CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

MARTIN DESROSIERS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

REASONS FOR DECISION

2003 CHRT 26
2003/07/10

MEMBER: Michel Doucet

[TRANSLATION]

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I. INTRODUCTION

[1] The complainant, Martin Desrosiers ("Desrosiers"), alleges that he was discriminated against on the basis of his disability and his family status in that the

respondent, the Canada Post Corporation ("the Corporation"), rejected his candidacy in September 1997 for a CS-03 position of management analyst. The reasons cited by the respondent, according to the complainant, were that he did not meet the physical requirements of the position and that the position called for evening work, which did not fit well with his family obligations.

[2] The complainant therefore alleges that the respondent discriminated against him, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("the *Act*").

[3] The parties have also asked the Tribunal, firstly, to deal with the issue of whether there was a discriminatory practice in this case and, if so, whether this discriminatory practice was based on a *bona fide* occupational requirement within the meaning of the case law and the *Act*. Secondly, if the complaint proves to be substantiated, the parties have asked that the Tribunal reserve its jurisdiction in order to convene a second hearing to allow the parties to present evidence and arguments on the issue of remedy.

II. JOINT ADMISSIONS OF FACTS

[4] At the start of the hearing, the parties agreed on the following facts:

> 1. Desrosiers has been an employee of the Corporation since May 6, 1987. Since being hired, Desrosiers has held several jobs within the Corporation. On May 22, 1988, he was promoted to full-time supervisor, at level 2. On July 15, 1991, he was appointed to the position of business analyst, an MGT 1.5 management level position. On October 11, 1993, following a lateral transfer, Desrosiers became a communication analyst, a management position (MGT 1.5).
>
> 2. In November 1993, the Union of Postal Communications Employees, a component of the Public Service Alliance of Canada, was certified as the bargaining agent for approximately 2,800 employees of the Corporation. Desrosiers was one of those 2,800 employees.
>
> 3. On December 15, 1994, Desrosiers' MGT 1.5 position became surplus.
>
> 4. On January 12, 1995, Desrosiers suffered a work accident and was absent from work until May 19, 1996. As a result of this work accident, Desrosiers suffered a back injury that affected his functional job skills.

5. On January 25, 1995, the Corporation informed Desrosiers that his position, classified as MGT, was reclassified at the AS-03 level.

6. To facilitate Desrosiers' return to work, the Corporation obtained a musculoskeletal report from the Movement and Analysis Treatment Centre focussing on Desrosiers' functional limitations as assessed on May 17, 1996.

7. On May 19, 1996, Desrosiers returned to his job as it had existed at the time of his work accident in January 1995. On June 10, 1996, Desrosiers took a temporary assignment as a technical development analyst, a position classified at the AS-03 level. On January 27, 1997, Desrosiers accepted a permanent assignment at the Corporation's Institute in an officer position that was classified at the AS-02 level.

8.Even though Desrosiers accepted the AS-02 position on January 27, 1997, he retained his higher employee status as an AS-03.

9. On May 19, 1998, Desrosiers obtained a permanent position as a communications analyst. The position was classified at the AS-03 level.
10. In August 1997, the Corporation posted a competition bearing reference number 97-RID-13 for a management analyst position, classified at the CS-03 level. The deadline for submitting candidacies for competition 97-RID-13 was August 29, 1997.

11. On August 7, 1997, Desrosiers submitted his candidacy for competition 97-RID-13 to Ginette Dinis ("Dinis"), a human resources officer employed by the Corporation. Dinis was responsible for administering the competition process.

12. Desrosiers' candidacy included a covering letter, his résumé, university diplomas, the results of his second language knowledge examinations and his most recent performance appraisal.

13. On August 8, 1997, Dinis acknowledged receipt of Desrosiers' candidacy by e-mail. She informed Desrosiers that the Corporation "[is] currently reviewing your qualifications and your experience relating to this employment opportunity. We will contact you once the review of applications for this position is completed" [translation].

14. On August 8, 1997, Desrosiers and Dinis were in touch by telephone and briefly discussed competition 97-RID-13. During this telephone conversation, Desrosiers and Dinis discussed, among other things, that the position to be awarded under competition 97-RID-13 was one that involved "on call" duties as well as some travel. During this same telephone conversation, Dinis told Desrosiers that she would send him a

copy of the statement of qualifications for competition 97-RID-13. Desrosiers received the statement of qualifications from Dinis in August 1997.

15. As of August 29, 1997, just four candidates had applied for the competition. Of the four, two were screened out and rejected by the Corporation because they did not belong to the bargaining unit within which the coveted position was offered. After these two candidates were screened out, just two candidates remained on the competition roster: Rod Magliocco and Desrosiers.

16. Dinis assigned Michelle Jammes ("Jammes") to screen the candidates for the competition while Dinis was on annual leave. As part of her screening process, Jammes inquired at the Corporation's health services about Desrosiers' particular medical and/or physical restrictions.

On September 2, 1997, Jammes asked the Corporation's health services to provide her with information about Desrosiers' particular medical and/or physical restrictions. According to Jammes:

> I urgently require a list of the above-mentioned employees work restrictions [Martin Desrosiers]. I have been told that he is unable to lift heavy weights however I am not aware of what the medical field deems as "heavy" or "light". I am told that he is unable to sit or stand for long periods of time however I need to know what a long period of time is considered to be, in minutes.
>
> The file for this employee is onsite in Huron/Rideau. I require something in writing from either Dr. Belzile or an occupation health nurse advising me of his restrictions.
>
> Mr. Ramsay is currently staffing a position for which Mr. Desrosiers has applied. I cannot complete the screening process until I know if Mr. Desrosiers is physically fit to be considered for this job. Mr. Ramsay would like the interviews to take place this Friday, Sept. 5.
>
> Could either Dr. Belzile or Ms Younger please qualify/quantify the restrictions for our files ?
> [*sic*]

Still in the context of her screening of the candidates, Jammes asked the manager responsible for the position represented by competition 97-RID-13 to provide her with a list of the physical activities associated with the vacant position.

On September 3, 1997, the consultant working for the Corporation's health services sent Jammes a list of Desrosiers' physical limitations, dated May 21, 1996. This list mentioned the following medical and/or physical restrictions:

> 1.- Change position every 20-30 minutes;
>
> 2.- Stand for short periods of time (5-6- minutes)
>
> 3.- Lifting under 18 pounds
>
> 4.- Occasional stair climbing
>
> 5.- Push/pull carts with 20 pounds resistance or less.
>
> [*sic*]

On September 4, 1997, Jammes informed Dinis that she had rejected Desrosiers' candidacy for competition 97-RID-13 "due to the fact that he is medically unfit to perform the requirements of this vacant position." On September 5, Rod Magliocco, being the only eligible candidate following the screening process, began the review of qualifications phase as mandated by the hiring process.

On September 18, 1997, Dinis informed Desrosiers by e-mail that his candidacy for the competition had been rejected because he did not meet the physical requirements of the position owing to his medical restrictions. Desrosiers filed grievance number 70810-AS-97-079 with his Union, which grievance was subsequently withdrawn from the grievance process by the Union on December 8, 1997.

Rod Magliocco passed the written examination with a grade of 92% and was offered the position under competition 97-RID-13.

III. SUPPLEMENTARY FACTS PRESENTED AT THE HEARING

[5] As stated in the Joint Admissions of Facts, the Corporation hired Desrosiers on May 6, 1987. On January 12, 1995, he suffered a work accident, a back injury, which forced him to be absent from his job until May 19, 1996. This injury required surgery in August 1995, which was performed by Dr. Max Aebi at the Royal Victoria Hospital in Montreal. Prior to this accident and Dr. Aebi's surgery, Desrosiers had had two other surgeries to the lumbar spine, in 1987 and in 1992 (decompression). Also in 1989, he had had surgery to the cervical spine (Clowards). Desrosiers described the last procedure (L4-S1 fusion), in 1995, as follows:

> [Translation]
> The lumbar fusion consisted first in placing titanium intervertebral spaces between the vertebrae to prevent any further collapse between the vertebrae; so replacing the discs. And then making a kind of cage around the column - I don't know exactly how it's done - and placing titanium rods on both sides with six screws.
>
> They then took bone from the hip to place around to calcify everything, so it would be very solid in the future. And the operation was a success, and I have been doing quite well since then.

[6] In February 1996, the Workplace Safety and Insurance Board of Ontario described Desrosiers' disability as permanent and said, among other things, that he was not to lift heavy objects.

[7] Desrosiers was absent from work until May 19, 1996. As stated in the Joint Admissions of Facts, in order to facilitate his return to work, the Corporation asked him to undergo a musculoskeletal test to determine his functional limitations. Lucie Labenski Blench, a physiotherapist at the Movement Analysis and Treatment Centre, administered this test on May 17, 1996. Mrs. Labenski Blench's mandate, as described in her report, was to assess the functional capacity of Desrosiers in order to determine his office work tolerance and consider his capacity to bend over, sit, stand, and lift heavy objects. She was also to recommend a work tolerance program.

[8] In the summary of her report dated May 21, 1996, sent to the Corporation, Mrs. Labenski Blench concluded as follows:

> **SUMMARY**

> Mr. Desrosiers is able to do sedentary and light duties. He is able to perform regular task involved with this category of job.
>
> His needs do require proper ergonomic set-up for his work station (i.e. chair, desk, monitor, keyboard, etc.). He should be allowed to :
>
> 1. Change position every 20-30 minutes.
>
> 2. Stand for short periods of time, 5-6 minutes
>
> 3. Do light lifting, carrying under 18 lb.
>
> 4. Occasional stairs
>
> 5. Push / pull carts with 20 lb. resistance or less.
>
> 6. Unlimited dexterity activities.
>
> **OPINION**
>
> Mr. Desrosiers seems motivated to return to a sedentary-light duty job.
>
> His potential functionality for such a job seems adequate at this time.
>
> **SUGGESTIONS :**
>
> 1. Six weeks of work hardening to increase his flexibility and endurance.
>
> 2. Ten weeks of exercises in a gym set-up or in house programme.
>
> 3. Ensure ergonomic set-up of the work place is adequate. [*sic*]

[9] This report from the Movement Analysis and Treatment Centre was the last medical examination the Corporation requested in Desrosiers' case.

[10] The parties have acknowledged in their Joint Admissions of Facts that in August 1997, the Corporation posted a competition for a management analyst position, classified at the CS-03 level. As human resources officer for the Huron/Rideau region, Dinis was responsible for staffing vacant positions as well as for employees who were declared "surplus." In the performance of her duties, she was responsible for writing the competition poster for the management analyst position.

[11] The poster describes the duties of the position as follows:

> [Translation]
> Plans, coordinates and manages activities related to telecommunications support, micro-computing support, mail processing systems support, improvements and configuration control related to information systems, telecommunication networks and to National mail sorting systems. Ensures project management, does the follow-up on service integrator's activities and coordinates changes. Prepares requirement definitions and various analyses for equipment improvements. Acts as a technician and installs equipment. Acts as a technical advisor for the manager and for customers (internal or external). Supervises a support group, assigns tasks, coordinates the group activities, participates to job ratings, writes procedures, manages service requests and ensures training.

The qualifications were as follows:

> [Translation]
> - Bilingualism is imperative.
> - University or college diploma in the computer, electronic or telecommunications field or successful completion of secondary school paired with a minimum of 5 years' experience in these fields.
> - Very good experience in telecommunication networks (voice and data) and micro-computers related to the design, installation, testing, support and on maintenance of equipment and software is needed.
> - Experience in planning, management and projects of personnel management.

[12] The poster also stated that candidates had to demonstrate "that they meet the requirements" mentioned.

[13] According to the evidence presented by the Corporation, the management analyst must carry out all the activities of a technician, including moving filing cabinets or desks to gain access to cables or electrical outlets; moving communication cabinets; moving network control units; removing and replacing floor tiles in the computer room; moving and carrying boxes containing telephones, modems and cables. He must also lift and install equipment that can weigh between 60 and 70 pounds.

[14] In their rebuttal, Desrosiers and the Commission argued that nothing in the job poster expressly stated that there were "physical requirements" attached to this position. They also said that the poster described some fifteen duties and that the only one that might implicitly call for physical requirements would be the one stating that the incumbent "acts as a technician, installs equipment." The other duties, in their view, entail more intellectual requirements, a conclusion with which Dinis said she agreed. They also said that the poster did not call for the candidate to be able to move filing cabinets, communication cabinets or floor tiles.

[15] Rod Magliocco, who has held the management analyst position since winning the competition in September 1997, testified about the duties of the position. He testified that a management analyst is responsible for managing, supporting and advising the users of telecommunication networks (voice and data). He is also responsible for coordinating and managing support activities in telecommunications, mail processing systems, upgrades and configuration control related to information systems, telecommunication networks and national mail sorting systems for the Rideau region. This region extends north to Petawawa, east to Cornwall, including the Ottawa Valley and the Hull and Gatineau region, and south to Brockville, Kingston, Belleville and Peterborough. In some cases, more than three (3) hours of travel may be involved. The management analyst is often called on to help out people experiencing problems with their computers, printers, fax machines or telephone lines. In his various tasks, he may be required to move equipment or furniture weighing over 18 pounds. Magliocco admitted, however, that movers can be used in some cases and that there are what he termed "Service Level Agreements" under which the supplier installs the new equipment.

[16] Desrosiers submitted his candidacy to Dinis on August 7, 1997, a few weeks before the deadline for the submission of candidacies, which was set at August 29, 1997.

[17] On August 8, 1997, Desrosiers and Dinis had a telephone conversation during which they briefly discussed the competition, the requirements of the

position in terms of hours of work and travel requirements. Desrosiers apparently also asked that he be sent the job description for the position as well as the statement of qualifications. This conversation did not touch on Desrosiers' family status.

[18] While Dinis was on annual leave, Jammes, a human resources officer at the Corporation, was assigned to screen the candidates. After the deadline set in the poster for submitting candidacies, Jammes began the screening process. This process consists in determining which candidates, if any, will be accepted into the competition process. To this end, she was to refer to, among other things, the requirements of the Collective Agreement and to the staffing directives of Treasury Board. The Treasury Board directives state, *inter alia*, that medical suitability is one of the "conditions of employment which must be administered according to Treasury Board policy and be met before appointment" [translation].

[19] Thus, as part of this screening process, she said she asked the Corporation's health services about Desrosiers' particular limitations. On September 3, 1997, Dr. Robert Belzile, of the Corporation's health services, informed Jammes of Desrosiers' physical restrictions. In his memorandum, Dr. Belzile basically repeated the findings of the report of May 21, 1996, of the Movement Analysis and Treatment Centre, which stated that Desrosiers could not lift objects heavier than 18 pounds, that he was to change position every 20-30 minutes and that he could stand only for short periods of 5-6 minutes.

[20] After receiving this information, Jammes, in light of the Treasury Board requirements and the physical requirements of the position, concluded that Desrosiers would not be able to perform the duties of the management analyst position, and therefore screened out his candidacy.

[21] As for a possible accommodation for Desrosiers, she admitted that she had considered this only "very, very briefly." In her view, the accommodation, in this case, would have necessitated another employee accompanying Desrosiers, particularly when he was travelling, and this, according to her, was impossible. When cross-examined in this regard, Jammes had this to say:

> Q. You said earlier today that you briefly considered accommodating Mr. Desrosiers ?
>
> A. Yes.
>
> Q. Did you make any written notes as to what you had considered, as far as possible accommodations for Mr. Desrosiers ?

> A. No, when I say I briefly, you know, I mean a fleeting thing because basically when I say briefly I am thinking what can I do. I mean what could, what assistant devices I do not know of any. Certainly, as I said in my testimony in-chief, you know I went through a process of looking at what was required against this and made my decision from there.
>
> As for alternate accommodations, I did not consider any alternate.
>
> Q. Did you, perhaps make any request for financial analysis of what consequences would be entailed by hiring another employee?
>
> A. No, that would not be up to me to do that.
>
> Q. Aside from your brief consideration, your fleeting thought as you yourself said, you did not really consider anything else?
>
> A. No, to my understanding, there was nothing else. [*sic*]

[22] Finally, Desrosiers alleges that he had another telephone conversation with Dinis, on September 18, 1997, during which she told him that he had not qualified for the competition because, among other things, the management analyst position did not fit well with his family obligations since the incumbent would be required to do evening work. Dinis denies having had this telephone conversation with Desrosiers or having ever discussed his family status with him.

IV. ISSUES OF LAW

[23] The parties submitted the following issues of law to the Tribunal:

a) Did the Corporation discriminate against Desrosiers in rejecting his candidacy for the position of management analyst based on his disability or perceived disability (back injury) or his family status, in contravention of section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6?

b) If the Tribunal answers the above question in the affirmative, has the Corporation demonstrated that the rejection of Desrosiers' candidacy was justified by a *bona fide* occupational requirement within the meaning of the case law and/or the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6?

V. LEGAL FRAMEWORK

[24] Desrosiers filed a complaint against the Corporation under section 7 of the *Canadian Human Rights Act*. Section 7 states that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual, or to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. During the relevant period, certain practices were not regarded as discriminatory under the terms of section 15 of the *Act*. Paragraph (*a*) of section 15 stated that it was not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference was established by an employer to be based on a *bona fide* occupational requirement.

[25] Since the Supreme Court decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [also called "Meiorin"] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [also called "Grismer"], the conventional distinction between direct discrimination and indirect discrimination has given way to a unified approach to processing human rights complaints. According to this approach, it is incumbent first on the complainant to establish a *prima facie* case of discrimination. A p*rima facie* case is one which covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in favour of the complainant, in the absence of an answer from the respondent.

[26] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on the balance of probabilities, that there is a *bona fide* justification for the discriminatory policy or standard. Thus, the respondent must prove that:

i) it adopted the standard for a purpose or goal rationally connected to the performance of the job. The focus at this step is not on the validity of the particular standard, but rather on the validity of its more general purpose, such as the safe and efficient performance of the job. Where the general purpose is to ensure the safe and efficient performance of the job, it will not be necessary to spend much time at this stage;

ii) it adopted the particular standard in good faith, in the belief that it was necessary to the fulfillment of the legitimate work-related goal, with no intention of discriminating against the claimant. At this stage, the focus shifts from the general purpose of the standard to the standard itself;

iii) the impugned standard is reasonably necessary to accomplish its goal, that is, the safe and efficient performance of the job. The employer must demonstrate that it cannot accommodate the claimant and others affected by the standard without suffering undue hardship. It must ensure that any procedure that has been adopted to assess the issue of accommodation considers the possibility that it may unduly discriminate on a prohibited ground of discrimination. Moreover, the substantive content of a more accommodating standard offered by the employer must be adapted to each case. Subsidiarily, the employer must justify why it has not offered such a standard.

[27] The *Meiorin* and *Grismer* decisions include parameters for determining whether a defence based on undue hardship has been established. In *Meiorin*, the Supreme Court pointed out that the use of the term "undue" infers that some hardship is acceptable. In order to meet the standard, the hardship imposed must be "undue." It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

[28] The Supreme Court also pointed out that the respondent, in order to prove that its standard is reasonably necessary, always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship. [See *Grismer, supra*, para. 32.] It is incumbent on the respondent to show that it considered and reasonably rejected all viable forms of accommodation. The respondent must prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. [See *Grismer, supra*, para. 42.] 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 accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. [See *Grismer, supra*, para. 41.] The adoption of the respondent's standard must be supported by convincing evidentiary elements. According to *Meiorin* and *Grismer*, impressionistic evidence of increased expense will not generally suffice. [See *Grismer, supra*, para. 41 and 42.] One must devise practical, non-pecuniary and innovative means of accommodation. Finally, factors such as the cost of possible means of accommodation should be applied with

common sense and flexibility in the context of the factual circumstance presented in each case. [See *Meiorin*, *supra*, para. 63.]

[29] Concerning the application of the *Meiorin* and *Grismer* decisions, rendered after the events of the case at bar, for determining whether the standard applied by the respondent constitutes a *bona fide* occupational requirement, I would mention that it is a fundamental tenet of our legal system that the common law always speaks from the moment that it is pronounced to all prior events. [See *Irvine v. Canada (Canadian Armed Forces)*, [2001] C.H.R.T. No. 39, para. 120.]

VI. ANALYSIS

A. Has the complainant established a *prima facie* case of discrimination in contravention of section 7?

(i) Discrimination based on family status

[30] In my view, Desrosiers has not discharged his initial burden of proof and has not succeeded in demonstrating that the respondent discriminated against him based on his family status. According to Desrosiers, there was a telephone conversation with Dinis on September 18, 1997, during which she informed him that he had not been accepted for the competition. He also alleges that she then told him that the position of management analyst did not fit well with his family obligations because the incumbent would be required to do evening work. Dinis denies having had this telephone conversation with Desrosiers or having ever discussed his family status with him. The Joint Admissions of Facts states that on September 18, 1997, Dinis did indeed inform Desrosiers, but by e-mail, that his candidacy for the competition had been rejected because he did not meet the physical requirements of the position due to his medical restrictions. No mention at all is made of his family status.

[31] It may very well be that at some time or other Desrosiers' family status was raised in connection with the position requirements, which required the incumbent to be on call and to travel. However, I am not convinced that this issue influenced the respondent's decision as to whether or not to assign the job to Desrosiers.

(ii) Discrimination based on a disability

[32] Subsection 3(1) of the *Act* stipulates:

> For all purposes of this Act, the prohibited grounds of discrimination are [...] disability [...].

[33] We have already seen that section 7 states that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual, or to differentiate adversely in relation to an employee, on a prohibited ground of discrimination, and that paragraph (*a*) of section 15, at the time in question, stipulated that it was not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment was established by an employer to be based on a *bona fide* occupational requirement. Section 25 of the *Act* defines "disability" as any "previous or existing mental or physical disability".

[34] Thus, a "disability" may be the result of a physical limitation, a perceived limitation, or a combination of the two. [See *Quebec (C.D.P.D.J. v. Montréal (City)*, [2000] 1 S.C.R. 665, para. 79.] The Tribunal must therefore consider in its determination not only the complainant's medical condition, but also the circumstances in which a distinction is made. In other words, in the context of the impugned practice of an employer, the Tribunal must determine, *inter alia*, whether an actual or perceived ailment causes the complainant to experience the loss or limitation of opportunities to take part in the life of the community to the same extent as others. [See *Quebec (C.D.P.D.J. v. Montréal (City)*, *supra*, para. 80.]

[35] In most cases, the complainant will have the burden of proving (1) the existence of a distinction, exclusion or preference; (2) that the distinction, exclusion or preference is based on a ground enumerated in the *Act*; and (3) that the distinction, exclusion or preference has the effect of nullifying or impairing the right to full and equal exercise of human rights. [See *Quebec (C.D.P.D.J. v. Montréal (City)*, *supra*, para. 84.]

[36] It is important to recall that, at this stage, the complainant has the burden of establishing a *prima facie* case of discrimination, that is, one which covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in favour of the complainant, in the absence of an answer from the respondent.

[37] In the case at bar, I am convinced that there is a *prima facie* case of a distinction based on an actual or perceived physical disability in the treatment of Desrosiers at the time of his candidacy for the position. I also believe that his health condition, in this case his back pain, may constitute a "disability" and thus be a prohibited ground of discrimination under the *Act*. [See *Quebec (C.D.P.D.J. v. Montréal (City)*, *supra*, para. 82.] It is also clear that this distinction in the

treatment of Desrosiers had the effect of depriving him of the opportunity to participate fully in the job competition.

[38] Moreover, this conclusion is strongly supported by the facts. I refer, notably, to the Joint Admissions of Facts in which the parties have acknowledged that Desrosiers' candidacy was not accepted "due to the fact that he is medically unfit to perform the requirements of this vacant position." I refer also to an e-mail from Jammes dated September 4, 1997, in which she states "I have screened Mr. Desrosiers out of the competition process due to the fact that he is medically unable to perform the requirements of this vacant position."

[39] A *prima facie* case of discrimination having been established, it is now incumbent on the respondent to demonstrate, on the balance of probabilities, that it is based on a *bona fide* occupational requirement. In order to determine whether the respondent has successfully met its burden of proof, I propose to follow the three-step approach proposed by the Supreme Court in *Meiorin* and *Grismer*.

[40] In its oral argument, counsel for the respondent, to support her argument that the complainant has not established a *prima facie* case, relies on three decisions rendered before *Meiorin* and *Grismer*, to wit, *Rivard v. Canada (Canadian Armed Forces)*, [1990] C.H.R.T. No 5; *Canada (Canadian Armed Forces) v. Bouchard*, [1991] C.H.R.T. No 14; and *Boivin v. Canada (Canadian Armed Forces)*, [1994] C.H.R.T. No 2. With all due respect to the Tribunal members who heard them, I do not think that these cases are relevant, in view of the new approach proposed by the Supreme Court.

[41] I must now continue my analysis and determine whether this discrimination established on a *prima facie* case is based on a *bona fide* occupational requirement.

B. Is the discrimination based on a *bona fide* occupational requirement (BFOR)?

(i) Was the standard adopted for a purpose rationally connected to the performance of the particular job?

[42] The first step in assessing whether the employer has successfully established a BFOR defence is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. It is therefore necessary to determine what the impugned standard is generally designed to achieve. The ability to work safely and efficiently is the purpose most often mentioned in the cases. [See *Meiorin*, *supra*, para. 57.] The employer must demonstrate that there is a rational connection between the general purpose for

which the impugned standard was introduced and the objective requirements of the job. Where the general purpose of the standard is to ensure the safe and efficient performance of the job it will not be necessary to spend much time at this stage. [See *Meiorin*, *supra*, para. 58.] The focus at this first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose.

[43] The standard in the present case is found in a Treasury Board document entitled "Staffing Information," which states:

> [Translation]
> Medical suitability, security and reliability are conditions of employment which must be administered according to <u>Treasury Board policy</u>. They must be met before appointment.

[44] According to the Commission, the particular standard is not rationally connected to the process of screening candidates for jobs. I cannot agree with this conclusion. In my view, the only relevant issue at this stage is whether the general purpose of the standard is valid. This purpose is to allow the employer to identify employees or applicants who are unable to perform the job safely and efficiently. In the case at bar, the medical suitability and security conditions assure the purpose of safe performance of the job, while reliability addresses the purpose of efficiency. I conclude from this that there is an obvious rational connection between the standard and the performance of the job in question.

(ii) Did the employer adopt the standard with an honest and good faith belief that it was necessary to the accomplishment of that legitimate work-related purpose, with no intention of discriminating against the complainant?

[45] In *Meiorin*, Madam Justice McLachlin explains the second step of this approach as follows:

> Once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. This addresses the subjective element of the test which, although not essential to a finding that the standard is not a BFOR, is one basis on which the standard may be struck down. If the

> imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory *animus*, then it cannot be a BFOR. [See *Meiorin*, *supra*, para. 60.]

[46] Contrary to the Commission's argument, there is no indication in the case at bar that the employer did not act with an honest and good faith belief that the adoption of the particular standard was necessary in order to identify persons who would be unable to perform the job safely and efficiently. In adopting this standard, the respondent did not at all intend to discriminate against Desrosiers.

(iii) Is the impugned standard reasonably necessary to accomplish the intended purpose?

[47] In order to demonstrate that the standard was reasonably necessary to achieve the intended purpose, namely, to identify employees or candidates who would be unable to perform the work safely and efficiently, the Corporation must show that it was impossible to accommodate Desrosiers or other employees having similar characteristics without experiencing undue hardship.

[48] The Supreme Court has this to say on the subject of undue hardship:

> When referring to the concept of "undue hardship", it is important to recall the words of Sopinka J. who observed in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at p. 984, that "[t]he use of the term 'undue' infers some hardship is acceptable; it is only 'undue' hardship that satisfies this test". It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.
> [See *Meiorin*, *supra*, para. 62]

[49] When the *Act* was amended in 1998, subsection 15(2) was added. According to this subsection, the factors the employer can consider to determine whether an accommodation would impose on it undue hardship are health, safety and cost. However, the events that gave rise to the present complaint occurred prior to the adoption of this amendment; as pointed out in *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, 2003 CHRT.2, my consideration of the

accommodation issue must therefore be governed, not by the new subsection 15(2), but rather by the principles articulated by the Supreme Court of Canada in *Alberta (Human Rights Commission) v. Central Dairy Pool*, [1990] 2 S.C.R. 489, at pages 520 and 521:

> I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar -- financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

[50] As we have already indicated, there are parameters for determining whether a defence based on undue hardship has been established. The use of the term "undue" obviously infers that some hardship is acceptable. In order to meet the standard, the hardship imposed must be "undue." For it to be justified under the human rights legislation, the standard chosen by the employer must accommodate factors relating to the unique abilities and inherent worth and dignity of every individual, up to the point of undue hardship.

[51] The respondent, in order to prove that the standard is reasonably necessary, has the burden of demonstrating that it incorporates every possible accommodation. It will have to establish that it considered and reasonably rejected all viable forms of accommodation and that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. In some circumstances excessive cost may justify a refusal to accommodate those with disabilities. However, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. The respondent's case must be supported by convincing evidentiary elements. Impressionistic evidence will not generally suffice.

[52] According to the Commission and the complainant, in order to determine whether in this case there was *undue* hardship the Tribunal must look to the approach proposed by Madam Justice McLachlin in *Meiorin*. In this decision she points out that apart from individual testing to determine whether the person has the aptitudes or qualifications necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered. [See *Meiorin*, *supra*, para. 64.]

[53] Let us broach the issue of the individual appraisal of Desrosiers to determine whether he had the aptitudes or qualifications necessary to perform the work. At the hearing, Jammes testified that she had considered the physical requirements for the position and assessed them against Desrosiers' physical limitations as reported by Dr. Belzile of the Corporation's health services. Dr. Robert Belzile, relying on the conclusions of a report prepared some 15 months earlier by the Movement Analysis and Treatment Centre, concluded that Desrosiers could not lift objects heavier than 18 pounds, that he must change position every 20-30 minutes and that he could stand only for short periods of 5-6 minutes. Dr. Belzile was not called to testify.

[54] After receiving this information, Jammes concluded that Desrosiers could not carry out the duties of the position of management analyst. She therefore screened out Desrosiers' candidacy.

[55] The Corporation also presented in evidence the testimony of Rod Magliocco, who has held the position of management analyst since winning the competition in September 1997. Mr. Magliocco testified about the duties of the position. His testimony concerned the duties of the position as they existed in 1997 and as they have evolved since. The Corporation also produced in evidence the expert evidence of Jeff Pajot, an ergonomist and president of Pajot Ergonomics, who presented two reports. The first, entitled "Analyse des exigences physiques. Gestion des données, analyste-programmeur-Gestion des systèmes d'ordinateurs (CS-3)" [Analysis of physical requirements. Data management, programmer analyst, Computer systems management (CS-3)] was prepared December 17, 2002. In this report, Mr. Pajot stated that on December 12, 2002, he did an ergonomic analysis of the position of programmer analyst. He also stated that the data used in his analysis were taken from workplace observations and an interview with Mr. Rod Magliocco. The second report, entitled "Évaluation du poste CS-3 à Postes Canada par rapport aux qualités personnelles de Martin Desrosiers" [Evaluation of the CS-3 position at Canada Post in relation to the personal suitability of Martin Desrosiers] was prepared January 13, 2003. In this report, Mr. Pajot said he had analysed the position to see whether it was suitable for Desrosiers. The ergonomic analysis done in December 2002 was based on the conclusions found in the previous report. Mr. Pajot never met with Desrosiers.

[56] I give little weight to Mr. Magliocco's testimony and Mr. Pajot's reports. When determining whether the Corporation discharged its obligation to accommodate Desrosiers, the relevant question is as follows: At the time it was decided not to assign the position to Desrosiers because of his disability, did the Corporation make proper inquiries to determine the nature of his disability, what was the prognosis, what accommodation was required? [*Conte v. Rogers Cablesystem Ltd.*, [1999] C.H.R.T. No. 4, para. 81.] Mr. Magliocco basically testified about the current duties of the position, while Mr. Pajot's reports are an attempt, five years later, to justify a decision. The relevance of such evidence in the human rights context is questionable. I must consider the evidence as it existed in 1997, not five years later. Furthermore, it is rather my impression that this ergonomic study is intended to justify, after the fact, the respondent's decision to deny Desrosiers the position because of his disability.

[57] Despite the weakness of the evidence presented at the hearing by the Corporation, I nevertheless find that in 1997, Desrosiers' physical ability to perform the duties of the position was limited. The back injury suffered by Desrosiers in August 1995 required major surgery. In February 1996, the Workplace Safety and Insurance Board of Ontario described Desrosiers' disability as permanent and said, among other things, that he was not to lift heavy objects. The only issue we must consider in this case is whether the respondent considered and reasonably rejected all viable forms of accommodation for Desrosiers, without causing itself undue hardship.

[58] In the case at bar, the only evidence having to do with seeking an accommodation was that of Jammes. She acknowledged having briefly considered ("a fleeting thought") the matter of an accommodation for Desrosiers in view of his disability. According to her, the only possible accommodation, given Desrosiers' restrictions, would have been to have another employee accompany him while he performed his duties, particularly when he was travelling. She testified that in 1997 there was only one other position classified as CS-02, and requiring the incumbent to accompany Desrosiers while he performed his duties would have opened the door to the filing of a grievance by that employee on the grounds that he was required to perform the duties of a CS-03, and so ought to be paid the hourly wage of a CS-03. Under the collective agreement, this would have entitled the CS-02 to a wage increase of about $9,000. Creating another CS-02 position to replace the employee who would now have to accompany Desrosiers would have forced the Corporation to incur additional wage costs of $44,530. She also believed that Desrosiers was currently accommodated in his AS-03 position and that she had therefore committed no breach.

[59] In cross-examination, Jammes acknowledged that she had not taken any notes concerning possible accommodations for Desrosiers. She also admitted never having requested a financial analysis about the possibility of hiring another employee to assist Desrosiers.

[60] In order to prove that the standard is reasonably necessary, the respondent, as I said earlier, has the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship. It is therefore incumbent upon the respondent to establish that it considered and reasonably rejected all viable forms of accommodation, which it obviously did not do in this case. Excessive cost may justify a refusal to accommodate people with disabilities, but according to Jammes, no financial analysis was done with respect to Desrosiers.

[61] In her closing argument, counsel for the respondent referred to the ruling of the Divisional Court of Ontario in *Ontario (Human Rights Commission) v. Roosma*, [2002] O.J. No. 3688, notably paragraph 89 of this decision, in which the Court states:

> [...], I believe the Company's method of deliberation on the request for accommodation was sufficient. The circumstances constraining the Company were sufficiently apparent that detailed enquiry into the possibilities of accommodation was unnecessary.

[62] I would point out, however, that in *Roosma* the employer made a real effort to offer an accommodation. In fact, the evidence shows that there were 8 to 10 meetings between the employer and the employees concerned to discuss accommodation. Different accommodation scenarios were considered, and in the end it was the employees who withdrew from these meetings. In the case at bar, there was never any real or serious consideration of a possible accommodation.

[63] I therefore believe that the respondent has been unable to demonstrate in this case that there was undue hardship or that there was a *bona fide* occupational requirement. In support of this finding, we refer to the e-mail dated April 9, 2002, from Barry Butcher to Kevin Wilson, two employees of the Corporation, which we find in the admitted documentary evidence presented jointly by the complainant, the Commission and the respondent and which states, *inter alia*:

> The employee [Desrosiers] has raised a formal Human Rights complaint and in the event that the case goes to a Tribunal, I want to make sure that we have a good handle and documented paper trail regarding his ability to complete the physical demands of the job. It looks at this point that there may be some of the tasks associated with the job that he could perform with assistive devices, but still others that are questionable.

[64] This is the kind of question the employer should have put to itself in 1997, not in 2002.

[65] I am aware in the case at bar that Desrosiers' candidacy was rejected at the screening stage and that there is nothing to indicate he would have obtained the position had he made it past this stage, but since the parties have chosen to bifurcate the issues of merits and of remedy, at this time I need not pursue the analysis of this issue any further.

VII. CONCLUSION

[66] The parties have submitted the following issues to the Tribunal:

> a) Did the Corporation discriminate against Desrosiers in rejecting his candidacy for the position of management analyst based on his disability or perceived disability (back injury) or his family status, thereby contravening section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6?

. . .

> The Corporation did discriminate against Desrosiers in rejecting his candidacy for the position of management analyst based on his disability or perceived disability (back injury), thereby contravening section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

The Corporation did not discriminate against Desrosiers based on his family status.

. . .

> b) If the Tribunal answers the above question in the affirmative, has the Corporation demonstrated that the rejection of Desrosiers' candidacy was based on a *bona fide* occupational requirement within the meaning of the case law and/or the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6?

. . .

> The Corporation has not demonstrated that the rejection of Desrosiers' candidacy was based on a *bona fide* occupational requirement within the meaning of the case law and/or the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

VIII. RETENTION OF JURISDICTION

[67] At the request of the parties, the Tribunal retains its jurisdiction to convene a second hearing to allow the parties to present evidence and arguments on the issue of remedy.

[68] The Tribunal will contact the parties to set a date for the hearing of this matter.

Michel Doucet

OTTAWA, Ontario
July 10, 2003

PARTIES OF RECORD

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APPEARANCES:	
Martin Desrosiers	For the Complainant
Benoit M. Duchesne	For the Canadian Human Rights Commission
Michelle O'Bonsawin and Shirley Boucher	For the Respondent (Canada Post Corporation)