THE CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

PETER CRANSTON, HARVEY POWELL, ROBERT BISSON, DONALD J. ALLIN, JOHN THORPE, JOHN G. BURKE, DENNIS BISSON, LORNE VICKERS, JACQUES H. BRULE, WILLIAM N. DEVINE, DONALD WILLIAMS, LYMAN H. GILKS, ROBERT GRAHAM, JOHN WOODLEY, GARY BROWN, PIERRE LALIBERTE, ROBERT CASKIE, JOHN D. SQUIRES, MARCEL LAROCHE, PAUL CARSON,

DAVID FALARDEAU, WILLIAM L. MacINNIS, ALBERT J.G. CHIASSON, JOE CZAJA, LEONARD MURRAY & CHARLES L. EMPEY

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: Hugh L. Fraser - Chairman
Lise Leduc - Member
Marjorie Lewsey - Member

APPEARANCES: René Duval
Counsel for the Canadian Human Rights Commission

Brian Evernden
Counsel for the Respondent

Alain Préfontaine
Counsel for the Respondent

DATES AND LOCATION OF HEARING: December 5, 1990;
March 4, 5, 6, 7, 11, 12, 13, 14, 18, 19 and 20, 1991;
June 3, 4, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25 and 26, 1991;
August 26, 27, 29 and 30, 1991; and
September 5, 1991
Ottawa, Ontario

THE COMPLAINT

There are twenty-six complainants who filed complaints with the Canadian Human Rights Commission alleging that Her Majesty, The Queen in Right of Canada has discriminated against them on the basis of age in contravention of Section 7(a) of the Canadian Human Rights Act. The complainants also alleged that the Department of National Defence pursued a policy or practice that deprives or tends to deprive a class of individuals of an employment opportunity on the ground of age in contravention of Section 10 of the Canadian Human Rights Act. The complainants were employed with the Department of Transport at the time of the alleged discrimination. Donald Allin, Dennis Bisson, Robert Bisson, Gary Brown, Jacques H. Brule, John G. Burke, Paul Carson, Robert Caskie, A.M. Chiasson, Joseph Czaja, Peter Cranston, William Devine, Charles L. Empey, David Falardeau, Lyman H. Gilks, Robert Graham, Pierre Laliberte, Marcel Laroche, William MacInnis, Leonard J. Murray, Harvey Powell, John Squires, John Thorpe, Lorne Vickers, Donald Williams and John Woodley were executive pilots with the Executive Flight Services which was part of Transport Canada.

Robert Bisson, John Burke, Jacques Brule, Albert Chiasson, Charles Empey and Lyman Gilks were flight attendants employed in the Executive Flight Services branch of Transport Canada.

It was agreed at the commencement of the hearing that this Tribunal would be bound by the decision relating to mandatory retirement in the case of Douglas H. Martin et al and The Department of National Defence and Canadian Armed Forces et al.

For several years the Federal Government has employed Executive Flight Services by two separate ministries, the Department of Transport and the Department of National Defence. Peter Cranston, the lead witness for the complainants testified that the Department of Transport Executive Flight Services operation was responsible for approximately 85 to 90% of the executive flights. Mr. Cranston described the Executive Flight Service as an on-demand airline. Flight requests came into the Transport Minister's office and were then passed onto the flight operation centre who then arranged the aircraft and the crews. The scheduling of the flight crews was held in conjunction with the chief pilot.

All pilots with the Executive Flight Service were required to have an airline transport pilot licence which is the top licence that an airline pilot can have as a civilian pilot in Canada. Pilots in the Executive Flight Services were experienced pilots who had a considerable number of flying hours.

A memorandum written by Peter Cranston on December 9, 1984 noted that the Canadian Armed Forces operated a comparable service to that of the Department of Transport, Executive Flight Services. In his memorandum Mr. Cranston pointed out that the Executive Flight Service pilots employed with the Department of Transport at that time had a mean age of fifty one (51) with an average logged flying time of over twelve thousand hours. The mean period of employment with the Executive Flight Service was thirteen years. Many of the pilots with the Executive Flight Service had been flying full time for up to thirty years. There is no record of any flying accident involving any members of the Executive Flight Services. Mr. Cranston also stated that the flight attendants, with one exception, all had years of experience in the same job in the military and the best graduates of the

military were generally employed in the flight attendant position with the civilian service.

Notwithstanding the exemplary record of the Executive Flight Services as operated by the Department of Transport, evidence presented to the Tribunal indicated that for several years consideration had been given to combining the Federal Government's Executive Flight Services within either the Department of Transport or the Department of National Defence with a view to providing air transport for Ministers in the most effective way. There were a number of documents placed before the Tribunal, which documents chronicled the development of the concept of combining the two services. These documents were of great assistance to the Tribunal in

considering the complaints.

THE EVIDENCE

The first document that the Tribunal considered was the letter of November 2, 1984 from the Prime Minister of Canada, the Honourable Brian Mulroney which was addressed to the Honourable Robert C. Coates, Minister of National Defence. This short letter reads as follows:

"Dear Colleague:
I have now had an opportunity to consider the issue of transferring the executive flight service presently under the jurisdiction of the Department of Transport to the Department of National Defence.

I would ask that this transfer be effected at the earliest possible time. In coming to the conclusion that this is a desirable objective, I have primarily taken into account the factors of economy and efficiency. I would ask that the transfer be carried out in an equitable and fair manner so as to impose the least possible hardship on any persons that may be involved."

On November 9, 1984 a Memorandum was sent from the Minister of Transport Don Mazankowski to the Deputy Minister of Transport stating that the transition referred to in the letter from the Prime Minister "be proceeded with forthwith". The Transport Minister's memorandum outlined six points to be considered in insuring "a quick and smooth transition".

"1. The flight co-ordination center is to come under the jurisdiction of the Department of National Defence and it will service all needs for executive flight services as had been carried out in the past.

2. Guidelines for the use of executive aircraft are to remain the same until

further notice.

3. All requests in relation to flights are to go to the Minister of National Defence.

4. Pilots presently employed by the Department of Transport and more particularly those who work with the Canadian Air Administration are to be integrated into the Department of National Defence for Executive flight services if they so desire and are to be given full credit for their prior service.

5. Maintenance and support personnel presently associated with executive flight services are to be transferred to and absorbed by the Department of National Defence should this be necessary. If not, then all required steps are to be taken to ensure a fair and equitable severance from employment of such personnel.

6. The executive fleet, under the jurisdiction of the Department of National Defence is to be utilized whenever possible in order to facilitate and enhance all aspects of pilot training."

On November 20, 1984 a news release was issued by the Government of Canada, specifically by the two ministries involved, advising that "the federal government's Executive Flight Services, currently operated by two separate ministries, will be consolidated under the Department of National Defence".

The news release added that:

"Mr. Coates and Mr. Mazankowski said the move will end duplication of services and over a

period of time result in cost savings to the federal government."

The last paragraph of the news release is significant.

It stated:

"The Ministers said they do not expect lay offs to result from the consolidation of service. We have instructed our staffs to ensure that the transfer is carried out in an equitable and fair manner so as to impose the least possible hardship on any persons that may be involved."

The next document of significance was an Action Directive. The document is entitled Action Directive/84 InterDepartmental Working Group-Executive Flight Services. The stated aim of the directive was to produce an interdepartmentally agreed implementation plan for the transfer of Executive Flight

Services from the Department of Transport to the Department of National Defence. The Action Directive pointed to several factors which were to be borne in mind in developing the implementation plan. Those factors were:

a. The level of service to be offered to the Ministers should be sustained at a traditional high level to the maximum extent possible.

b. The transfer of responsibility from DOT to DND must be carried out in a fair and equitable manner so as to impose the least possible hardship on the personnel effected.

c. The transfer of responsibilities from DOT to DND will require a Treasury Board submission to address resources issues;

d. The transition must be orderly and without compromise to flight safety.

e. DOT will continue for an interim period to provide flight services in support of DND tasking through the terms of an interdepartmental Memorandum of Understanding (MOU) to be drafted by the Interdepartmental Working Group (IWG).

The Action Directive was a conceptual framework involving three phases. In brief, phase one would involve the transfer of the tasking authority for all Executive Flight Services for Ministers to DND. In phase two, by April 1, 1985 an interdepartmental memorandum of understanding would be achieved which would outline the terms and conditions for the provision of Executive Flight Services for the medium term. For Phase three, by September 1, 1985 full details of a long term plan for the provision of Executive Flight Services would be completed by DND and DOT including provisions for fleet modernization by DND.

On December 12, 1984, Gary Brown, one of the pilots employed with the Executive Flight Services who was also the union representative, wrote a memo to Donald Lamont, the Director General of Flight Services. In this memorandum Mr. Brown referred to the fact that there was still at that time a lack of detailed information available to the individuals who would be affected by the transfer. He also requested that details of any option being considered for implementation of the transfer would be made known to the affected parties before a final choice was made. He then stated the preferences of the members as follows:

"Our first preference would be to continue operating our aircraft as civilians working for DND, with some guarantee of long term employment

- if DND will not accept the concept of civilian crews operating their aircraft, some of our members are willing to operate them as

members of the military. This could involve enrolment in the military under some form of reserve service. Under this proposal, our members would need certain guarantees such as minimum term of employment and the right to

transfer pension contributions to the military pension plan.

- For those members who do not wish to continue VIP flying under new management, we would like some form of preferential treatment in transferring to other jobs within Transport Canada.

The next significant document that the Tribunal reviewed was the Memorandum from an individual identified as R. St. John to the Minister of Transport dated January 24, 1985. In this Memorandum the DND position regarding DOT personnel was stated as follows:

(1) The twenty (20) DND executive pilots are not acceptable for transfer to DND for military operational reasons;

(2) The aircraft maintenance personnel are not acceptable for transfer to DND for military operational reasons;

(3) The eight Flight Attendants - could be absorbed in DND but would not necessarily be utilized in that capacity; and

(4) There is no problem with the transfer of one Flight Dispatcher involved in the transfer.

The following options were then outlined:

(1) The immediate transfer of the aircraft and DOT personnel to DND. This option would impose the least hardship on the personnel involved, provided they were guaranteed employment at their present salary levels and employed in the same capacity as enjoyed with DOT. DND have expressed that this option is not acceptable as they could not maintain the JetStar aircraft and the problem of civilian pilots flying military aircraft and civilians maintaining military aircraft becomes an issue. The level of VIP service would decrease as aircraft availability would decrease due to the inability of DND to maintain the aircraft;

(2) A phased option with no transfer of personnel and DOT operating and maintaining the aircraft for periods specified by DND. This option provides no security for the personnel involved. They would be surplus to DOT requirements at the end of the period. In addition, as the prospect of

continuous employment in VIP service would no longer exist, the involved personnel would seek employment elsewhere and as this occurred, DOT would be unable to provide operating and maintenance staff adequate to maintain a satisfactory level of VIP service;

(3) The seconding of personnel to DND for the specified period after which time they revert to DOT. The future employment prospects are similar to option 2 above and the results would be similar; and

(4) The transfer of personnel to DND with the seconding of those personnel back to DOT to operate and maintain the VIP aircraft for a period specified by DND. This option has the best possibility of maintaining an adequate workforce for the safe maintenance and operation of a VIP service at, or near, the existing levels of service. However, this option does not address the concerns expressed by DND regarding civilian pilots operating DND aircraft which could occur subsequent to the secondment.

The last paragraph of this Memorandum reads:

> In order to maintain a satisfactory level of VIP service, in concert with ensuring fair and equitable treatment of DOT employees, your approval to proceed with option four in the negotiations with DND is solicited. Should this option not be selected or possible, DOT would seek assurances from the central agencies that assistance would be provided in resolving resultant personal problems in DOT.

The approval of Don Mazankowski was apparently given on February 1, 1985.

A Memorandum of Understanding between the Department of Transport and the Department of National Defence was signed firstly by the Honourable Erik Nielsen, Minister of National Defence on May 29, 1985 and subsequently by the Honourable Don Mazankowski, Minister of Transport on June 17, 1985. Paragraph 1 of this memorandum of understanding reads as follows:

1. The purpose of this Memorandum of Understanding (MOU) is to provide the basis of mutual understanding and agreement on matters relating to the transfer of the Government Administrative Flight Service, formerly known as the Executive Flight Service, of the Department of Transport (DOT) to the Department of National Defence (DND), as directed by the Prime Minister in letters to the Minister of National Defence and the Minister of Transport dated 2 November, 1984.

Paragraph 3 of this memorandum states as follows:

Implementation and interpretation of the terms of this MOU shall reflect the principles established by the Prime Minister in his letter to Ministers 2 November 1984, that is, taking into account the factors of economy and efficiency; that the transfer be effected at the earliest possible time and that it be carried out in an equitable and fair manner so as to impose the least hardship on any person that may be involved.

Annex C to the Memorandum of Understanding contained the job placement and retirement provisions. These provisions were as follows:

1. For employees who will be surplus 1 July 1986, the normal provisions of the Work Force Adjustment Policy and the provisions of the collective agreements will apply. Concerted efforts will be made by DOT, DND, PSC and TBS to redeploy these employees to vacant positions for which they qualify or would qualify with retraining. Other provisions include:

- salary protection for one year for those accepting lower paid jobs;

- PY's given new department for up to two years if they accept surplus personnel;

- re-training, if it will facilitate placement;

- four months minimum notice in the event of lay-off;

- priority for public service placement for one year after lay-off.

2. Flight attendants wishing to remain employed with administrative airlift after 1 July 1986, will be given the opportunity of becoming Class C Reservists, provided they meet the requirement for such service.

3. If some employees remain to be placed in other employment ninety days before 1 July 1986 phase-out of the JetStar, the Treasury Board will consider special provisions on a case-by-case basis.

The essence of all of the complaints before this Tribunal is that on April 26, 1985 the executive pilots as well as the flight attendants were told by Brigadier General Bell of the Canadian Armed Forces that "because of the average age of the group, we were unacceptable to the Department of National Defence". General Bell's role with regard to the transfer of this function from the Department of Transport to the Department of National Defence was obviously critical in the eyes of the complainants.

In his examination in chief, General Bell indicated

that his understanding of the Prime Minister's directive was that the administration of Executive Flight Services would come over to the Department of National Defence and that it was to be done with reasonable speed. Their personnel were to be treated in as fair a manner as possible and that economy and efficiency must be recognized. General Bell then directed one of the members of his own staff to do a study on the options which might arise as a result of the discussions between the Interdepartmental Working Group. His staff was directed to look at the militarization of the Executive Flight Services within the Department of National

Defence as well as to look at it as a civilian activity within the Department.

A comprehensive study was produced by Lieutenant-Colonel Scott. General Bell testified that after studying the report produced by Lieutenant-Colonel Scott, he thought that the operation should be a military operation due to the numerous inconsistencies that would be involved in attempting to bring civilians over and set up a separate civilian organization within the 412 squadron. When pressed to specify the inconsistencies General Bell testified that:

"we noticed the vast disparity in the terms of service between the two. The military terms of service of course were quite different from civilian terms of service in the government. There were no unions involved, the pay differences were remarkable...and there was a large age difference between the groups."

When questioned as to what difference the age differential made in his mind General Bell stated:

"only because I was looking at it as a group, I looked at the twenty pilots and the administrative flight services as a composite group and the initial intention had been from their view point, I believe, certainly the way we looked at it, that they would come over as an entity and it was therefore significant to see how many fitted into our military rules and how many fell outside in terms of age, recognizing the military retires people at fifty five."

When questioned further as to the difference of age that the pilots would make in terms of the civilian organization General Bell answered "none at all".

When questioned as to the various options that the Department of National Defence were considering in early January 1985 with regard to the pilots and flight attendants in the Executive Flight Services General Bell remarked:

"My understanding if you are talking about

the option that we consider the best, was that they would not be seconded back from the Department of National Defence, because one of the original intents had been that they would come over to the Department of National Defence as DND civilians and be seconded back to work for the Department of Transport under the military operational direction and we were advised that, if anything, would create more hardship to their personnel than it would provide any benefit and create a lot of administrative turmoil at the same time and that the best approach, assuming that we continue to pursue our intent of militarization, was that at least for the three year period while the JetStars were still operating, that they work on behalf of the Department of National Defence under a Memorandum of Understanding and continue with DOT and that during the three years of lapsed time that the Jet Star would operate, that both DOT and DND and Treasury Board would work out an acceptable solution to the loss of their opportunities, if you like, in the administrative flight services by employment and DOT or elsewhere."

When asked if any consideration was given at any stage in this process to the employment of the pilots in Class "C" reserve, the answer given by General Bell was "certainly and it always was". When asked if the possibility of Class "C" service ever came off the table, General Bell replied that "no it was always available".

In addition to the notes taken by D.E. Lamont, Director General of Flight Services of the meeting of January 30, 1985 the Tribunal was also presented with the notes taken by one of the complainants, William Devine. These notes refer to several matters which were put to Brigadier General Bell in his examination-in-chief. The comments attributed to General Bell in notes taken by Mr. Devine on January 30, 1985 read as follows:

"Gen Bell - we've looked at exec. pilots going back to the SC either as reg. force or as class "C" and it wouldn't be a good operation. Class "C" max. age is 55. Pay scales would be much lower. Captain rank would be the max. not acceptable. Can't see the mix between young 412 types being senior to older more experienced exec. pilots. No portability of pension from DOT to DND. Prefers contractual approach where DOT supplies a/c & crews and DND would pay the costs"

In reference to these notes Brigadier General Bell was

asked whether he remembered indicating that it "would not be a good operation". His answer was as follows:

"What I said was, while it is possible, there are some pilots that could fit into class "C" by virtue of previous military experience -- and I can't remember exactly how many that might have been, probably about eight that had military experience -- who were still under 55 years old. Because we have to recognize the class "C" limits were exactly the same as the military, that commissioned officers in the service could go to 55 years old.

I told them that if they were seriously thinking about making that kind of transfer and joining the military, that they should look carefully at what it would involve in becoming squadron members and that they would be expected to operate just as military officers operated, which would impose certain hardships on them. That was my perception, because of the different terms we talked about, the different discipline, secondary duties required, certain things that they had properly put behind them for

many years since they were in the military and that it would only be wise to consider those, if they were really serious about coming over to join the military. Class "C" was often not as a soft way of getting into the military and leading a specialized life as part of the administrative flight services, but joining fully the Canadian forces.

In further describing the hardships that he foresaw General Bell added that:

"...after the protection period, and they might well have been protected for one year because of prevailing rules, but beyond that most of them would probably have been at the Captain rank level, because you don't bring people over as Majors and make them executive directly so their pay would have dropped drastically. The Captain level of pay at that time was around thirty five thousand dollars. As I have already indicated to you, my recollection was that their pay levels were up to sixty one thousand and with overtime, probably beyond seventy in some cases. Nevertheless, whatever an appreciable difference and also it was my belief that

with very young pilots the Jet Flight, for example had most of the young pilots in 412 squadron. Their average age was around thirty - thirty one and the administrative flight service people were appreciably older but mixing the two together would create certain problems for both the young fellows and the old fellows.

When pressed to describe the problems he foresaw with regard to the young pilots General Bell remarked:

"Well my perception there, of course, is the young captain who was earning appreciably

less, has completely different terms of service, completely different requirements, I think would resent enormously having someone with him who was earning twice as much as he did, did not have to conform in the same manner as he did and I think the age difference creates difficulties because the young fellow is less willing to assert himself. By trying to train these young guys to assert themselves as Captains to make difficult decisions, I just felt that I would find it difficult to tell if someone had thirty years of flying experience, leave me alone, I am trying to learn to do this. And I think it would be equally difficult for the vastly experienced individual who might have to sit as second to that young military captain of the aircraft and not poke his finger into what was going on. This is only one of a number of considerations, and it certainly shouldn't be over emphasized.

The next question put to General Bell was: And did you put that proposition to the group of pilots on the terms that you have just explained? Answer: "Yes, I did, very much so."

The meeting that all the complainants refer to, took place on April 26, 1985. The Tribunal was assisted with the presentation of notes taken by General Bell of that meeting as well as the notes taken by William Devine one of the pilots who was in attendance at the meeting. With regard to the first set of notes referred to, General Bell admitted that he had authored the notes which were reproduced in Tab 16 of Volume R-32 of the Exhibits. When asked how the question of the age of the pilots came up at the meeting, General Bell, although his recollection was not completely clear on this point, recalled that he had made a statement along the lines that:

"the average age of the twenty pilots was

fifty-one and that coming over to the Canadian Forces to work the military as military pilots presented problems which we

had discussed at great length prior to this time and again fifty-one was just the average of that total group of pilots. When I made the statement, it was to recognize again in effect what I had said on numerous occasions when we were talking about the military, how difficult in effect it would be for many of them.

General Bell was then questioned with regard to the notes produced by William Devine, specifically the reference to "problems associated with aging which make it difficult to adapt to military life". General Bell did not recall making the statements. He admitted that he might well have said it because it is a common sense statement. He elaborated as follows:

"Well, I am thinking if I was fifty-two or fifty-three years old and I was considering joining a military where I was going to retire at fifty five with the demands and extreme change of my style of life, it would make it extremely difficult and I would be totally dishonest if I didn't tell people that."

The next question put to General Bell was "What demands did you have in mind?" The answer given:

Again, the disciplinary measures that the complete changes in the terms of service, the loss of salaries, the disciplinary activities, the secondary duties that were required and when you impose that on someone who has been used to a different way of life -- I am not saying it was any easier, but a different way of life. As you get older it is much more difficult. Hell, I found it difficult to adapt as I was getting older. I was much more crotchety and still am.

It is clear that by January 1985 the Department of National Defence was still considering a variety of options open to them for the transfer of the Executive Flight Services function, although DND had already come to the conclusion that the transfer of twenty DOT executive pilots to DND could not take place for "military operational reasons". The same reference to

"military operational reasons" was given for the unacceptability of the transfer of the aircraft maintenance personnel. The precise definition of military operational reasons was not given to the Tribunal, but it seems clear that the testimony of the various witnesses such as General Bell and Admiral Mainguy with

regard to the numerous obstacles that the pilots, and to a lesser extent the attendants, would face in attempting to perform similar functions in a strictly military environment underscores the "military operational reasons" referred to in several documents.

In support of their position that cohesion and morale were significant considerations in any military operation the Respondents presented the Tribunal with the evidence of Dr. Darryl Henderson who is considered to be an expert in the area of cohesion and morale in the Armed Forces. Dr. Henderson who served as a Colonel in the U.S. Army authorized a book entitled "Cohesion The Human Element in Combat". This book was presented to the Tribunal for its consideration.

Dr. Henderson testified as to the different factors that can erode morale in a military unit. His opinion was based on scientific research as well as on his own personal experiences. Amongst the main factors cited by Dr. Henderson was inequality of treatment between people performing the same tasks. He was of the opinion that having some pilots subjected to the rules of military conduct, having to perform more duties, including those that are life threatening, for a lesser pay than civilian pilots not subjected to the same rules, performing substantially less work, having the legal right to refuse to perform life threatening work and being paid more, would be destructive of employee morale and, hence, the unit's cohesion.

THE LAW

The Tribunal considered a number of Statutes dealing with employment with Her Majesty The Queen. Sections 7(1)(a), (b), (e) and (f) of the Financial Administration Act read as follows:

7(1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to

(a) general administrative policy in the public service of Canada;

(b) the organization of the public service of Canada or any portion thereof, and the determination and control of establishments therein;

(e) personnel management in the public service of Canada, including the determination of the terms and conditions of employment of persons employed therein; and

(f) such other matters that may be referred to by the Governor in Council.

Public servants are appointed by the Public Service Commission. The public servants hold their position at the pleasure of her Majesty in accordance with Section 24 of the

Public Service Employment Act, R.S.C. 1985, c. P-33 which reads as follows:

The tenure of office of an employee is during pleasure, subject to this Act and any other Act and the regulations thereunder and, unless some other period of employment is specified for an indeterminate period.

The Supreme Court of Canada in Kelso v. Her Majesty The Queen (1981) 1 S.C.R. 199 confirmed the principle that employment in the public service does not provide an employee with a vested right in any particular position. The tenure is in the service rather than to a position within that service. As a result the government is free within the context of the law, to move employees around within the Government service.

Another significant statute is the Public Service Rearrangement and Transfer of Duties Act, R.S., c.P-34. Section 2 of this Statute states:

2. The Governor in Council may

(a) transfer any powers, duties or functions or the control or supervision of any portion of the public service from one minister to another, or from one department or portion of the public service to another; or

(b) amalgamate and combine any two or more departments under one minister and under one deputy minister.

Has direct discrimination occurred? Discrimination is adverse differentiation which is defined as a distinction based on grounds relating to personal characteristics of the complainant having the effect of imposing obligations not imposed on others or to limit the opportunities available to others. This definition was cited in Andrews v. Law Society of British Columbia 1989 1 F.C.R. 143 at 174 per McIntyre, J. In O'Malley v. Simpson-Sears Ltd. 1985 2 S.C.R. 536 at 551, Justice McIntyre held that direct discrimination occurs where an employer adopts a practice or rule which on its face discriminates on a prohibited ground.

The complainants also argued that they were subjects of adverse effect discrimination. In the case of O'Malley v. Simpson-Sears Ltd. Justice McIntyre stated that indirect or adverse affect discrimination arises when

"...an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which had a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it

imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive

conditions not imposed on other members of the work force."

The main allegations of the complainants are that the Respondent directly or indirectly discriminated against them by refusing to employ or continue to employ them because of their age. The complainants referred to the statement made by Brigadier General Bell on April 26, 1985 as the source of this discrimination. The complainants claim that they were prevented from applying for employment by the Canadian Armed Forces. However, the Tribunal agrees with the Respondent's position that although the complainants alleged that the Respondent indirectly discriminated against them by establishing or pursuing a practice or entered into an agreement affecting employment that tends to deprive them of an employment opportunity, it was never made clear what the particular offensive practice was.

Counsel for the Respondent in his final submissions sought to emphasize the significant differences in the employment of public servants vis-a-vis members of the Canadian Armed Forces. It was argued by the Respondent that public servants are appointed by the Public Service Commission, they can be members of bargaining units, bargain to set their terms and conditions of employment and strike if not satisfied with these negotiations. Their obligation to work is limited in time and they are entitled if provided for in their collective agreements, to be paid overtime. They can refuse to perform work that would endanger their life or security. Public servants can resign their position by simply informing their superior in writing. They are subject to discipline, but can grieve any decision of the employer in this regard to an independent arbitrator. Punishment for disciplinary infractions can be no more severe than dismissal. They can have the appointment of another public servant reviewed to ensure that it was made in accordance with the merit principle. The conditions under which the employment of a civil servant can be terminated are governed by the applicable legislation and the collective agreements. The aforementioned provisions are contained in the Financial Administration Act, R.S.C. 1985 c.F-11, The Public Service Employment Act R.S.C., 1985 c. P-33 and the Public Service Staff Relations Act R.S.C., 1985 c. P-35.

The Respondent also argued that members of the Canadian Armed Forces are subject to a very different regime. They are enroled directly by the Canadian Armed Forces, soldiers cannot be members of a bargaining unit. Members of the Canadian Armed

Forces have no legal right to their pay, overtime pay is a foreign concept to the Military. A member of the Canadian Armed Forces must request to be released. Such an individual becomes subject to the Code of Service Discipline once they become a soldier. Under the Code, refusal to carry out a lawful order, even at the risk of one's life, amounts to insubordination,

punishable by life imprisonment. Not reporting to work is desertion or an absence without leave which is punishable by life imprisonment. Joining in a strike is mutiny punishable by death. Advocating use of force to change the government is not the expression of an opinion, it is a seditious offence punishable with life imprisonment. These provisions are contained in the National Defence Act, R.S.C. 1985 c.N-5.

It is beyond dispute that Her Majesty can re-organize her Departments and transfer duties and powers as between Ministers in accordance with the Public Service Rearrangement and Transfer of Duties Act. The Governor in Council acting on the recommendation of the Prime Minister decreed the transfer of duties from the Department of Transport to the Department of National Defence. The effect of the transfer was to eliminate the civilian flight service by virtue of the decision of the Minister of National Defence to perform this service by employing a military unit which had already been performing a similar function for a considerable period of time. As a result of this transfer, all civil service flight crew positions associated with the operation of the Executive Flight Services or administrative services were abolished.

The lawful exercise of this power of re-organization can sometimes have a negative impact on certain employees as was the case with these Complainants. The Tribunal agrees, however, with the submission of the Respondent that the evidence clearly supports the conclusion that being a pilot with 412 Squadron required additional and special qualifications to such an extent that the military personnel who filled the positions which were added to the structure of the 412 Squadron were filling new positions for which the Complainants were not qualified and in which the Complainants were not interested.

With regard to the issue of direct discrimination the Complainants alleged that the statement of Brigadier General Bell

to the effect that, as a group, they were too old for enrolment in the Canadian Armed Forces, constitutes direct discrimination.

Taken further, this discrimination allegation meant that the Respondent refused to employ or to continue to employ the Complainants because of their age in violation of Section 7(a) of the Act. The only mention of age was the reference to the average age of the pilots by Brigadier General Bell. The Tribunal is satisfied that this reference was made in an attempt to explain the difficulties presented by some of the options which were available to DND and DOT regarding DOT personnel. It was clear that one of the options being considered at the time was the transfer of all DOT personnel to DND.

The Complainants alleged that the Respondent refused to employ them, but the evidence supports the Respondent's position that with the exception of the Complainant Albert Chiasson, none of the Complainants applied for enrolment in the Canadian Armed Forces. Mr. Chiasson applied for enrolment as a Class "C" reservist, but was turned down for reasons other than those

stated in his complaint. The evidence also indicates that the Canadian Armed Forces was prepared to entertain applications from individuals and that for a considerable period of time the possibility of Class "C" service for a number of the Complainants was being considered as a possible option. The individuals who expressed an interest in Class "C" service were Albert Chiasson and Robert Bisson. Both of these Complainants met with the recruiter. Mr. Bisson decided not to pursue this option because it was not financially attractive. Albert Chiasson pursued it to the point of a medical examination but was advised that he might possibly have cancer. When he later found out that the diagnosis was not correct, he did not pursue the matter further.

Dennis Bisson considered enrolment in the Canadian Armed Forces and discussed the matter with someone in the Canadian Armed Forces Headquarters but he also did not pursue the matter any further. Paul Carson's testimony was that he considered re-enroling in the Canadian Armed Forces but abandoned the idea after discussions with his union representative Gary Brown. There was evidence presented to the Tribunal that the Recruitment Centre for the Canadian Armed Forces in Ottawa was alerted to the possibility that a number of the Complainants might apply for enrolment. The instruction given to the

recruiting centre was to ensure that these applications be processed in strict compliance with the standard procedure. There was no evidence that any of the Complainants attended at the Recruitment Centre to make application for enrolment in the Canadian Armed Forces.

The Tribunal finds that on the basis of all the evidence presented before it, age was not a proximate cause in the decision made to consolidate the Federal Government's Executive Flight Services. The Tribunal also finds that the directive from the Prime Minister to consolidate the function is not an employment rule so as to give rise to the doctrine of adverse effect discrimination. The Tribunal also finds that the Complainants failed to prove that the Respondent has a policy or practice regarding the preferred age of recruiting that deprives or tends to deprive the Complainants of any employment opportunity.

At the hearing it was determined that the validity of the Canadian Armed Forces mandatory retirement age was to be decided solely by reference to the decision in the Tribunal involving the case of Martin et al v. The Department of National Defence and the Canadian Armed Forces. The Tribunal in the Martin case decided that the Canadian Armed Forces mandatory retirement policy contravenes the Canadian Human Rights Act.

The Tribunal in the case at bar has concluded that the Complainants were not discriminated against by the Canadian Armed Forces and were not deprived of employment opportunities by the Canadian Armed Forces. There was no evidence presented to the Tribunal that supported the allegation that the Respondent refused to employ or to continue to employ the Complainants on

the basis of their age. When the Complainants positions of employment were abolished they were offered the choice of alternative positions in the Public Service for which they could become qualified within a reasonable period of time. Since the Complainants expressed little interest in joining the Canadian Armed Forces as regular members of the military, the Canadian Armed Forces mandatory retirement policy cannot be said to have effected them in a discriminatory manner.

The Tribunal finds that the decision of the Canadian Human Rights Tribunal in Martin et al v. The Department of National Defence and the Canadian Armed Forces will be of no benefit to these complainants.

The evidence placed before this Tribunal clearly establishes that the complainants enjoyed their jobs with the Executive Flight Services. They presented a highly professional group of public servants with an unblemished and enviable safety record. These men had very desirable flying jobs. They testified to a high level of job satisfaction. The evidence does not indicate any dissatisfaction with the Executive Flight pilots or the flight attendants who were employed with the Executive Flight Services. Peter Cranston in his Memorandum dated December 9, 1984 stated that "it is difficult to see how any cost savings can result from simply turning over our aircraft to the military, and laying off or transferring transport flights and ground crews to other jobs."

One of the initial reasons given for the interdepartmental transfer was that of economy and efficiency. This Tribunal was not given the responsibility of determining whether the transfer from DOT to DND resulted in greater economy or efficiency. The Tribunal was required to determine whether the Department of National Defence discriminated against the complainants on the basis of their age by refusing to employ them. The Tribunal is satisfied after a thorough review of the evidence that the responsibility for VIP flights as it was to be carried out by the 412 squadron was a quite different job from that of Executive Flight Services under the Department of Transport.

The complainants in their evidence indicated a willingness to follow the job of transporting VIP's, to DND or to any other department if necessary. It was the opportunity to continue performing a job that they had enjoyed that they were seeking to preserve, not a career in the military. General Bell referred to the significant differences between the working conditions faced by the pilots in the 412 squadron and the pilots who had been employed with the Executive Flight Services. He doubted very much whether any of the complainants would have considered enrolment in the military given these significant differences.

A number of the complainants had in fact left the military to pursue the opportunities and working conditions

provided with the Department of Transport in the Executive Flight Services. In Mr. Cranston's memo of December 9, 1984 he acknowledges this fact and also recognizes the difference between employment with the Department of Transport and employment with DND as part of the Canadian Armed Forces. At one point in his memorandum Mr. Cranston states:

"The chief difference in personnel between Transport and DND is that our people stay on the job much longer. A CAF pilot is first a career officer. He works for perhaps half of his twenty to twenty five year term of service in other jobs then actively piloting aircraft. The more experience he gets, the more likely he is to be promoted and spend even less time on the flight deck. In any case, he will spend a maximum of three to four years in any one posting, and will reach compulsory retirement age in his mid to late forties, just about the time our pilots are about to be promoted to command of our aircraft."

Later on in the same Memorandum Mr. Cranston states:

Whether alternate responsibility rests with Transport or DND seems less important than maintaining the integrity of the existing flight. It does not really matter who we work for; the job is the same in either case: to get the passengers to destinations safely at all times no matter what.

Mr. Cranston has very succinctly stated what appears to be the complainants position in this case in that it did not really matter who they worked for as long as the job remained essentially the same. The difficulty with enrolment in the Canadian Armed Forces is that the job would not have been the same. While the safe transport of passengers is a definite priority regardless of which department had the responsibility of transporting the VIPs, it has been clearly established that the position as a pilot or flight attendant with the 412 squadron is a significantly different responsibility than that of a pilot or

flight attendant with the Executive Flight Services under the Department of Transport. As Mr. Cranston stated himself, the military pilots have to perform jobs other than that of piloting aircraft from time to time. The higher they are promoted the less time they tend to spend on a flight deck. Such a pilot could expect to spend only three to four years in one posting before being transferred perhaps to a non-flying position.

Unless the Canadian Armed Forces were to make a special exception for the Executive Pilots, there is no reason to believe that they would have been employed as members of the military in the 412 squadron flying VIPs for more than a three or four year period.

At the end of the Memorandum Mr. Cranston makes another significant statement which supports the Tribunal's finding that the complainants did not have a high degree of interest in joining the Canadian Armed Forces. In the paragraph to which we are referring Mr. Cranston states:

> The flight attendants, with one exception, all have years of experience in the same job in the military. Just as with pilots, we have always been in a position to hire the best 'graduates' of the military, since they were, up to now, assured of a permanent career doing the thing they did best. It is easy to see why our turnover has been so low.

Mr. Cranston here acknowledges that all but one of the flight attendants has already been employed in the same job in the military. He also acknowledges in this paragraph that a number of pilots who had military experience had been hired and these have often been the best graduates of the military. The motivation for both the pilots and the flight attendants to leave the military and seek a career with the Executive Flight Services was the assurance of a permanent career doing the thing they did best. This statement more than anything else summarizes the position of the complainants. They were seeking a permanent career doing the thing they did best and if a permanent career doing the thing they did best could not be achieved through the Department of Transport then they fervently hoped that such a permanent career could be maintained within the Department of

National Defence and possibly in the Canadian Armed Forces if not in the civilian arm of the Department of National Defence.

The Canadian Armed Forces for reasons that they described as military operational reasons determined that they could not accommodate the complainants by providing them with the continuation of their permanent career doing what they had been doing for a number of years and doing a job that they did extremely well.

While the Tribunal understands very clearly the reasons why the complainants would want to continue to carry out employment duties which had been performed with a high degree of skill and professionalism for a number of years, we must acknowledge Her Majesty's right to change those employment duties as she thinks best.

For the reasons given the Tribunal hereby dismisses all of the complaints.

DATED this day of November, 1992.

HUGH L. FRASER
Chairman

Lise Leduc

Marjorie Lewsey