with their new baby. I just didn't think it was right because I had to access special benefits, the sickness part, to stay at home while I was pregnant, that I was denied parental benefits because I had used sick benefits. I don't think it's right because I had no control over how my body has a baby.[(2)]

[6] Ms. McAllister-Windsor acknowledges that her husband could have applied for and received parental benefits. Ms. McAllister-Windsor says that not only could her husband not breastfeed her daughter, but that as the child's mother, she should have been able to receive parental benefits.

II. Legislative Provisions in Issue

[7] Ms. McAllister-Windsor's claim for EI benefits was governed by Section 11 of the *Unemployment Insurance Act*,[(3)] the relevant portions of which provide:

> (1) Where a benefit period has been established for a claimant, benefit may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.
>
> (3) Subject to subsection (7), the maximum number of weeks for which benefit may be paid in a benefit period
>
> > a) for the reason of pregnancy is fifteen;
> >
> > b) for the reason of caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is ten; and

> c) for the reason of a prescribed illness, injury or quarantine is fifteen.
>
> (4) Subject to subsection (7), the maximum number of weeks for which benefits may be paid
>
> (a) in respect of a single pregnancy is fifteen; and
>
> (b) in respect of caring for one or more new-born or adopted children as a result of a single pregnancy or placement is ten.
>
> (5) In a claimant's benefit period, the claimant may combine weeks of benefits to which the claimant is entitled for any of the reasons referred to in subsection (3), but the maximum number of combined weeks is thirty. [emphasis added]
>
> (7) The maximum number of ten weeks specified in paragraphs (3) (b) and 4 (b) is extended to fifteen weeks where
>
> (b) a child referred to in paragraph (3) (b) or 4 (b) is six months of age or older at the time of the child's arrival at the claimant's home or actual placement with the claimant for the purpose of adoption; and
>
> (c) a medical practitioner or the agency that placed the child certifies that the child suffers from a physical, psychological or emotional condition that requires an additional period of parental care.

[8] It is the cap imposed by subsection 11 (5) that is in issue in this proceeding.

[9] The "benefit period" referred to in the foregoing subsections is a 52 week period immediately following the claim for benefits, and represents the time in which EI benefits must be taken. No combination of benefits may extend a claim beyond this 52 week period.

III. Purpose of the Legislation

[10] Gordon McFee testified about the history and purpose of Employment Insurance in Canada. Mr. McFee is the Director of Policy and Legislation Development in the Insurance Branch of Human Resources Development Canada. According to Mr. McFee, an employment insurance scheme first came into effect in Canada in the early 1940's. The scheme was created largely in response to the experience of the Depression of the 1930's, when many people lost their jobs, and had nothing to fall back on. Its purpose was to provide temporary income replacement to individuals who were involuntarily unemployed, while reintegrating them into the work force.

[11] Over time, the profile of the labour market changed, with the increased participation of women in the paid workforce. In order to reflect changing economic and social circumstances, in 1971, the legislation underwent a major overhaul, now providing coverage to workers in the event of pregnancy and sickness, as well as shortage of work. According to Mr. McFee, the modified scheme was still intended to provide short term benefits, but extended the contingencies insured against to include pregnancy and sickness.

[12] Mr. McFee described the 1971 amendments as "the most fundamental changes to the [employment insurance] program since its inception". Before 1971, the plan was purely an insurance plan: with the introduction of maternity and sickness benefits in 1971, the plan departed from pure insurance principles, and a social element was introduced into the scheme.[(4)]

[13] Pregnancy or maternity benefits were introduced to address the presumed period of incapacity surrounding childbirth, and as such were only available to the biological mother of a child. In 1984, the plan was again changed, to provide benefits in the case of adoption. In 1990, parental benefits were introduced, which benefits are payable to both mothers and fathers, adoptive and natural parents alike, and are intended to allow parents time to care for their young children.

[14] Maternity, sickness and parental benefits are referred to collectively as 'special benefits', in contrast to benefits paid on account of unemployment, which are known as 'regular benefits'. According to Mr. McFee, there are two major differences between regular benefits and special benefits: one relates to the way in which a claimant qualifies for benefits, and the other to the requirement that a claimant be available for work. On the first issue, in the case of regular benefits, the number of weeks necessary for a claimant to qualify varies in accordance with the unemployment rate in the geographical area where they live, whereas in the case of special benefits, a claimant is always required to have worked for 20 weeks in the year before the claim, regardless of the regional rate of unemployment. Insofar as availability for work is concerned, it is a fundamental requirement that, in order to be eligible for regular benefits, a claimant must, at all times, be ready, willing and able to work, whereas there is no such requirement in the case of special benefits.

[15] EI legislation continues to evolve. According to Mr. McFee, as of December 31, 2000, parental benefits are being increased from a maximum of 15 weeks to a maximum of 35 weeks.[(5)] Correspondingly, the cap on the total amount of special benefits which a claimant may receive will increase from 30 to 50. Mr. McFee testified that the October, 1999 Speech from the Throne advised that this was being done to enable parents to spend more time at home in the first year of their child's life.

IV. Purpose and Selection of the Caps

[16] There have always been limits on the number of weeks of regular EI benefits an individual could collect. With the introduction of special benefits, a limit or cap was placed on the number of weeks of special benefits that one individual could claim, which is the cap in issue in this case.

Limits were also placed on the number of weeks of regular benefits that could be collected in combination with special benefits.[(6)] In no case, could a claimant receive benefits outside of the 52 week benefit period. These limits reflect the fact that EI benefits are intended to be short-term in nature. If there were no caps, Mr. McFee says, the goal of the EI scheme would be frustrated, and claimants could receive benefits forever.

[17] Given that there is always going to be a cap on the benefits payable under the plan, Mr. McFee says that the identification of the appropriate cap in a given circumstance is a function of several factors, including mathematics and 'the proximity between employment and unemployment and the periods of time that surround that event.' In selecting the appropriate limit or cap for maternity benefits, an attempt was made to approximate the time during which women would normally require income support when they give birth. While the evidence indicates that parental benefits are designed to allow parents time to care for their young children, it is not clear how the original selection of 10 weeks as an appropriate period for parental benefits was arrived at. Insofar as the decision to increase the limit on parental benefits from 15 to 35 weeks in the future is concerned, Mr. McFee testified that he is not aware of what went into that decision, beyond what was said in the Speech from the Throne, and a speech that the Prime Minister gave a couple of days later. I was not provided with any more specific information as to how the 15 week limit on sickness benefits was chosen, or how 30 weeks was selected as an appropriate cap on special benefits.

[18] The imposition of a limit on the total number of weeks of special benefits that a claimant may collect is an issue that has received some consideration. The 1985 Report of the Parliamentary Committee on Equality Rights (the 'Boyer' Report) observed with respect to an earlier incarnation of the EI legislation that:

> It is inappropriate to deal with maternity and the proposed parental benefits in the same context as sickness benefits. Childbirth is a common occurrence, and the need to make provisions for maternity leave should be treated as a normal consequence of the full participation of women in the workforce...[(7)]

[19] At the time of the Boyer Report, the legislation imposed a 15 week cap on the total number of weeks of special benefits that any one individual could claim within a benefit period. The Committee observed:

> The effect is that a pregnant woman who becomes ill during the maternity leave period can claim only 15 weeks of benefits in total. If she has had to use two weeks, for example, for sickness, these are subtracted from 15 weeks to determine the amount of maternity benefits available to her. Similarly, an adoptive parent who claims the full amount of adoptive benefits is unable to claim sickness benefits for any cause within the same benefit period. It is the Committee's view that this restriction is unduly harsh to parents, natural and adoptive, who become ill, and should be eliminated as a consequence of the other changes we recommend.

[20] The next year, the Commission of Inquiry on Unemployment Insurance (the 'Forget Commission') came to a similar conclusion.[8]

V. Effect of the 30 Week Cap on Special Benefits

[21] Evidence with respect to the consequences of removing the 30 week cap on special benefits was provided by Jean-François LaRue, the Head of Special Groups, EI Policy at Human Resources Development Canada. Mr. LaRue reviewed the claims experience for the EI plan, in an effort to identify how many people are affected by the 30 week cap on special benefits. According to Mr. LaRue, in the 1998-99 fiscal year, there were 2,360 cases where benefits were denied as a result of a claimant having already reached the 30 week special benefits limit. Every one of these 2,360 claimants was a woman. Mr. LaRue explained that, given the limits on the available weeks of the various types of special benefits, the only claimants who could be affected by the 30 week limit were people who had taken a combination of maternity and sickness benefits. Maternity benefits can only be taken by women.

[22] Mr. LaRue also testified with respect to the financial consequences of removing the rule against stacking benefits. According to Mr. LaRue, the elimination of the anti-stacking rule would add an additional $2,789,928 to the cost of the EI plan, based upon the 1998-99 claims experience.

VI. Financial Structure of the Employment Insurance Scheme

[23] Mr. McFee testified that the EI plan is a self-funding insurance scheme. That is, the plan is funded by premiums paid by employers and employees. Premium rates are set by the Employment Insurance Commission, and require the approval of the Minister of Human Resources and the Minister of Finance. Premium revenues are used to cover the cost of the benefits paid out, as well as the cost of administering the plan. Although the plan is administered by Human Resources Development Canada, no money from the Government of Canada's Consolidated Revenue fund is used in the EI plan.

[24] The financial position of the EI plan has varied over time, with the plan sometimes operating in a deficit, other times, in a surplus. The last time that the plan operated in a year-to-year deficit was in 1994. On a cumulative basis, the plan has been in a surplus position since 1996 or 1997. According to Mr. McFee, the current surplus in the EI account is 'somewhere around $29 billion'.

VII. Legal Principles

[25] Ms. McAllister-Windsor's complaint is brought pursuant to section 5 of the *Canadian Human Rights Act*.[9] Section 5 makes it a discriminatory practice, in the provision of services

customarily available to the general public, to deny access to any such service to any individual, or to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. Section 3 of the *Act* designates sex (which includes pregnancy and childbirth), and disability as prohibited grounds of discrimination.

[26] Pursuant to section 15 (g) of the *Act*, it is not a discriminatory practice to deny access to a service to an individual where there is a *bona fide* justification for that denial.

[27] The Supreme Court of Canada has recently had occasion to revisit the approach to be taken in cases such as this in its decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [(10)] *('Meiorin') and British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [(11)]('*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 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.[(12)]

[28] 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 or goal that is rationally connected to the function being performed;
>
> ii) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
>
> iii) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate persons with the characteristics of the complainant without incurring undue hardship.

[29] The term 'undue hardship' is not defined in the *Act*, however, *Meiorin* and *Grismer* provide considerable guidance in determining whether or not 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 - it is only 'undue' hardship that will satisfy the test.[(13)] 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.[(14)] 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.[(15)] 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.[(16)] The adoption of the respondent's standard has to be supported by

convincing evidence. Impressionistic evidence of increased cost will not generally suffice.[17] Finally, the Supreme Court has indicated that 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.[18]

VIII. Analysis

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

[30] There is no dispute that the provision of EI benefits by HRDC is a 'service customarily available to the public', as contemplated by Section 5 of the *Canadian Human Rights Act*.[19] Similarly, there has been no attempt to suggest that Ms. McAllister-Windsor's permanent physical condition is not a 'disability' within the meaning of the legislation. What is in issue is whether the standard in issue - that is, the rule against stacking special benefits contained in Section 11 (5) of the *Unemployment Insurance Act* - has a discriminatory effect on Ms. McAllister-Windsor by reason of her sex or disability.

(i) Position of the Commission

[31] Counsel for the Canadian Human Rights Commission contends that this is a classic case of what has traditionally been described as adverse effect discrimination.[20] That is, the neutral rule against stacking benefits contained in Section 11 (5) of the *Unemployment Insurance Act* imposes an adverse, differential burden on Ms. McAllister-Windsor, because of her pregnancy and disability, which burden is not shared by other participants in the EI plan. Ms. McAllister-Windsor was unable to collect parental benefits following the birth of her daughter, whereas others who had not claimed maternity and sickness benefits during their benefit periods were able to receive parental benefits. This, counsel says, establishes a *prima facie* case of discrimination on the basis of sex and disability.

(ii) Position of HRDC

[32] In contrast, counsel for HRDC submits that no *prima facie* case of discrimination has been established here. The rule against stacking special benefits is applied uniformly in all cases, and does not discriminate amongst groups of individuals. No one - male or female, able-bodied or disabled - is able to collect more than 30 weeks of special benefits under the EI plan.

[33] HRDC submits that any assessment of the limits on special benefits must take into account the purpose of the EI plan. Numerous judicial decisions have concluded that the EI plan is intended to provide short term income replacement.[21] This complaint, HRDC says, seeks to change the essential nature of the plan to that of a disability insurance scheme.

[34] Insurance plans invariably place limits on benefits. In this case, Parliament has chosen to place limits on the number of weeks that claimants may receive special benefits. HRDC says that it is not for the courts or this Tribunal to second-guess this policy decision.

[35] Finally, HRDC observes that maternity, sickness and parental benefits were not originally provided for in EI legislation. The addition of such benefits, on a limited basis, was ameliorative in nature. Recipients of special benefits receive certain advantages over those claiming regular benefits: examples of these advantages include the fact that recipients of special benefits do not have to be available for work, their EI income may be 'topped up' to 95% of their regular salary, and they may collect benefits while outside of Canada.

(iii) Purpose of the Legislation

[36] The first step in my analysis is to consider the purpose of the EI plan. This issue has received considerable judicial consideration in the context of challenges to various subsections of Section 11 of the *Unemployment Insurance Act* under Section 15 of the *Canadian Charter of Rights and Freedoms*. In each of the cases cited by HRDC, the Courts have concluded that the EI plan is intended to provide short term income replacement. The fundamental purpose of the legislation is "... to help those members of the workforce who lose their employment and are unable to find immediately another one in replacement."[(22)] Courts have observed that the focus of the legislation is the circumstances surrounding employment and unemployment, and not the formation of families [(23)], and that the plan is primarily an insurance scheme to help those who are capable of working, not a disability insurance scheme.[(24)]

[37] These comments are particularly apt as they relate to regular EI benefits. Clearly, the EI plan was originally introduced to provide employees with insurance against the contingency of involuntary unemployment while they sought alternate employment. However, as Mr. McFee noted in his testimony, with the introduction of maternity and sickness benefits in 1971, the EI plan departed from pure insurance principles, and a social element was introduced into the scheme. As the Ontario Court of Appeal observed in *Shafer:*

> The specific purpose of both the 1971 and 1984 legislation [which introduced parental benefits into the plan] was to provide partial replacement of income while out of the workplace, either by reason of pregnancy and childbirth or by reason of child care.[(25)]

[38] Although sickness benefits were not in issue in *Shafer*, in my view, the Court's observations with respect to the purpose of maternity benefits and parental benefits apply, with the necessary modifications, to sickness benefits.

[39] It is clear that, at the time it was introduced, the exclusive purpose of the EI plan was to provide short-term income replacement for those who were willing and able to work, but who found themselves unemployed. While this remains the primary focus of the legislation, in the last 30 years the plan has evolved to also provide benefits, on a limited basis, to those who may not be available for work by reason of illness, childbirth, or child care responsibilities.

(iv) Choice of Appropriate Comparator

[40] As the Supreme Court of Canada noted in *Gibbs v. Battlefords and District Co-operative Ltd.*[(26)], the concept of equality is a comparative one. For there to be a finding of discrimination, a burden must be imposed on, or a benefit withheld from, one individual in comparison with the burden imposed or benefit conferred on others. It is therefore necessary to identify the appropriate comparator in order to be able to identify any differential treatment, as well as the grounds for the distinction.[(27)]

[41] In *Law v. Canada*, the Supreme Court of Canada suggested that the natural starting point in any consideration of the relevant comparator is the complainant's view of the situation. It is the complainant who will generally choose who it is that she wishes to be compared to for the purpose of the discrimination analysis. It may, however, be open to the adjudicator to refine the comparison suggested by the complainant, where warranted.[(28)]

[42] Counsel for the Commission submits that in this case, Ms. McAllister-Windsor compared her situation to that of other participants in the EI plan (which would presumably include recipients of both regular and special EI benefits), and that this is the appropriate comparator group for the purposes of the discrimination analysis. Although counsel for HRDC did not expressly address the issue of the identification of the comparator group in her submissions, I understand her to have adopted the same comparator group in her analysis.[(29)]

[43] A review of Ms. McAllister-Windsor's testimony discloses that she did not compare her situation to that of other participants in the EI plan claiming regular EI benefits. Rather, Ms. McAllister-Windsor compared herself to others claiming special EI benefits, and in particular, to other new mothers who were able to collect both maternity and parental benefits after the birth of their children.

[44] In order to identify the appropriate comparator group, it is necessary to look at the purpose of the benefit scheme in issue.[(30)] I have already found that the EI plan serves two purposes: regular benefits under the EI plan provide short-term income replacement for those who are willing and able to work, but who are unemployed, whereas special benefits provide benefits to those who may not be available for work by reason of illness, childbirth, or child care responsibilities.

[45] In my view, it does not make sense to compare Ms. McAllister-Windsor to others who are able to work, but cannot find suitable employment. As Mr. Justice Sopinka noted in *Brooks v. Canada Safeway Ltd.*[(31)], comparing benefits allocated to individuals pursuant to different purposes is not helpful in identifying discrimination. Rather, Ms. McAllister-Windsor should properly be compared to others participating in the EI plan who are unavailable to work. In other words, other individuals claiming special benefits.

(v) Is There Differential Treatment by Reason of Sex or Disability?

[46] Insurance plans often place limits on the benefits that are payable under the plan. Insurers are not obliged to provide benefits indefinitely, and lines have to be drawn somewhere.[(32)]

Having said that, once a service provider elects to provide benefits, these benefits must be provided in a non-discriminatory fashion.[(33)]

[47] The question then is: Does subsection 11 (5) of the *Unemployment Insurance Act* have a discriminatory effect on Ms. McAllister-Windsor by reason of her sex or disability?

[48] Counsel for HRDC contends that recipients of special benefits are not disadvantaged; in fact, they receive certain advantages not available to those claiming regular EI benefits. This argument is premised on the assumption that individuals in Ms. McAllister-Windsor's situation should be compared to individuals claiming regular EI benefits. As I have noted at the outset, in my view, the proper comparison in this case is one between Ms. McAllister-Windsor and other claimants of special benefits.

[49] Although the provisions of Section 11 of the *Unemployment Insurance Act* have been subject to repeated judicial scrutiny under the provisions of Section 15 of the *Charter*, I have not been provided with any decisions in which the issues raised by Ms. McAllister-Windsor's complaint have been squarely addressed. The decision of Jerome, A.C.J., sitting as an Umpire under the *Unemployment Insurance Act* in *CUB 19483 (Irving*) is closest to Ms. McAllister-Windsor's case. *Irving* deals with an earlier version of subsection 11 (5). At the time in issue in *Irving*, the *Unemployment Insurance Act* provided up to 15 weeks of maternity benefits, 15 weeks of parental benefits and 15 weeks of sickness benefits, but a claimant could not claim more than 15 weeks of special benefits, in total. Ms. Irving had claimed her full 15 weeks of maternity benefits. Shortly after returning to work, she became ill, and sought to claim sickness benefits. Her claim was rejected, on the basis that the legislation limited the special benefits payable to one individual in a single benefit period to 15 weeks. Ms. Irving challenged the legislation under Section 15 of the *Charter*, alleging that it discriminated on the basis of sex, as only women could have their benefits reduced by virtue of the fact that they had collected maternity benefits. Jerome A.C.J. concluded that the legislation did not operate to deny Ms. Irving benefits by reason of her sex, noting that *all claimants*, whether male or female, were entitled to a maximum 15 weeks of special benefits.[(34)] As a consequence, he found that the right in issue was of an economic nature, and did not relate to the personal characteristics of Ms. Irving.

[50] HRDC contends that the rule against stacking special benefits in issue in this case is applied uniformly in all cases, and, like the provision in issue in *Irving*, does not discriminate amongst groups of individuals. No one, HRDC says, is able to collect more than 30 weeks of special benefits under the EI plan.

[51] The legislative scheme in issue in this case is facially neutral, and does theoretically apply equally to everyone claiming special benefits. My task, however, is not to apply the *Canadian Human Rights Act* so as to achieve formal equality, but rather in a manner that achieves what the Supreme Court of Canada described in *Meiorin* as 'the promise of substantive equality'.[(35)] In contrast to the legislation under review in *Irving*, the limits on the various types of special benefits in this case are configured in such a way that, in reality, the *only* people who can have their access to special benefits limited by the operation of the caps are pregnant women who have claimed sickness benefits. This fact was graphically demonstrated by the testimony of Mr.

LaRue, when he noted that lifting the cap on special benefits would affect 2,360 people, every one of whom would be a woman. As Mr. LaRue pointed out, maternity benefits, which relate to the physical aspects of pregnancy and childbirth, are only available to women.

[52] As a result, I find that while subsection 11 (5) of the *Unemployment Insurance Act* is, on its face, a neutral rule, it has not just a disproportionate effect, but an exclusive adverse effect on pregnant women such as Ms. McAllister-Windsor, who have claimed EI sickness benefits. While some women affected by subsection 11 (5) may not suffer from conditions that would qualify as disabilities within the meaning of the *Canadian Human Rights Act* [(36)], it is undisputed that Ms. McAllister-Windsor does. In Ms. McAllister-Windsor's case, the combination of her pregnancy and her disability resulted in the loss of her entitlement to parental benefits under the *Unemployment Insurance Act*. This amounts to *prima facie* discrimination on the basis of sex and disability.

B. Has HRDC Discharged its Burden?

[53] Having found a *prima facie* case of discrimination on the basis of sex and disability, the onus shifts to HRDC to establish that it has a *bona fide* justification for the anti-stacking rule. There are three elements which must be established in order to demonstrate the existence of a *bona fide* justification. Each of these elements will be considered in turn.

(i) Rational Connection

[54] Using the approach established by the Supreme Court of Canada in *Meiorin* and *Grismer*, in order to prove the existence of a *bona fide* justification for the standard in issue, HRDC must first establish that it adopted the standard for a purpose or goal that is rationally connected to the function being performed. The focus at this stage is not on the validity of the standard in issue, but rather on the validity of its more general purpose. [(37)]

[55] Counsel for the Commission disputes that there is a rational connection between the anti-stacking rule and the purpose of the *Unemployment Insurance Act*. Preventing the stacking of special benefits, the Commission says, does not have the effect of providing temporary income replacement to individuals who have lost their jobs while reintegrating them into the workforce. Removing the anti-stacking rule would not enable claimants to collect benefits indefinitely. Claimants would still be limited by the limits on the total number of each type of special benefit that can be collected within the 52 week benefit period. The Commission evidently has no concerns with respect to the legitimacy of the maximum weekly limits on any of the types of special benefits, or with respect to 52 week benefit period.

[56] The issue at this phase of the inquiry is not the legitimacy of a 30 week cap on special benefits, as opposed to some other weekly limit, but rather, whether temporal limits are rationally connected to the purpose of the plan. In this regard, it is significant that the Commission appears to accept the legitimacy of weekly limits on the various types of special benefits, as well as the 52 week benefit period limit.

[57] I am satisfied that the anti-stacking rule is rationally connected to what I have previously found to be the general purpose of special benefits under the *Unemployment Insurance Act*, which is to provide limited, *short-term* income replacement for those unable to work because of illness, pregnancy and childbirth, or child care responsibilities.

(ii) Good Faith

[58] The second element that must be established by HRDC under the *Meiorin* and *Grismer* test is that it adopted the standard in issue in good faith, in the belief that it is necessary for the fulfilment of its purpose or goal. If the standard was not thought to be reasonably necessary or was motivated by discriminatory considerations, then it cannot be justified.

[59] The Commission contends that there is no evidence before me as to how the 30 week cap was chosen, and that the selection of 30 weeks as the limit on special benefits was an arbitrary decision. This, the Commission says, is circumstantial evidence of bad faith.

[60] There was indeed very little evidence before the Tribunal with respect to the reasons for choosing individual limits in the EI plan, beyond the blanket assertion by Mr. McFee the caps were necessary to prevent unlimited claims. In particular, no explanation was offered as to why the decision was made to impose a 30 week limit on special benefits as opposed to some other maximum number.

[61] That said, as the courts have often observed, the drawing of lines is an unavoidable feature of insurance schemes.[(38)] The EI plan is a self-sustaining insurance scheme, and as such, those with responsibility for administering the plan have responsibility for ensuring its on-going financial viability. It is evident from Mr. LaRue's testimony that there would be significant financial consequences if the cap on special benefits were removed. Based upon the testimony of Mr. McFee, I am prepared to accept that, in imposing the rule against stacking special EI benefits on claimants under the EI plan, HRDC acted in good faith, in the belief that the standard is necessary for the fulfilment of its purpose or goal.

(iii) Undue Hardship

[62] Finally, in order to establish the existence of a *bona fide* justification, the onus is on HRDC to establish that the standard is reasonably necessary to accomplish its goal, in the sense that it cannot accommodate persons with the characteristics of the complainant, without incurring undue hardship.

[63] The essence of HRDC's submissions with respect to the third element of the *bona fide* justification analysis is that eliminating the rule against stacking benefits would impose a significant financial burden on the EI plan, and on the contributors to the plan, which burden would amount to an undue hardship. In this regard, HRDC points to the evidence of Mr. LaRue, who testified that the elimination of the anti-stacking rule would add an additional $2,789,928 to the cost of the EI plan, based upon the 1998-99 claims experience.

[64] Counsel for the Commission challenges Mr. LaRue's cost estimate, noting that not everyone who claims EI sickness benefits will suffer from a 'disability' within the meaning of the *Canadian Human Rights Act*. Women who are detrimentally affected by the 30 week cap, as a result of the combined effect of their non-'disability' illnesses and their pregnancy, will not have suffered discrimination on the basis of disability under the *Canadian Human Rights Act*. As a result, counsel says, Mr. LaRue's cost estimate should be adjusted downward to take this into account.

[65] It seems to me that it is at least arguable that the fact that pregnancy is *a factor* in the differential treatment that would be encountered by the women in Mr. Taylor's example would be sufficient to constitute *prima facie* discrimination on the basis of sex.[(39)] As a result, I am not persuaded that such an adjustment to the cost estimate is indeed appropriate.

[66] Mr. LaRue's evidence regarding the cost of the change has to be examined in the context of Mr. McFee's evidence regarding the overall financial position of the EI plan. According to Mr. McFee, the EI plan has been in a surplus position since 1996 or 1997, and has a current surplus in the account of 'somewhere around $29 billion'.

[67] It is therefore apparent that the increase in cost that would result from the elimination of the rule against stacking benefits could very easily be absorbed by the surplus in the EI fund, without having any immediate impact on the contributors to the plan.

[68] Rather than pay for the increased cost resulting from the elimination of the anti-stacking rule out of the accumulated surplus in the plan, HRDC could choose to pass the increased cost on to the contributors to the EI plan. In this regard, counsel for the Commission submits that the service in issue here is provided by HRDC, and that I should only consider the position of HRDC when it comes to the issue of undue hardship. The impact that changes to the EI plan may have on contributors to the plan should be of no concern to me. I do not agree. As the administrator of the EI plan, HRDC has responsibility for the overall viability of the plan. In *Grismer*, the Supreme Court of Canada concluded that, in administering the British Columbia motor vehicle licencing system, the Superintendent of Motor Vehicles was entitled to look beyond the licencing authority itself, and to consider the safety of individuals on the roads of the province. In my view, it is equally appropriate to consider the effect that any changes to the EI plan may have on premiums and premium payers, as well as the consequences that these effects may have on the viability of the plan.

[69] Having said that, there is no evidence before me as to what the cost of these changes would mean for premium rates[(40)], nor is there any evidence of what the consequences of any increase in premiums would be for the contributors to the plan, or for the plan as a whole.

[70] In my view, the evidence adduced by HRDC does not meet the standard required by the jurisprudence to establish that accommodating women such as Ms. McAllister-Windsor by eliminating the rule against stacking special benefits would result in undue hardship.

C. Conclusion on Liability

[71] I have found that the limit contained in subsection 11 (5) of the *Unemployment Insurance Act* has a discriminatory effect on women such as Ms. McAllister-Windsor. I have also found that HRDC failed to establish that it could not accommodate persons with the characteristics of the complainant, without incurring undue hardship. For these reasons, Ms. McAllister-Windsor's complaint is sustained.

IX. Remedy

[72] Having found liability on the part of HRDC, it remains to be determined what, if any, remedy should properly be provided to Ms. McAllister-Windsor. In fashioning a remedy, the Tribunal's jurisdiction is governed by section 53 of the *Canadian Human Rights Act*. The *Act* was amended on June 30, 1998,[(41)] which amendments affected the Tribunal's remedial jurisdiction. The parties are in agreement that it is the provisions of the pre-1998 *Act* that govern this case.

A. Legislative Remedy

[73] When legislation has been found to have a discriminatory effect, the Canadian Human Rights Tribunal has the power to order a respondent to cease applying the legislative provision in issue.[(42)] Counsel for HRDC submits that the December 31, 2000 changes to the legislation eliminate the need for any such order.

[74] The amendments to the *Employment Insurance Act* increase the limit on parental benefits from 15 to 35 weeks, and the cap on the total amount of special benefits payable under the plan from from 30 to 50 weeks. The weekly limits on maternity and sickness benefits remain the same. Under the amended legislation, the cap on the total number of weeks of special benefits that can be collected by one individual during the benefit period will still only have any application in the case of pregnant women who collect both sickness and maternity benefits. In other words, the problem identified in this decision has not been addressed by the amendments.

[75] There are a number of different ways that Parliament could choose to ensure that women in Ms. McAllister-Windsor's situation are treated in a non-discriminatory fashion by EI legislation. Possible solutions range from the extreme step of abolishing special benefits altogether, to less drastic measures such as adjusting the weekly maximums for each type of special benefit so that women such as Ms. McAllister-Windsor are no longer subject to adverse differential treatment. How to remedy the problem with the legislation identified in this decision is a matter best left to Parliament to determine.[(43)]

[76] I have found that subsection 11 (5) of the *Unemployment Insurance Act* discriminates on the basis of sex and disability, contrary to Section 5 of the *Canadian Human Rights Act*. Accordingly, I order HRDC to cease applying the provisions of subsection 11 (5) of the *Unemployment Insurance Act*. This order will be suspended for a period of 12 months from the date of this decision to allow HRDC to consult with the Canadian Human Rights Commission

with respect to appropriate measures to prevent the same or similar problems in the future, and to allow Parliament to remedy the problem in the manner it deems appropriate.

B. Lost Benefits

[77] The Commission contends that Ms. McAllister-Windsor should be paid the EI benefits that she was denied as a consequence of HRDC's discriminatory conduct. I do not agree. The goal underlying the remedial authority of a human rights Tribunal is to attempt to put the victim of a discriminatory practice into the position that she would have been in, but for the discrimination. (44) This goal is, however, subject to principles of foreseeability, remoteness and mitigation. Ms. McAllister-Windsor testified that after her claim for parental benefits was denied, she collected one week of regular EI benefits, and then returned to work. There is no suggestion that she actually suffered any financial hardship as a result of not collecting parental benefits. Consequently, I decline to make any award with respect to the unpaid parental benefits.

C. Special Compensation

[78] Where a Tribunal finds that a respondent has engaged in a discriminatory practice recklessly or wilfully, or where a victim of a discriminatory practice has suffered in respect of feelings or self-respect as a result of the discriminatory practice, the Tribunal may order the respondent to pay the victim up to $5,000 as special compensation. (45) Counsel for the Commission suggests that Ms. McAllister-Windsor should be entitled to the maximum award under the *Act*.

[79] As indicated earlier, I am not persuaded that HRDC acted in bad faith in this matter. Similarly, I am not persuaded that it acted recklessly or wilfully, or that any award should be made in this regard.

[80] The issue of Ms. McAllister-Windsor's entitlement to compensation for injury to her feelings or self-respect is more problematic. There is very little guidance in the jurisprudence with respect to the principles that should inform the Tribunal in the exercise of the discretion conferred by Section 53 (3) (b). In *Druken*, another case dealing with eligibility for EI benefits, the Federal Court of Appeal questioned whether, as a matter of public policy, awards of this nature should be made at all, when the discriminatory practice giving rise to the hurt feelings was mandated by Parliament. These comments were made in *obiter*, the issue evidently not having been argued by the parties in that proceeding.

[81] The Supreme Court of Canada has observed that human rights legislation is intended to be remedial and not punitive. (46) With this principle in mind, it seems to me that the focus of my inquiry at this juncture of the proceeding should be on the *effect* that the denial of benefits had on Ms. McAllister-Windsor, and not on the reasons that HRDC had for acting the way that it did.

[82] It was evident from Ms. McAllister-Windsor's testimony, particularly her demeanour while describing the impact that these events had on her, that Ms. McAllister-Windsor was both hurt and angered as a result of being denied parental benefits. In my view, in all of the circumstances, an award of $2,500 is appropriate.

D. Interest

[83] Interest is payable on awards of damages for special compensation [(47)], however, the payment of interest must not bring an award for special compensation over the $5,000 limit prescribed in the legislation.[(48)] I order interest be paid on the monies awarded pursuant to this decision, payable in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest should run from January 12, 1996, that is the date upon which Ms. McAllister-Windsor was advised that she would not be able to collect parental benefits, until the date of payment. In no case, however, should the total amount payable on account of special compensation, including interest, exceed $5,000.

X. Order

[84] For the foregoing reasons, I declare that subsection 11 (5) of the *Unemployment Insurance Act* discriminates on the basis of sex and disability, and that Ms. McAllister-Windsor's rights under the *Canadian Human Rights Act* have been contravened by HRDC, and order that:

> i) HRDC cease applying the provisions of subsection 11 (5) of the *Unemployment Insurance Act*. This order shall be suspended for a period of 12 months from the date of this decision to allow HRDC to consult with the Canadian Human Rights Commission with respect to appropriate measures to prevent the same or similar problems in the future, and to allow Parliament to remedy the problem in the manner it deems appropriate;
>
> ii) HRDC pay to Ms. McAllister-Windsor the sum of $2,500 as special compensation; and
>
> iii) Interest shall be paid on the special compensation awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest should start to run from January 12, 1996 until the date of payment. The total amount payable on account of special compensation, including interest, shall not exceed $5,000.

Anne L. Mactavish

OTTAWA, Ontario

March 9, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T575/3300

STYLE OF CAUSE: Helen McAllister-Windsor v. Human Resources Development Canada

PLACE OF HEARING: Ottawa, Ontario

(November 29-30 and December 18-19, 2000)

DECISION OF THE TRIBUNAL DATED: March 9, 2001

APPEARANCES:

Helen McAllister-Windsor On her own behalf

Eddie Taylor Counsel for the Canadian Human Rights Commission

Anne Turley Counsel for Human Resources Development Canada

Reference: T.D. 3/01 (K. Popaleni and P. Janssen v. HRDC)

March 9, 2001

1. At the time that Ms. McAllister-Windsor applied for benefits, the federal employment insurance scheme was known as 'Unemployment Insurance'. On June 30, 1996, the name of the plan changed to 'Employment Insurance', although there were no material changes to the statutory provisions in issue in this case. The current terminology will be used throughout this decision.

2. Transcript, p. 35.

3. R.S., 1985, c. U-1, s. 11, 1985, c. 4 (4th Supp.), s. 2; 1990, c. 40, s.9.

4. Mr. McFee is not alone in his view of the fundamentally different character of regular EI benefits and special benefits. The November, 1962, Report of the Commission of Inquiry into the Unemployment Insurance Act (the 'Gill Report') looked at whether maternity benefits should be added to the employment insurance plan. In concluding that maternity benefits should be dealt with separately, the Commission noted that maternity benefits were 'properly within the sphere of some other social security plan' (at para 112).

5. See the *Budget Implementation Act, 2000*, S.C. 2000, c. 14, Section 3.

6. This type of cap is under scrutiny in the human rights complaints of Katherine Popaleni and Pamela Janssen, whose complaints were heard together with those of Helen McAllister-Windsor. My decision regarding Ms. Popaleni's and Ms. Janssen's complaints is being released simultaneously with this decision.

7. Report of the Parliamentary Committee on Equality Rights, at pp. 14-15.

8. Commission of Inquiry on Unemployment Insurance, 1986, at p. 124.

9. [9] Ms. McAllister-Windsor's complaint relates to matters occurring in 1996. As a result, insofar as I am dealing with issues relating to the substantive law, I will be relying on the *Act* as it stood in 1996.

10. [1999] 3 S.C.R. 3

11. [1999] 3 S.C.R. 868

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

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

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

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

16. *Grismer*, supra., at para. 41

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

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

19. Indeed, there is binding judicial authority to this effect. See the decision of the Federal Court in *Gonzalez v. Canada (Employment and Immigration Commission)*, [1997] 3 F.C. 646.

20. Although the term 'adverse effect discrimination' has lost some of its significance as a result of the creation of the unified approach espoused by the Supreme Court of Canada in *Meiorin* and *Grismer*, the term is still useful insofar as it describes the nature of the discrimination alleged here.

21. See, for example, *Sollbach v. Canada (Attorney General)*, (1999), 252 N.R. 137 (F.C.A.), *Canada (Attorney General) v. Faltermeier*, (1995) 128 D.L.R. (4th) 481 (F.C.A.), CUB 19483 (*Irving)*, CUB 58460 *(Miller)*, CUB 22373 (*Lemieux*), *Schafer v. Canada (Attorney General)*, (1997), 35 O.R. (3d) 1 (Ont. C.A.), and *Tinkham v. Canada (Minister of Employment and Immigration)* (1995), 16 B.C.L.R. (3d)) 79 (B.C.S.C.).

22. *Faltermeier*, supra., at p. 487. See also *Sollbach*, supra., at p. 139.

23. *Shafer*, supra., at p. 15.

24. *Tinkham*, supra., at p.83.

25. At p. 15.

26. 27 C.H.R.R. D/87 at para. 29. See also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 10 C.H.R.R. D/5719

27. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at p. 531.

28. Supra, at p 532.

29. Throughout her submissions, Ms. Turley compared Ms. McAllister-Windsor's situation to that of other claimants under the EI plan.

30. *Ontario Nurses Association v. Orillia Soldiers Memorial Hospital*, (1999), 36 C.H.R.R. D/202 (Ont. C.A.), Leave to Appeal denied, [1999] S.C.C.A. No. 118), at paras. 27-33.

31. (1989), 59 D.L.R. (4th) 321 at p. 337.

32. See *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 (S.C.C.), at p. 746, and *Schafer*, supra., at p. 28.

33. *Gibbs*, supra.

34. The gender neutrality of this legislative scheme is illustrated by the fact that a man could claim 15 weeks of sickness benefits, and thus have been precluded from claiming parental benefits.

35. Supra., at para. 41.

36. See *Ouimette v. Lily Cups Ltd.*, (1990), 12 C.H.R.R. D/19, *Naval v. Globe Foundry Ltd.*, (1993) 21 C.H.R.R. D/136, and *Elkas v. Blush Stop Inc.*, (1994), 25 C.H.R.R. D/158.

37. *Meiorin*, supra., at para. 59

38. *Granovsky*, supra., at p. 746, and *Schafer*, supra., at p. 28.

39. *Holden v. Canadian National Railway Co.*, (1990), 14 C.H.R.R. D/12, 91 C.L.L.C. 17,028, 112 N.R. 395 (F.C.A.)

40. Although Mr. LaRue testified that he had calculated what the impact of the changes sought would be on premiums, this information was not shared with the Tribunal.

41. See *An Act to Amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, S.C. 1998, c. 9.

42. *Druken v. Canada (Employment and Immigration Commission)*, [1989] 2 F.C. 24, 23 C.C.E.L. 15 (F.C.A.)

43. In this regard I am in agreement with the views expressed by the Federal Court in *Gonzalez*, supra. See also *Schachter v. Canada*, [1988] F.C.J. 515.

44. See *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401, and *Canada (Attorney General) v. McAlpine*, [1989] 3 F.C. 530

45. Section 53 (3), *Canadian Human Rights Act*

46. *Canada (Treasury Board) v. Robichaud*, (1987), 8 C.H.R.R. D/4326 (S.C.C.) at para. 33940

47. *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401.

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