T.D. 15/91
Decision rendered on October 25, 1991

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

HUMAN RIGHTS TRIBUNAL

IN THE MATTER OF the complaint filed under Sections 7 and 10 of the Canadian Human Rights Act.

BETWEEN:

PATRICIA DUNMALL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION

TRIBUNAL:

Marshall E. Rothstein, Q.C. - Chairman Donna M. Gillis - Member Raymond W. Kirzinger - Member

APPEARANCES:

Patricia Dunmall

Linda Wall Counsel for the Canadian Armed Forces

Peter Engelmann Counsel for the Canadian Human Rights Commission

DATES AND PLACE OF HEARING:

September 26-28, 1990 and October 10-12, 1990 Winnipeg, Manitoba

CONTENTS Page

THE COMPLAINT

The hearing before this Tribunal results from a complaint under the Canadian Human Rights Act filed by Patricia Dunmall, dated July 21, 1982, against the Department of National Defence. The complaint states:

In September of 1981, I contacted the Department of National Defence in Winnipeg, Manitoba, and advised that I wish to apply for employment as a dental hygienist, Class "C" service.

I was requested to undergo a medical examination and did so in early October of 1981.

Subsequent to this medical examination I was advised that I did not meet the minimum medical category required. Nevertheless, I was advised by Major Byrne of the Department of National Defence in Winnipeg, Manitoba that a request for a waiver of this medical category would be submitted. I therefore applied for enrolment in the supplementary reserve, which is a prerequisite for employment on Class "C" service.

I was advised in March of 1982 that a waiver of the medical category required would not be granted and I would therefore not be recommended for employment on Class "C" service.

I have reason to believe that I have been discriminated against because of my physical handicap contrary to Sections 7 and 10 of the Canadian Human Rights Act.

(Exhibit HRC-1, Tab 1)

The Complainant returned to Canada where she worked as a dental hygienist for approximately 15 years for the Canadian Armed Forces in various locations. The Complainant spent the last six of these years in Winnipeg.

In 1968, a lesion was discovered on the Complainant's right kidney.

As part of the diagnostic procedure, a renal angiogram to inspect the kidney was performed. This involved the insertion of a catheter-like device in an artery in the groin area. There was some difficulty in locating the artery and as a result, a blockage in the femoral artery in her left leg developed. Consequently, a bypass graft operation was done on her leg in the summer of 1968. Following this operation, the Complainant required a rather lengthy recuperative period, although the specific amount of time was not provided to the Tribunal. She went back to work as a dental hygienist, although she slowed down considerably.

In 1969, she was medically released by the Canadian Armed Forces. No specifics were given to the Tribunal regarding this release, although it clearly was related to her leg problem.

The Complainant went to the United States Virgin Islands where she practiced dental hygiene with a private dentist until 1977. She then came back to Winnipeg and applied to the University of Manitoba for accreditation for a license to practice as a dental hygienist in Manitoba. The licensing authorities refused to recognize her British certificate and refused to allow her to write any exams on the strength of her certificate. Consequently, she was not able to commence employment in Manitoba as a dental hygienist.

The Complainant worked as a dental lab technician in Winnipeg and then as a dental assistant. In 1980, her husband was transferred to Vancouver Island where she worked as a technician. In 1981, her husband died and she moved back to Winnipeg and obtained employment with Associated Crown & Bridge Laboratory Ltd. where she worked as a technician commencing in August 1981 and lasting until June 1982.

When the Complainant returned from Vancouver Island, she was told by a friend that the Canadian Armed Forces had positions known as Class "C" Reserves. The Complainant thought it might be a way for her to work again as a dental hygienist in the Canadian Armed Forces.

The Complainant was eager to work again as a dental hygienist. At the suggestion of her friend, she met with Major Byrne, commanding officer of the Air Reserve Augmentation Flight (ARAF) in Winnipeg, and completed an Application for Enrolment on August 24, 1981. Major Byrne informed her that to be employed with the ARAF as a dental hygienist, Colonel Richardson, the officer commanding #14 Dental Unit in Winnipeg, would have to submit a written request. #14 Dental Unit is the unit responsible for dental services for the prairie provinces.

As a result, the Complainant wrote to Colonel Richardson to inquire about the possibility of employment as adental hygienist. Colonel Richardson responded by letter dated September 21, 1981. He wrote:

We have opportunities for Hygienists and I would be interested in talking with you prior to making specific arrangements. Would it be possible for you to come and see me at some mutually agreeable time?

(Exhibit R-1, Tab 2)

Colonel Richardson met with the Complainant. She said he advised her that there were two vacancies, one at Camp Shilo, Manitoba, and one upcoming at Winnipeg. Colonel Richardson wrote to Major Byrne on September 29, 1981 (Exhibit R-11) and requested that the Complainant be enrolled in the Supplementary Reserves so that

she could commence Class " C " Service on February 1, 1982 as a Sergeant. Major Byrne wrote a note on this letter on September 30, 1981 that the Supplementary Reserve enrolment procedures should proceed.

As part of the enrolment application, on October 1, 1981 the Complainant underwent a medical examination. The examination was carried out by the duty medical officer, Dr. Anderson, who prepared a Report of Physical Examination dated October 20, 1981. The report consists of a series of questions relating to prior history which were completed by the Complainant, a series of questions completed by the attending physician, and a medical

classification section completed by the attending physician. There is also a space for the supervisor to sign and comment, as well as for someone with approving authority to sign and comment.

The relevant portions of the report involve references to the Complainant's left leg. The Complainant reported that she had had a kidney investigation in 1968 which led to bypass surgery. She also indicated she had no current problems.

Dr. Anderson commented in her findings that the Complainant's left leg was slightly cooler than her right leg. On the medical classification, Dr. Anderson appears to have classified the Complainant G3, 03, which was a medically acceptable category for dental hygienists. Her remarks, however, stated:

meets trade requirements? fit T restrictions.

(Exhibit R-9)

Dr. Anderson's report then went to the supervising medical officer, Dr. Sparenisi. It appears he changed the Complainant's G classification to G4. His remarks were:

Unfit field accommodation. Requires barrack or equivalent accommodation. May not work outdoor in cold weather.

(Exhibit R-9)

Dr. Sparenisi's decision was then concurred in by Lieutenant Colonel Barnes, the deputy command surgeon, who wrote:

Concur unfit. waiver for enrolment.

(Exhibit R-9)

Would require administrative

The classifications G3, G4, 03 will be dealt with subsequently. Suffice to say at this point that a G3, 03 classification would have rendered Mrs. Dunmall fit, while G4, 03 rendered her unfit.

The Complainant testified that Major Byrne then telephoned her and said that he would request a waiver of the medical category because she was a dental hygienist who was not going to an isolated post and would not be doing heavy lifting. Her evidence was that in November or December 1981, Major Byrne told her that a waiver had been denied.

The Complainant then called Colonel Richardson inquiring about the possibility of being hired on in a Class B position. She said he told her that a Class B position was only for three months and that he was looking for someone to work at least one year.

On December 20, 1981, the Complainant wrote to her MP, Dan McKenzie, and asked him to make inquiries concerning her application. By letter dated January 6, 1982 to the Minister of National Defence, Mr. McKenzie requested that the Minister investigate the matter.

A file of correspondence was submitted by the Respondent indicating a series of steps that had taken place commencing in January 1982.

Following the inquiry from Mr. McKenzie, it appears that on January 11, 1982 the matter was referred to the Department of National Defence Inquiries. The inquiry went to General Riffou,

who on January 13, 1982 referred the matter to the Director of Medical Treatment Services (DMTS). On January 22, 1982, Colonel Burden of DMTS replied that there was no record of any waiver request, and he returned the inquiry to General Riffou. By memorandum dated January 27, 1982, Colonel Phillips of DMTS also reported that there wasno record of any waiver request and advised:

"... this is not a matter to which a medical response can be made."

(Exhibit R-1, Tab 11)

The Ministerial Inquiry also appears to have been referred to the Directorate of Military Manpower Distribution (DMMD). On January 28, 1982, the senior staff officer of personnel at Air Command Headquarters in Winnipeg received a direction from OMMD to:

... investigate circumstances leading to the rejection of Mrs. Dunmall's application; and comment on her suitability for future employment if a medical waiver were to be granted.

(Exhibit R-1, Tab 12)

Major Byrne, commanding officer of ARAF in Winnipeg was asked to provide information for the response to DMMD. Included in Major Byrne's comments were the following observations:

Ms. Dunmall's statement that Major Byrne proceeded to ask NDHQ for a waiver of medical category resulted from a misinterpretation or misunderstanding.

2. Dunmall's Supplementary Reserve enrolment process was ceased because the requesting organization (14 Dental Unit) did not support an application for a request for waiver of medical category. This office is prepared to continue enrolment procedured (sic) subject to concurrence of the requesting unit.

(Exhibit R-1, Tab 13)

On February 5, 1982, a senior staff officer of personnel in Winnipeg replied to DMMD. After setting out the events in chronological order, the message continued:

2.

3.

4.

No further action was taken as the matter was considered closed. An application for medical waiver is only initiated at the request of the employing unit or the applicant, this case 14 Dental Unit, and no such request was received by the ARAF. Mrs. Dunmalls (sic) statement to the effect that Maj Byrne (CO ARAF) proceeded to ask NDHQ for a medical waiver is untrue and obviously the result of a misunderstanding or misinterpretation.

As a result of this inquiry Mrs. Dunmalls (sic) medical records will be reviewed and, subject to the approval of the CO 14 Dent Unit, a request for a medical waiver will be initiated.

Notwithstanding the above, the critical shortage of Class C man years at the present time and at the time of the original application dictates that Class C reserve sts only be hired to alleviate the

most serious manning shortfalls. As Mrs. Dunmal's (sic) employment does not meet this criteria it is very doubtful that, even should a medical waiver be granted, she could be accepted for Class C employment during fiscal year 82/83. Her application, however, will be retained on file at this headquarters for future consideration.

(Exhibit R-] , Tab 14)

In chronological order, the next document was a memorandum from Colonel Phillips of DMTS dated February 8, was captioned:

WAIVER - ENROLMENT IN CLASS C.

It stated:

1. DMTS has reviewed medical files of A/N and she has a medical condition that:

a. does not require active treatment that would interfere with the performance of her duties;

b. is unlikely to deteriorate in the near future; and thus concurs with administrative authority granting a waiver of medical standards provided that she is employed strictly within the limitations of her medical category G4 03 and provided this category has not deteriorated since it was awarded.

2. Her limitations are:

a. G4 - unfit for field or sea, medically isolated and UN duties - physician services readily available ; and

b. 03- unfit for prolonged heavy physical work, marching, running, lifting - unfit compulsory 2.4 Km PT test.

(Exhibit R-1 , Tab 1 5)

It was not clear what lead up to the concurrence issued by DMTS on February 8, 1982. While it may have been the February 5 memo from Winnipeg, there was some evidence that this was unlikely in view of the short time between that memo, which was not even addressed to DMTS, and the issuance of the

concurrence. In any event, from the February 8 concurrence it appears DMTS had been requested by the "administrative authority" to review Mrs. Dunmall's medical files and advise as to the granting of a waiver.

At the bottom of one of the copies of the February 8 memorandum was a handwritten note by Major Byrne indicating he had advised Colonel Richardson of DMTS' concurrence and that Richardson:

. . . will contact Dunmall and advise her to see ARAF for Class C procedures.

(Exhibit R-1, Tab 15)

The Complainant testified that she received a telephone call from Major Byrne indicating that the Canadian Armed Forces had waived the medical category and that she should reapply. The Complainant applied on February 22, 1982 for enrolment in the Supplementary Reserves.

The application was forwarded along with a lettergram from Major Byrne to Director of Personnel Information Services (DPIS), the arm responsible for the Supplementary Reserve List. In his message, Major Byrne wrote that the Complainant:

... could be considered for Class C Reserve Service employment in near future.

(Exhibit R-1, Tab 17)

Concurrently, Canadian Armed Forces officials were drafting a reply to Mr. McKenzie's inquiry. The reply from the Minister of National Defence dated March 18, 1982, after explaining that Mrs. Dunmall's medical category precluded her from enrolment in the Supplementary Reserves, stated:

Mrs. Dunmall makes mention of a request for a waiver of her medical category. This could not be considered in her case as her current medical condition, although slightly improved, does not meet the minimum standard for enrolment and has not significantly changed from

that which caused her medical release from the Canadian Forces in 1969. (Exhibit R-1, Tab 19)

There was no evidence explaining the apparent inconsistency between the concurrence with medical waiver by Colonel Phillips of DMTS of February 8 and the refusal to consider a waiver for Mrs. Dunmall in the Minister's letter of March 18.

There was also no evidence as to how the Complainant's February 22 application and the DMTS waiver concurrence were handled internally by the Canadian Armed Forces. The documents simply conclude with a memorandum from DPIS to ARAF in Winnipeg dated April 5, 1982 stating:

Based on med cat and current medical condition enrol to suppres not authorized (Exhibit R-1, Tab 21)

Mrs. Dunmall testified that she was contacted by Major Byrne and given the original of the April 5 written message. It was shortly after this that Mrs. Dunmall contacted the Canadian Human Rights Commission and instituted a complaint of discrimination.

MEDICAL STANDARDS

Colonel Belanger, the current director of DMTS, described the Canadian Armed Forces rating system known as the Medical Standards for the Canadian Forces.

This system classifies an individual's ability to serve in the Canadian Armed Forces. The system also establishes a soldier's fitness in relation to his/her intended trade within the Army. Besides age, the six codes in the category are:

V - Visual Acuity CV - Colour Vision H - Hearing G - Geographical Limitation 0 - Occupational Limitation A - Air Factor

(Exhibit R-10, Tab 4)

There are six numerical ratings for the G and 0 factors, The G factor is composed of from 1 to 6, with 1 being the best. three sub-factors:

A. Climate - Various medical conditions preclude efficient employment in different climates. Some skin diseases do not fare well in hot moist climates, while others may be aggravated by dry cold climates. Certain peripheral vascular diseases are unfavourably influenced by cold.

B. Accommodation and Living Conditions - The environment, as well as the occupational and domiciliary accommodation, varies greatly throughout the world. All may be

accept able to permit personnel in certain trades to serve in remote areas of Canada or in foreign lands, provided they are accommodated in healthy shelters and have access to reasonable messing facilities. On the other hand, in certain trades, even in Canada, the person must be medically fit enough to live out in the open in inclement weather for extended periods, and to subsist on minimal rations. These factors must be considered in the light of disability and every effort must be made not to subject personnel to stresses that can aggravate predetermined disability.

C. Medical Care Available - In the past, accidental injury and disease have always depleted military forces to a greater degree than the direct effects of combat. This situation prevails despite careful selection of manpower to ensure that only the medically fit are sent in to battle. Battles are sporadic. Preparedness for combat, however,is a continuous process, and the time so involved is constantly accompanied by exposure to disease or injury. It is axiomatic that the closer the point of conflict between combatant forces, the less the probability of fully effective medical resources being available. Casualties among the healthy can be predicted with some accuracy, and mandatory evacuation to medical facilities must be accepted. The necessity for complex medical care can be reduced by excluding those who present a high risk from serving where appropriate medical care cannot be given or evacuation is cumbersome. The above considerations have been included in the medical category under factor G and graded from 1 to 6.

(Exhibit R-10, Tab 4)

The minimal medical standards for dental hygienists for the G factor is G3. (G3 is the minimum G standard for any trade in the Canadian Armed Forces.)

The G3 grade is described as follows:

This grade will be assigned to the individual who has a medical condition that requires more frequent medical supervision. Such personnel have a requirement to seek medical care, but not necessarily a physician's services, approximately every three months. They are considered capable of operating in the field and of eating field rations when required. Such personnel are capable of full duty at sea and are considered fit for isolatd (sic) duties.

(Exhibit R-10, Tab 4)

The G4 grade which was given to Mrs. Dunmall is described as follows:

Climatic or Isolation Limitation - Requirement for Barrack for (sic) Equivalent Accommodation and Physician Service Readily Available - This grade will be assigned to individuals in two groups, viz:

a. any individual who is limited to employment in temperate climates or who is considered unfit for medically-isolated posting because of a medical disability; and

b. any individual who has a medical condition that has the potential sudden serious complications or a medical disability which is persistently mildly incapacitating. This individual usually requires barracks or home living conditions and readily available physician's services. Such personnel are considered unfit for sea and field

duty, medically isolated postings and United Nations Emergency Force duty.

(Exhibit R-10, Tab 4)

The 0 Factor looks at the amount of physical activity and physical stress, as well as mental activity and mental stress that the individual can withstand. The minimal medical standard for dental hygienists for the 0 factor is 03. The 03 grade which was given to Mrs. Dunmall is described as follows:

Moderate Medical Disability - This grade will be assigned to the individual who has a moderate medical or psychological disability which prevents him from doing heavy physical work or operating under stress for sustained periods. He can, however, do most tasks in moderation.

(Exhibit R-10, Tab 4)

Colonel Belanger testified that the medical profile is awarded based on considerations of the safety of the individual, the safety of others and the interests of the Canadian Armed Forces. His evidence was that a proper medical profile must be determined based on the individual assessment of the person.

CLASS "C" RESERVE SERVICE

The legislative authority for the Canadian Armed Forces is the National Defence Act (at the relevant time R.S.C. 1970 Chapter N-4). Section 12 of the Act authorizes the Governor in Council (and subject to the Governor in Council, the Minister) to make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of the Act into effect. The regulations with which we are concerned are referred to as the Queen's Regulations and Orders (QR&O). Section 1.23 of the QR&O authorizes the Chief of the Defence Staff to issue orders and instructions not inconsistent with the Act or any regulations:

(a) in the discharge of his duties under the National Defence Act; or

(b) in explanation or implementation of regulations.

The orders of the Chief of the Defence Staff that are relevant in this case are referred to as Canadian Forces Administrative Orders (CFAO).

Subsection 15(3) of the Act establishes the Reserve Force of the Canadian Forces:

There shall be a component of the Canadian Forces, referred to in this Act as the reserve force, consisting of officers and men who are enrolled for other than continuing, full-time military service when not on active service.

Employment in Class "C" Reserve Service is provided for in CFAO 9 - 54. Of relevance in this case are Sections 3, 4, 5, 6(b) and 24.

Policy

3. Members of the Reserve Force may be employed on Class "C" service with the Regular Force to meet manning shortfalls which cannot otherwise be met.

Period of Employment

4. Normally, a member's employment on Class "C" service will be from a minimum period of three months to a maximum period of one year. In exceptional circumstances employment may be authorized for longer periods.

Eligibility

5. A member of any sub-component of the Reserve Force may be employed on Class "C" service. A former member of the Canadian Forces (CF) may apply for enrolment in any sub-componentof the Reserve Force and thereby become eligible for employment on Class "C" service.

6. To be eligible for employment on Class "C" service a member of the Reserve Force must

b. be medically examined andmeetthe minimum medical standards for the member's classification or trade as detailed in CFAO 34-30; or, be granted a medical waiver by NDHQ which would permit employment;

Employment Offers

24. After a Class "C" service offer has been received and considered, the unit concerned shall advise the CHQ, NDHQ/DMMD and the appropriate NDHQ career manager that the member either:

a. accepts the offer and,

(1) as a result of a medical examination, meets the medical requirements detailed in paragraph 6 b, or does not meet the medical requirements and NDHQ action to obtain a medical waiver is recommended (the member's medical category, as detailed in CFAO 34-34, and date of medical examination must be included),

(2) has the required security clearance for the position, or, is being processed for security clearance upgrading, and

(3) that copies of the agreement at Annex A have been completed and distributed as required:

b. has not accepted the terms offered; or

c. does not meet the medical requirements and NDHQ action to obtain a medical waiver is not recommended.

(Exhibit R-4, Tab 9)

Of significance is that Class "C" Service involves service with the Regular Force to meet staffing short falls which cannot be otherwise met. Further, the period of employment is from three months to one year, except in exceptional circumstances.

Other issues of relevance with respect to the Class "C" Reserve Service employment Mrs. Dunmall was seeking are:

- 22 -

1) what were the conditions of her entry;

2) what duties would she have to perform.

As to entry, CFAO Article 49-8, Annex A, Paragraph 3 provides:

3. To be eligible for enrolment in the Supp List a former member of the CF must:

a. at the time of release, have met the conditions in para 1;

b. meet the conditions prescribed in QR&O 6.01 ; and

c. meet the medical standards prescri bed for the Reserve Force in CFP 154. (Exhibit R-4, Tab 10)

Paragraph I of the Annex in turn refers to various categories of of the Table to QR&O release but does not mention item 3(a) Article 15.01 which is release:

On medical grounds, being disabled and unfit to perform duties as a member of the Service.

(Exhibit R-4, Tab 6)

This was the basis for Mrs. Dunmall's release from the Regular Force in 1969.

- 23 -

QR&O Article 6.01 item (2)(b)(i) provides:

2. The following persons shall not be enrolled in the Canadian Forces:

(b) unless special authority is obtained from the Chief of the Defence Staff, a person who has been released from the Canadian Forces ....

as medically unfit for further service ...

(Exhibit R-4, Tab 4)

These rather convoluted regulations, which apply when an applicant for Class "C" Reserve Service is previously discharged from the Regular Force as medically unfit and/or where she does not meet prescribed medical standards, were not easy to follow. The practice followed by the Canadian Armed Forces in these cases was explained by Lieutenant Colonel Moffatt, Head, Manning and Data Requirements, Directorate of Military Manpower Distribution (DMMD), as follows:

Q. Okay. So, at what point -- if anybody was going to ask for a waiver, when would this kick in? Before she is admitted to the Supplementary Reserve, before she is admitted to Class C, and can you explain that?

A. It should occur before she is admitted to Class C. If the events followed naturally, the application for Supplementary Reserve first would come to Ottawa, and because Mrs. Dunmall was released 3(a), it would be denied. Just on the -- just administrative by DPIS. They would go

back and say, sorry, she was released 3(a). She is not eligible for service. She can't get on the Supplementary Reserve List. The unit would then have to make another start all over again, make an application for Class C service, with an appendix or addendum saying we would like to hire this lady for Class C service. We realize she didn't meet the medical standards. We request a medical waiver to hire her Class C. So, then come back to NDHQ and be looked at by both DMMD and DMTS, and then the waiver would be granted.

THE CHAIRMAN: I'm sorry, Colonel Moffatt, you left me behind there. Can you just walk through that one again more slowly?

THE WITNESS: The application for the Supplementary Reserve List would be handled routinely by the Director of Personnel Information Services. When it came in NDHQ, they would look at the prerequisites for the Supplementary Reserve. In Mrs. Dunmall's case, they would take one look at the file and see that she was released 3(a), look in CFAO 49-8 --

T H E CHAIRMAN: Just a second. When they saw she was released for medical reasons --

THE WITNESS: They would automatically deny the request for Supplementary Reserve service because she doesn't fall within the guidelines as outlined in CFAO 49-8. That should be relayed back to the unit, and they would tell

her sorry, and at the same time, tell 14 Dental Unit, you know, she was released 3(a). At that time, the unit should make further application for Class C service mentioning the fact that Mrs. Dunmall didn't meet the medical standards, could we have a waiver to -- so we can employ her Class C.

THE CHAIRMAN: This is where I am just not following you. Does the waiver apply to the application for Supplementary Reserve status?

THE WITNESS: No, it would apply for Class C service only.

THE CHAIRMAN: How do you get --

THE WITNESS: Basically, what you are looking at, the people in the Supplementary Reserve List are people that we want to call out for what could be a war and that would be one of the few times when you would go to everybody on the Supplementary List and say, would you like to serve? When it's applied to Class C service, you are looking at a very limited time frame. In this case, from three months to a year. So, we could accept somebody in Class C service with a medical disability for a short period, whereas you might not want to bring that person out to go to war with you.

THE CHAIRMAN: I guess where I am getting lost is I was under the impression you never got to Class C until you got into the Supplementary Reserve or Primary Reserve or --

THE WITNESS: You are not supposed to. This is where it gets a little convoluted.

When you are asking for a waiver for a short period of Class C service, it sort of by passes the requirements for medical fitness on the Supplementary Reserve List.

THE CHAIRMAN: So, if you are in Class C without being in the Supplementary Reserve

THE WITNESS: Well, you would be given the waiver for both, I guess, is the way it works.

THE CHAIRMAN: Okay.

THE WITNESS: You would not stay on the Supplementary Reserve List when your Class C service finished. Whereas, if I got out tomorrow and came back on Class C, next year, when I finished my Class C service,

my name would still be on the Supplementary Reserve List. I guess that's where the fine line is. It's a little hard to follow.

MS. GILLIS: Could I just clarify? So, if the waiver is allowed,your name will go on the Supplementary List, and you will be admitted into the Class C?

THE WITNESS: Only for the period of --

MS. GILLIS: Only for that period of time. When the term is up, your name comes off the Supplementary Reserve List?

THE WITNESS: Exactly.

MS. GILLIS: Okay, but your name does go on -and so the waiver really applies to --

THE WITNESS: To both.

MS. GILLIS: -- both. Okay, but the waiver is with respect to the medical condition or the fitness of the individual?

THE WITNESS: Yes, it is.

MS. GILLIS: Okay.

(Transcript pp. 338-341)

In summary, it appears that where a member of the Regular Force has been released as being medically unfit and/or where her medical condition, upon medical examination for re-enrolment in a Class "C" Reserve Force position, is below the minimum acceptable level, such enrolment may only take place upon a medical waiver being granted. Because Class "C" Service involves a limited time frame (i.e. when the period of employment with regular force terminates, normally after three months to one

year, the Class "C" employee does not stay on the Reserve List), medical standards appear to be somewhat relaxed.

Lieutenant Colonel Moffatt:

As stated by

So, we could accept somebody on Class C service with a medical disability for a short period, whereas you might not want to bring that person out to go to war with you.

(Transcript p. 340)

2) As to the duties Mrs. Dunmall would be required to perform in Class "C" Reserve Service, the evidence was not unambiguous. The issue is whether Mrs. Dunmall would be required to perform regular military duties if ordered to do so or whether she would only have to perform such duties if she consented to do so. Section s 33 and 34 of the National Defence Act outline the obligation to serve for Regular Force and Reserve Force members:

33.(1) The regular force, all units and other elements there of and all officers and men thereof are at all times liable to perform any lawful duty.

(2) The reserve force, all units and other elements thereof and all officers and men thereof may be ordered to train for such periods as are prescribed in regulations made by the Governor in Council, and

may be called out on service to perform any military duty other than training at such times and in such manner as by regulations or otherwise are prescribed by the Governor in Council.

(3) Nothing in subsection (2) shall be deemed to impose liability to serve as prescribed therein, without his consent, upon an officer or man of the reserve force who is, by virtue of the terms of his enrolment, liable to perform duty on active service only.

34.(1) Where theGovernorin Council has declared that a disaster exists or is imminent that is, or is likely to be, so serious as to be of national concern, the regular force or any unit or other element thereof or any officer or man thereof is liable to perform such services in respect of the disaster, existing or imminent, as the Minister may authorize, and the performance of such services shall be deemed to be military duty.

(2) Where the Governor in Council declares that a disaster as mentioned in subsection (1) exists or is imminent and that the services of the reserve force are required for the purpose of rendering assistance in respect of the disaster, existing or imminent, the Governor in Council may authorize the reserve force or any unit or other element thereof or any officer or man

thereof to be called out on service for that purpose and all officers and men while so called out shall be deemed to be performing military duty.

(3) Nothing in subsection (2) shall be deemed to impose liability to serve as prescribed therein, without his consent, upon an officer or man of the reserve force who is, by virtue of the terms of his enrolment, liable to perform duty on active service only.

It appears that while members of the Regular Force must serve as and when ordered to do so, members of the Reserve Force are not liable to perform military duty without their consent. The obligation to serve, however, is further amplified in QR&O Paragraph 6 was specifically drawn to our attention:

(6) An officer or man of the Reserve Force may with his consent and by or under the authority of the Chief of the Defence Staff be employed with the Regular Force. (Exhibit R-4, Tab 5) In addition, Article 9.05, Class "C" Reserve Service, provides:

(1) An officer or man of the Reserve Force is on Class "C" Reserve Service when he is on full-time service and, with the approval of the Chief of the Defence Staff, is serving in a Regular Force establishment position or is supernumerary to a Regular Force establishment.

(Exhibit R-4, Tab 5)

The inference to be drawn from these provisions seems to be that while a member of the Reserve Force may only be required to perform "military duties" with his or her consent, such consent is implied when a Reserve Force member is employed with the Regular Force as is the case with Class "C" Reserve Service. conditions without option. Forces are relatively small the Canadian government has

It follows that a member on Class "C" Reserve Service would be liable to perform military duties if ordered to do so.

The obligation to serve was further explained by Captain M. MacKnie, Specificationtaff Officer, Director of Military Operation Structures (DMOS).

Q. Okay. Now, I see, at tab 3, you have a little chart saying Factors Affecting the Military Occupational Structure. Can you explain what this is about?

A. Yes. Basically, what it indicates is that all the Canadian Forces personnel must be capable of serving under a wide variety of The Canadian in size, and given them a fairly large number and wide variety of operational taskings. So that, as a member of the Canadian Forces, you must be prepared to serve sort of anywhere at any time.

Q. I see. Is that what without option means?

A. Yes.

Q. Where does that concept come from, to your knowledge?

A. Something I have always accepted. Basiclly, that is one of the provisos of being a member of the Canadian Forces. You are on duty 24 hours a day, seven days a week, sort of 365 days a year.

Q. What about a person who takes a Class C position in the Canadian Forces? Does the same apply?

A. Yes, it does.

Q. I see. In the point 2 of this chart, you refer to CF --

THE CHAIRMAN: Excuse me, Ms. Wall, I'm sorry. You asked Major MacKnie if --

THE WITNESS: Excuse me, sir, I am a captain, not a major. I don't mind the promotion, but I am not getting paid for it.

THE CHAIRMAN: Well, regrettably, I don't have the authority to promote you. I'm sorry, Ms. Wall asked you whether the conditions under tab 3 applied to Class C and you said yes?

THE WITNESS: I am basing that on my own experience with Class C personnel. Basically, we have a Class C in our section in DMOS, and he does everything that we are required to do. An example of that is that five of us from the section have been temporarily posted to work on something called Task, and we have been separated into the various commands. When I was with I Combat Group back in '73-'76, on a regular basis, we received Class C personnel for basically, I guess, on-job training, and subsequently, they were sent

to the Middle East replacing Regular Force personnel that serve us there. In my little group or task that I am doing in Montreal at the present time, our team leader is a Class C, and he has been tasked -- not tasked. That's perhaps, a wrong expression to use. He is required to perform the physical fitness test that is required by all Regular Force members of the Canadian Forces.

THE CHAIRMAN: Then are you speaking from your personal knowledge --

THE WITNESS: Yes, I am, sir.

THE CHAIRMAN: -- of what you have seen occur, or are you speaking from the point of view of having looked at some regulations or rules?

THE WITNESS: Of personal experience, sir.

THE CHAIRMAN: I see. The reason I am asking is that we had evidence from Lieutenant-Colonel John Tattersall. Were you here for that evidence?

THE WITNESS: Yes, I was, sir.

THE CHAIRMAN: Okay. My notes indicate that, when he gave evidence, he said, with respect to obligation to serve, that the Regular Force must serve as ordered, that the Primary Reserve can be called out by the minister for an emergency, the Supplementary Reserve must volunteer, and then when he spoke about Class C Supplementary Reserve, he said they are there to perform a specific function, their jobs can be terminated on 30 days' notice. So, if my notes correctly record what he said, he is saying, that insofar as the Supplementary Reserve is concerned, these people must volunteer. In other words, the without option is not applicable to the Supplementary Reserve and, therefore, presumably Class C.

THE WITNESS: My understanding of that is that they must volunteer, but once they have volunteered, they are under the same regulations as all Regular Force personnel.

THE CHAIRMAN: So, you are interpreting must volunteer as being their initial hiring on?

THE WITNESS: That's correct, sir.

THE CHAIRMAN: Once they have done that, then they have got to serve without option?

THE WITNESS: That's correct, sir.

THE CHAIRMAN: And how do we reconcile that with the fact that they are -- according to him, they are to perform a specific function and can be terminated on 30 days' notice?

THE WITNESS: The 30 days'notice applies either way.

THE CHAIRMAN: Yes.

THE WITNESS: So that the individual decides to leave, he can leave within the 30 days' notice.

THE CHAIRMAN: Doesn't that say then, that for that individual, they either do what they are told -- that is, to go to combat or whatever it may happen to be, or they --

THE WITNESS: Posting to the Middle East, yes.

THE CHAIRMAN: Yes, or they give their notice?

THE WITNESS: Yes, but they are still subject to the Code of Military Discipline up to the time they are released.

THE CHAIRMAN: Yes. Which takes us where?

THE WITNESS: Which means, that if they are given, say, a posting to serve in the Middle East today, they are still subject to the Code of Service Discipline, and they can be sent to the Middle East. At the end of the 30 days, they can then be sent back.

THE CHAIRMAN: Now, is that what would happen?

THE WITNESS: Normally, you wouldn't want to disrupt a unit to that extent and that probably would not occur.

THE CHAIRMAN: No. You would think --

THE WITNESS: But in an emergency, yes, it could. It depends whether you need the bodies there or not or how urgently you need the people there.

(Transcript pp. 608-613)

According to Captain MacKnie's interpretation of the obligation of a person performing Class "C" Reserve Service, Mrs. Dunmall would be obligated to serve as ordered and perform the military duties of a soldier that are outside of her trade as a dental hygienist.

For purposes of this decision, this Tribunal accepts that a person performing Class "C" Reserve Service duties has an obligation to serve when ordered to do so and that such service may include military duties in addition to duties strictly related to a trade.

INTERPRETATION OF HUMAN RIGHTS LEGISLATION

Parliament first enacted a comprehensive antidiscrimination statute in the form of the Canadian Human Rights Act in 1977 (S.C. 1976-77, c.33). The legislation has undergone amendments since it was first enacted and, as with human rights acts of the provinces, it has been the subject of a number of a landmark decisions of the Supreme Court of Canada interpreting its various provisions and explaining the approach to be taken by human rights tribunals in deciding complaints brought before them. In employment discrimination cases, the scheme of the legislation is for a complainant to first establish a prima facie case of discrimination. The onus then shifts to the espondent

employer to establish a defence. The jurisprudence has established certain principles and methods of analysis which can be summarized as follows:

1. Human rights legislation is to be interpreted broadly to give effect to its purposes.

2. Once a complainant has established a prima facie case of discrimination, he/she is entitled to relief in the absence of justification by the employer.

3. The justification may be established according to two different standards, depending upon whether the discrimination is direct or adverse effect.

4. If the discrimination is direct, the employer must show that the practice or rule giving rise to discrimination is based on a bona fide occupational requirement (BFOR).

The practice or rule must satisfy both subjective and objective tests. They are to be construed having regard to the occupation and not the individual. A practice or rule must be reasonably necessary and not disproportionately stringent. They must be the least discriminatory alternative available to the employer.

If adverse effect discrimination is shown the employer must demonstrate that accommodation of the individual is not possible without undue hardship.

These principles and procedures will be further elaborated hereunder.

SECTION 2 - CANADIAN HUMAN RIGHTS ACT

In consideration of any complaint under the Canadian Human Rights Act, it is necessary for courts and tribunals to recognize the special nature of the Act and to give it an interpretation that will advance its broad purpose. A broad rather than a narrow approach is to be adopted. Section 2 of the Act states:

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

In Ontario Human Rights Commission et al v. Simpson Sears Limited (1985), 23 D.L.R. (4th) 321 (usually referred to as O'Malley), the Supreme Court of Canada considered the nature and purpose of human rights legislation. Although in that case the Court was dealing with the Ontario Human Rights

Code, it is clear that the comments are equally applicable to all human rights legislation. At page 328, McIntyre J., after quoting the preamble to the Ontario Human Rights Code, then stated:

There we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a sound approach to say that according to established rules of construction, no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the court to recognize in the construction of the human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corp. of B.C. V. Heerspink et al (1982), 137 D.L.R. (3d) 219 at pp. 228-9, [1982] 2 S.C.R. 145 at pp. 157-8, 39 B.C.L.R. 145), and give to it an interpretation which will advance its broad purposes.

Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

Thus,inconsideration of any complaint under the Canadian Human Rights Act, it is necessary for courts and tribunals to bear in mind the purpose set out in Section 2 of the Act and carefully scrutinize employers' rules and practices in relation to the subject matter of complaints and strike them down where they are found inconsistent with these purposes. In the case at bar, this Tribunal has at all times kept in mind Section 2 and the dicta of McIntyre J. in O'Malley, supra.

HAS A PRIMA FACIE CASE OF DISCRIMINATION BEEN MADE OUT

This is a complaint of discrimination on account of physical disability. Upon medical examination the Complainant's left leg was found to be slightly cooler than the right leg. Pulses in the left leg were weaker than in the right leg. Both findings indicate a mild circulatory condition in her left leg (technically a mild left calf claudication). As a result, she was given

a G4 rating, below the minimum enrolment standard for dental hygienists according to the Medical Standards for the Canadian Forces Order CFAO 34-30.

At this point her enrolment processing ceased. Attempts to obtain a waiver proved unsuccessful.

- 39 -

Section 7 of the Canadian Human Rights Act states:

It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Subsection 3(1) of the Act states that disability is a prohibited ground of discrimination:

For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Section 25 of the Act contains a definition of disability.

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

(Subsection 65.I(3), S.C. 1976-77, c.33 contains a definition of physical disbility but that provision is not pertinent to this case.)

- 40 -

In Morgan v. Canadian Armed Forces (1989 10 C.H.R. R. D/6386, the distinction between denial of employment and denial of opportunity for employment is discussed. At page 6389, that Tribunal stated:

What is the distinction between the denial of a position and a loss of an opportunity to compete for a position? Where the complainant has done all that it is necessary for him or her to do in order to complete the application process for a position and the only basis for rejecting the

complainant's applicant is a prohibited ground of discrimination, this constitutes a denial of employment. Where the complainant is disqualified from further competition in the application process for a position, before the complainant's application has been considered for employment, this constitutes the loss of an opportunity to compete for a position, if the person is disqualified on the basis of a prohibited ground of discrimination.

In this case, while we are satisfied that Mrs. Dunmall had done all that was required of her, we cannot say that this included everything necessary to complete the process. We do not know whether there may have been grounds for rejecting Mrs. Dunmall other than the circulatory problem in her left leg, e.g. disability would be the only basis for rejecting her application, we cannot conclude that a prima facie case under Section 7 has been made out. Since we cannot say that Mrs. Dunmall's security clearance

Section 10 of the Act states:

It is a discriminatory practice for an employer, employee organization or organization of employers

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

In this case, Mrs. Dunmall was disqualified from having her employment application further considered because of the findings relating to the circulatory condition in her left leg - a physical disability. It is apparent that the Canadian Armed Forces have established and pursue a policy that requires applicants for employment to be of a certain medical fitness level. While there is nothing which on its face is reprehensible about requiring applicants for employment to be of a certain medical fitness level, such requirements will inevitably deprive some individuals who cannot meet those medical criterion of employment opportunities. In this case, failure to meet the medical standards resulting from a physical disability deprived Mrs. Dunmall from having her application for employment being further considered. While we cannot say that she was definitely denied

employment only for this reason, we can say that she was deprived of the opportunity for employment because of her disability.

The Respondent argued that the Complainant had not passed a security clearance and thus there was no guarantee that she could be hired. There was also some suggestion that there was a shortage of "Class C Man Years", i.e. a limited budget for hiring persons to fill positions of the type the Complainant was seeking in this case. While these considerations may be relevant under Section 7 or in assessing quantum of damages to be awarded, they do not affect the real reason the Complainant's application for enrolment was not processed in this case.

It is apparent in this case that the complaint was disqualified from being further considered for employment because of the circulatory condition of her leg. Questions of security clearance or budget had not yet arisen. The Respondent cannot cut off the Complainant because of her physical disability before the has reached the level of security clearance or before bud- getary factors were considered and then use these arguments to contend that it did not deny her an employment opportunity on a prohibited ground of discrimination. We are satisfied that a prima facie case of discrimination has been made out under Section 10 of the Act.

IS THE DISCRIMINATION DIRECT OR ADVERSE EFFECT

Having found that the Complainant has made out a prima facie case of discrimination under Section 10 of the Act, it is necessary for the Tribunal to determine whether the discrimination is direct or adverse effect. Although the Canadian Human Rights Act does not expressly distinguish between direct and adverse effect discrimination, the jurisprudence that has been developed since 1985 requires that the distinction be made as the employer's defence must be assessed in accordance with the type of discrimination that has been practiced. In O'Malley, supra, the Supreme Court of Canada distinguished between the two types of discrimination at page 332:

A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in the connection with employment. Direct discrimination occurs in this connection wherean employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature

would contravene the Act. On the other hand, there is no (sic) concept of adverse effect discrimination. It arises where 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 has a discriminatory effect upon a prohibited ground on one employee or 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 . . .

An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

The necessity to distinguish between direct and adverse effect discrimination was affirmed by the majority of the Supreme Court of Canada in Alberta (Human Rights Commission) v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489. In that case, Wilson J. for the majority states at page 517:

. . . The end result is that where a rule discriminates directly it can only beustified by a statutory equivalent of a BFOQ ... However, where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.

(It should be noted that Sopinka J., [LaForest and McLaghlin JJ. concurring in the minority] found that the Canadian Human Rights Act makes no distinction between direct and adverse effect discrimination. He would have required an assessment of the bona fide occupational qualification in all cases of discrimination and then an assessment of whether individual accommodation could or could not be accomplished without undue hardships [see page 525].) Had it been possible to follow the decision of the minority in Central Alberta Dairy Pool, supra, it would not be

necessary to embark upon an examination of whether the discrimination in this case was direct or adverse effect and it would have been appropriate, if the employer was found to have established a defence based upon a BFOR, to determine whether Mrs. Dunmall could have been accommodated without undue hardship.)

Following the majority of the Supreme Court in Central Alberta Dairy Pool, supra, it is necessary to determine whether the discrimination is direct or adverse effect. If it is direct, then it must be determined whether the employer's rule or practice constitutes a BFOR.

In Insurance Corporation of B.C. v. Heerspink (1978), 6 W.W.R. 702 at 708, the following definition of direct discrimination is found:

Direct discrimination is a distinction in favour of or against a person ... based on a group, class or category to which that person ... belongs, rather than on individual merit.

In Proving Discrimination in Canada, the author, Beatrice Vizkelety, says at page 78:

The essential ingredient (of direct discrimination) is whether or not the decision or act is related to a prohibited ground: to base a decision or act upon a person's membership in a particular group is to differentiate.

The key, therefore, to proving direct discrimination is to show a causal relation between the exclusion and colour, sex, religion, or some other prohibited ground.

In the case at bar, the Complainant was refused employment because of her physical condition. She failed to meet the minimum medical standards set by the Canadian Armed Forces for dental hygienists.

Instinctively, one would resist putting the refusal to employ because of the failure to meet apparently legitimate medical standards in the same category as failure to employ because of religion, race or colour. Medical standards clearly have a legitimate business purpose whereas discrimination on account of religion, race or colour would normally not. However, refusal to employ because of failure to pass a medical test due to a physical disability does single out a group of persons those with physical disbilities as determined by the medical standards) upon a prohibited ground of discrimination. Moreover, intent (although not necessarily of the reprehensible type) to discriminate is present. This would suggest that discrimination on the basis of disability would almost always constitute direct discrimination.

We have in this case a rule which on its face discriminates on a prohibited ground. Persons are refused employment based on the group to which they belong, i e. persons with disabilities that cause them not to meet the employer's medical standards. There is a causal relationship between the refusal to employ and a prohibited ground stated in the legislation.

A rule that falls into the adverse effect category has a discriminatory effect but will have been established for genuine business reasons and will be neutral on its face. There would be little or no argument that a required medical test would have a genuine business purpose. Neutrality on its face is more difficult to assess. While the requirement to wear a hard hat (Bhinder v. Canadian National Railway, [1985] 2 S.C.R. 561) or to work on Mondays (Central Alberta Dairy Pool, supra) are readily identifiable as rules that are neutral on their face in that they do not single out an employee or a group of employees on any expressly prohibited ground of discrimination, is a rule requiring a certain level of physical fitness in the same category? We think not. A rule requiring a certain level of physical fitness, while established for genuine business reasons, is not, on its face, neutral. It is intended to identify those who cannot meet that level of physical fitness and disqualify them from employment.

In Brossard (Town) v. Quebec (Commission des Droits de la Personnel, [1988] 2 S.C.R. 279 an anti-nepotism policy was considered to be direct discrimination on the basis of civil status prohibited under Section 10 of the Quebec Charter of Human Rights and Freedoms. In Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, a compulsory retirement provision was direct discrimination on account of age which was prohibited under subsection 4(6) of the Ontario Human Rights Code. In Rosin v. Canada (Canadian Forces) (1991), 34 C.C.E.L. 179 , a decision of the Federal Court of Appeal, the refusal to employ a cadet because he had only one eye was found to be direct discrimination.

We are satisfied that a rule which disqualifies an individual from an employment opportunity on account of a circulatory condition of her leg similarly constitutes direct discrimination.

THE BFOR DEFENCE

Having found a prima facie case of direct discrimination in this case, this Tribunal must next determine whether the refusal to employ Mrs. Dunmall is justified as being based on a Section 15(a) of the bona fide occupational requirement. Canadian Human Rights Act states:

It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement.

The leading case explaining BFOR is Etobicoke, supra. In Etobicoke, supra, the Supreme Court of Canada outlined the approach to be followed in dealing with bona fide occupational requirements and elaborated on the meaning of the term. Although the Court was applying the Ontario Human Rights Code, its comments have been applied in subsequent cases to the Canadian Human Rights Act, e.g. Bhinder v. Canadian National Railway, supra; Alberta Human Rights Commission v. Central Alberta Dairy Pool, supra.

At page 208 of Etobicoke, supra, McIntyre J. states:

Once a complainant has established before a board of inquiry a prima facie case of discrimination .... he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.

Two questions must be considered by the Court. Firstly, what is abona fide occupational qualification and requirement within s.4(6) of the Code and, secondly, was it shown by the

employer that the mandatory retirement provisions complained of could so qualify? . . . To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job

without endangering the employee, his fellow employees and the general public.

The requirement that the discriminatory rule or practice be imposed in good faith and not for the purposes of defeating the object and purpose of the Canadian Human Rights Act has been referred to as the subjective test. This test addresses the motive of the employer. The objective test that must be satisfied requires that a discriminatory rule or practice must be found to be reasonably necessary to ensure the efficient and economical performance of the job without endangering the employee, other employees or the general public.

With respect to the objective test of whether a rule is justified as being based upon a BFOR because of safety risk, prior to Central Alberta Dairy Pool, supra the law was quite clear. In Bhinder v.Canadian National Railway, supra, McIntyre J. found, at page 588, that a rule (the requirement to wear a

hard hat on the job) that reduced risk to an employee, though by a very small amount, was a BFOR. In reversing Bhinder, supra, the Supreme Court in Central Alberta Dairy Pool, supra has adopted a more flexible approach to the question of safety. At page 521, Wilson J. states:

Where safety is at issue, both the magnitude of the risk and the identity of those who bear it are relevant considerations.

While this observation was made in the context of the duty to accommodate which arises only in the case of adverse effect discrimination, we are of the view that it must apply equally to cases of direct discrimination where the BFOR defence is applicable. Indeed, in Attorney-General of Canada v. Rosin (1991), 34 C.C.E.L. 179 (a case of direct discrimination), Linden J. at page 196 suggests, in obiter, that Central Alberta Dairy Pool, supra is to be interpreted such that a rule designed to avoid only a marginal increase in risk to safety may not be sufficient to support the BFOR defence.

As to the nature and sufficiency of the evidence required to justify a practice as a BFOR, McIntyre J. addressed the issue in Etobicoke, supra at page 212 in the context of mandatory retirement. While no fixed rule has been laid down, it is clear that tribunals should have regard to the detailed nature of the duties to be performed, the conditions existing in the work place

and the effect of the conditions on employees. Statistical and/ or medical evidence is to be preferred over impressionistic evidence. Where danger to public safety is alleged, evidence on that subject must be adduced.

It has also been held that a BFOR is to be assessed in relation to the occupation in question and not to the individual. In Bhinder v. The Canadian National Railway, supra (overturned for other reasons by Central Alberta, supra), McIntyre J. stated at page 588:

The words of the statute speak of an "occupational requirement". This must refer to a requirement for the occupation, not a requirement limited to an individual...To apply a bona fide occupational requirement to each individual with varying results, depending on individual differences, is to rob it of its character as an occupational requirement and to render meaningless the clear provisions of s. 14(a). (Now s. 15(a))

In Saskatchewan v. Saskatoon, [1989] 2 S.C.R. 1297 (the Saskatoon Firefighters case), Sopinka J. reaffirmed the job related as opposed to the individual related nature of a BFOR. At page 1309, he stated:

This test obliges the employer to show that the requirement, although it cannot necessarily be justified with respect to each individual, is reasonably justified in general application ... In the limited circumstances in

which individual characteristics that are determinative but general characteristics reasonably applied.

this defence applies, it is not in

A further refinement to the BFOR defence arises from Brossard (Town) v. Quebec (Commission des Droits de la Personnel, [1988] 2 S.C.R. 279. In Brossard, supra, a town adopted an anti-nepotism hiring policy disqualifying members of the immediate families of full-time employees of a town from employment with the town. The anti-nepotism rule was struck down as being contrary to Section 10 of the Quebec Charter of Human Rights and Freedoms. At page 311, Beetz J. set down two tests to determine if a rule was reasonably necessary to assure performance of a job

(1

(2 Is the aptitude or qualification rationally connected tothe employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question. In Etobicoke, for example, physical strength evaluated as a function of age was rationally connected to the work of being a fireman.

Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows to us to enquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question. The 60-year mandatory requirement age in Etobicoke was disproportionately stringent, for example, in respect of its objective which was to ensure that all firemen have the necessary physical strength for the job.

As to the second rule, Beetz J. states at page 315:

In answer to the second question which I have posed to evaluate the respondent's hiring policy, I believe that the rule is disproportionately stringent in view of the aptitude or qualification which it seeks to verify.

The hiring policy the respondent has chosen to adopt is a blanket rule which, on its face, allows for no exceptions. As soon as it has been determined that a candidate is a member of the immediate family of a full-time employee or town council or, that candidate is excluded. The rule is unforgiving: it excludes candidates irrespective of the job for which they apply and irrespective of the position which their immediate family member occupies. It does not take into account the degree of likelihood that an abuse of power will take place. This is a maladroit technique of assuring an absence of real or potential conflicts of interest and even the appearances thereof. Line Laurin has provided us with a case in point. Given the position of lifeguard for which she applied and the position of typist at the police station which her mother occupied, there was no real conflict of interest, no reasonable potential for conflict of interest and no reasonable apprehension of bias which would give ri se to a justifiable appearance of conflect of interest. Applied to Line Laurin, the hiring policy is, as the saying goes, "like killing a fly with a sledge-hammer".

In her concurring reasons, Wilson J. states at page 343:

It seems to me that the hiring of relatives may well pose a threat or be perceived as a threat to the integrity of the town's administration ... The extent of the threat such a hiring practice poses is obviously a matter of

degree and should be established by evidence. Were the hiring of relatives to become common

practice it could obviously constitute a seri ous threat. This being so, is it "reasonably necessary" in this case to ban the hiring of relatives entirely or would it adequately serve the purpose if a watchful eye were kept on the situation and discretion exercised in order to keep the hiring of relatives (assuming their ability to do the job concerned) within reasonable proportions?

It seems to me that having regard to the nature of the right which is violated by an anti-nepotism policy, i.e., the right under s. 10 not to be discriminated against, the adoption of a total ban is not "reasonably necessary" in order to avoid a threat to the integrity of the town's administration. The town can avoid the threat by the less drastic means I have suggested.

Brossard, supra thus requires that a rule or practice that has a justifiable objective must nonetheless not be disproportionately stringent in order to satisfy the BFOR requirement. The rule as it is framed must be reasonably necessary. Of course, it is implicit that the rule will be applied as it is framed.

THE DISCRIMINATORY PRACTICE IN THIS CASE

What precisely is the practice that gives rise to a prima facie case of discrimination in the case at bar? It is that on recruitment a candidate for a dental hygienist position with the Canadian Armed Forces must meet certain medical standards - in this case, no limitation greater than a G3 geographical limitation. The G3 limitation as indicated earlier is

a geographical factor taking into account the effects that the environment, accommodation, living conditions and medical care available would have on the medical status of a member. Where a candidate fails to meet the medical standards, a waiver process may be invoked. In this case, the waiver was denied. Are these practices in this case based on a BFOR, as contemplated by Section 15(a) of the Canadian Human Rights Act? This determination requires an assessment of the detailed nature of the duties to be performed, the conditions existing in the work place and the effect of

the conditions on the employee, and the relevant medical evidence.

DETAILED NATURE OF THE DUTIES TO BE PERFORMED

Exhibit R-7 contained excerpts from the Canadian Forces Manual of Non-Commissioned Members Occupational Structure. This document (A-PD-123-001) is issued under the authority of the Chief of Defence Staff. The manual sets forth a framework within which all non-commissioned personnel are recruited, trained, employed, posted, promoted and paid. It provides that all Canadian Forces personnel must be capable of serving under a wide variety of conditions without option. We have found that this obligation applies to Class "C" Reserve Service as well as to the Regular Force.

The manual also specifies that the Canadian Forces must train and develop its own personnel as hiring of trained personnel from other sources is not normally feasible. In explaining this provision of the manual, the Tribunal was told by Captain MacKnie, Specification Staff Officer:

It's a requirement of all members of the Canadian Forces to be soldiers first ... and the requirement is that individuals ... or the military be a disciplined body of troops that obey legal orders promptly and basically go where they are posted or told to go, and these . . . this military or disciplined individual is not normally available from the civilian side of the house.

(Transcript p. 615)

The manual also contains a detailed description of occupations or trades. In addition to the operations, maintenance, administrative and other functions which pertain to a specific trade (in this case a dental hygienist), the functions include "general military requirements". This means that in addition to performing work in a specific trade or occupation, a member must perform general military duties and responsabilities applicable to his/her rank. Examples of this type of work were given by Warrant Officer James, career manager for dental hygienists in the Canadian Armed Forces.

On a rotational basis, non-commissioned officers would be required to drill detainees kept for puni shment and watch the base during off-duty hours. Once or twice per month (or perhaps more often) there would be parade appointments before a base commander. This would involve marching for 10 to 15 minutes. In Europe, this might require parades for up to half a mile in combat uniform. A backpack kit which may have to be carried could weigh up to 100 pounds. A dental hygienist who is a warrant officer or sergeant (the ranks at which Mrs. Dunmall would have entered) could have 10 to 30 people for whom he/she would be responsible in such parades.

Other duties outside of the dental hygienist trade that a member could be called upon to perform would be base defence force duties. Every base has a base defence force. The base defence force is involved in tasks such as crowd control, attending to natural disasters such as tornadoes, airplane crashes and the like. In such circumstances, a member's primary role would not be in his/her specialized occupation but in whatever duty, e.g. stretcher bearing, the member was asked to undertake. There is no advance notice of such requirements and the base defence force could be called out without notice.

The Board was also told that a dental hygienist could be required to serve "in the field", i.e. to support combat units in the field outside the clinic base. This would require field

exercises and training. Because real or simulated combat is involved, support units could be called upon to move very quickly. Heavy lifting could be encountered and physical activity could be strenuous.

Mrs. Dunmall's evidence was that her experience as a dental hygienist in the Regular Force involved minimal general military duties. However, we are required to consider the detailed duties of the occupation and not one individual's experience in assessing the BFOR defence. The Occupational Structure Manual and the evidence of Warrant Officer James outline the duties to be performed by dental hygienists in the Canadian Armed Forces and we accept this as evidence of the requirements of the position.

THE CONDITIONS EXISTING IN THE WORK PLACE AND THEIR EFFECT ON EMPLOYEES

As has been indicated, military personnel are employed at military bases. They may be required to perform base defence force duties as above described. They may also be requied to work in the field.

The working conditions for dental hygienists are described in the manual (A-PD-123-001) as follows, in part:

a. Physical. Duties are normally carried out in a well lighted, clean, ventilated, and heated building. Underfield conditions a mobile dental operating van may be provided, or tent accommodation may be used. Accommodation aboard ships is usually restrictive. The Dental Hygienist must possess moderate strength and endurance. The Dental Hygienist may be required to stand/sit for long periods of time. (Exhibit R-7, Tab 11) The general specifications contained in the manual part provide,

The physical stress normally imposed onother ranks is usually that associated with their trade. In some circumstances, such as those associate with combat activities or outside their trade employment, they could be subjected to extreme physical stress. (Exhibit R-7, Tab 8)

It is apparent that the conditions of the work place for dental hygienists in the military is different from civilian life. In particular, they may be required to perform duties outside their trade and may be subjected to physical stress not normally associated with the dental hygienist trade.

THE MEDICAL EVIDENCE

Dr. Charles Lye was qualified as an expert in vascular surgery. He explained what a mild left calf claudication was:

Well, calf claudication is pain in the calf muscle. When you walk or when the muscle is actively exercised, it's relieved by cessation of the exercise, and it's due to a relative insufficiency of blood supply. It's a matter of demand outstripping supply, and it's generally due to a blockage upstream in the circulation.

(Transcript p. 119)

In Mrs. Dunmall's case, he had found that claudication occurred "at about one block if she tries to rush".

If she were to have to rush, she would get discomfort, cramping or aching and may or may not have to stop for a minute or two. No long-term damage is caused by the exercise producing the claudication. Standing for long periods would not produce symptoms. She would not have required more frequent medical attention than anyone else. Although temperature can have an effect on persons with circulation problems, Dr. Lye was of the view that for mild conditions such as in the case of Mrs. Dunmall, it would not be significant.

She might have had to put on on extra pair of socks on a cold day, but that's about extent of it.

Transcript p. 128)

Nor did Dr. Lye think Mrs. Dunmall had the potential for sudden serious complications:

She had a stable situation which she had for sometime.

(Transcript p. 129)

Dr.Lye did not believe that poor wound healing or increased likelihood to infection were increased risks for Mrs. Dunmall.

However, persons with conditions such as Mrs. Dunmall would have certain limitations and would not be able to perform certain functions. Dr. Lye stated:

Basically, someone with the type of problem that Mrs. Dunmall had at that time, anything that would involve her having to exert herself fairly strenuously in terms of her legs -- in other words, walking quickly, walking uphill, walking any distance carrying a heavy load, these are all things that could -- that certainly she would have some -- she would be compromised to some extent with , and just how much you wouldn't know until she did it.

(Transcript pp. 136-137)

Prolonged marching would depend on the circumstances, what the terrain was like and how fast she had to march. If she was in hilly country, like I am now, she would probably have difficulty. If she was doing a slow march down

Portage Avenue, she could probably do it all day. It depends really on the level of exertion, and that depends on the speed and the load.

(Transcript p. 138)

Well, running, I guess just being a fairly extreme example of marching fast or walking fast, a lot of people with claudication, even when they develop pain, are able to walk through it and carry on even though they have discomfort. Other people have to stop, are literally forced to stop at some point in time. Some of this is physiological and some of it probably has to do with pain threshold. I suppose, if somebody was shooting at you, you might be inclined to put up with the pain more than at other times, but basically, she would just have to see what she could do, and I have no record really in my notes as to whether she was able to carry on with pain or whether she had to stop when she rushed. I don't recall, and it's not documented in my chart.

(Transcript pp. 138-139)

Well, certainly fieldwork, such as quick moves -- I am not sure what that means, but -- unless it was a prolonged quick movement and involving running. Carrying water; again, that puts an extra load on the legs. So, you know, it would be the same as having a heavy pack on her back. If she had to go at a good pace with a heavy pack, she wouldn't likely be able to do that without any trouble if she had to go a distance.

What was the other -- climbing up hills. People with claudication, classically, they will often volunteer that . They have more difficulty having to go uphill simply because the legs have to work harder. Wearing a rucksack, if it's a heavy one, that would be trouble. Standing for long periods shouldn't matter. Carrying stretchers; again, could obviously be a problem if she had to do it for any distance. It's really the amount of exertion times time versus just time alone.

(Transcript pp. 139-140)

A. That would depend on how fast she would have to go. My understanding was, that for a close to normal pace or, perhaps, a little slower than normal, she could walk indefinitely. Certainly, if she had to march quickly, she would have symptoms, no question about that. If she had to carry a heavy load, she might.

Q. Okay, how about walking more than a block carrying a 50-pound back sack?

A. That might cause her symptoms.

Q. How about carrying a 200-pound man on a stretcher, presumably with another person, too, on the other end of the stretcher for more than a block?

A. Yeah, I would expect she would have trouble with that as well.

(Transcript p. 141)

Q. So, if I understand your evidence, we wouldn't know what Mrs. Dunmall would be actually able to do until she was out in the field having to do all these things that we have listed.

A. As far as some of these more stressing situations are concerned, yes.

Q. So, it might only be discovered then in a situation of stress that she can't manage it.

A. That's correct.

Q. If there is too much pain, she would have to stop.

A. That's correct.

(Transcript p. 143)

Q. So, if she were placed in a situation where she no longer had a choice as to whether or not she was going to walk only a block, if there was somebody giving her orders and telling her to become involved in physical exertion and she had no choice, I take it that would change your opinion as to the symptoms that she might experience.

A. Most certainly. There would be some things -- you could tell her to do things that she probably wouldn't be able to do, at least not be able to do without a lot of pain.

Q. Or she might experience pain such that she would have to stop? She would not be able to do what she would been (sic) told to do.

A. That could occur, yes.

(Transcript p. 149)

This evidence demonstrates that a person with Mrs. Dunmall's condition could be compromised with respect to stressful physical work, especially under sustained conditions. The extent of her inability to perform certain heavy work could not be determined except when she was actually under stress. We can infer that this could pose a danger to Mrs. Dunmall herself, her fellow employees and it might pose a danger to the members of the public she was instructed to assist, e.g. in stretcher bearing.

The Respondent called Dr. Walter Pawliwec, Lieutenant Colonel, Head, Division of General Surgery, National Defence Medical Centre. Dr. Pawliwec's speciality is general surgery.

According to Dr. Pawliwec, the grading of Mrs. Dunmall as G4 was related to the question of whether the doctors examining her at the time believed the graft in her femoral artery was patent (functioning) or occluded (blocked). Dr. Pawliwec stated:

I can see how it can be very confusing. Again, if the graft was already totally occluded and her symptoms were minimal, when she came, a G3 03 category would have been probably satisfactory, but if they thought the graft was functioning, then obviously a 4 would have to be on, and I think there might have been some question in their minds, and I think they erred on the side of safety, and said no, let's give her a 4 until we can find out if the graft is functioning or not. I mean, I am just guessing. You know, I don't know what went through their minds.

(Transcript p. 582)

However, the evidence does not disclose a concern by the doctors involved relating to the patency of the graft. Further, Dr. Pawliwec himself was of the opinion that the graft would have been occluded in 1981 when Mrs. Dunmall was medically graded:

Q. Okay, you have heard now Dr. Lye's opinion with respect to whether the graft was patent or not?

A. Right.

Q. And it was his opinion that it had not been patent for many years?

A. Oh, I agree with that.

Q. And would you agree with me that --

A. I think the graft died a year or so after it was put in.

(Transcript p. 585)

This is consistent with Dr. Lye's oral evidence and his written medical report dated June 11, 1982 in which he stated:

. . .this lady presents with an occluded left iliac and left iliac graft ...

(Contained in Exhibit R-8)

ASSESSMENT OF THE EVIDENCE

We are required to assess whether an employer's rule (medical standards for dental hygienists) is reasonably justified in general application (although not necessarily justified with respect to each individual). Whether Mrs. Dunmall as an individual would be called upon to perform stressful physical activity is not at issue. We are satisfied that dental hygienists in the Canadian Armed Forces are required and must be able to perform general military duties which may involve strenuous activity. The medical standards for dental hygienists are intended to ensure efficient performance of these functions without endangering the employee, his/her fellow employees and the general public.

We have concluded from the evidence that Class C Reserve Force personnel are required to perform general military duties when ordered to do so. General military duties may include drilling detainees kept for punishment, watching the base during off-duty hours, parade appointments involving being responsible for 10 to 30 personnel, marching, sometimes with backpack kits weighing up to 100 pounds, base defence force duties involving crowd control, attending to natural disasters such as tornadoes, attending to airplane crashes, e.g. stretcher bearing and service in the field to support combat units requiring field exercises involving quick and strenuous physical activity.

Expert medical evidence disclosed that for persons such as Mrs. Dunmall, climate is not a significant factor, environment and occupational and domiciliary accommodation are not significant, and no special medical care considerations are applicable.

However, Mrs. Dunmall would have pain at one block if she rushed, she would be compromised walking quickly, walking uphill or walking any distance carrying heavy loads, some of her limitations might be discovered only in situations of stress and she could be told to do things under orders that she might not be able to do.

Mrs. Dunmall was rated G4. Based on the evidence before this Tribunal, a person with a mild left calf claudication should not be adversely affected by climate, environmental or medical care considerations such that she would be ineligible for enrolment in the Class "C" Reserve Service. Indeed the evidence of both Dr. Lye and Dr. Pawliwec indicated that a person with a mild calf claudication where an iliofemoral graft was not patent should have been graded G3, a grading that would render such person eligible for employment. Accordingly, we cannot agree with the Respondent that a G4 categorization for such person was appropriate.

There is no evidence before us to suggest that the medical rating system of the Canadian Armed Forces was not imposed honestly, in good faith and in the sincerely held belief that it was necessary in the interest of the adequate performance of military occupations with reasonable dispatch safety and economy. Nor is there any evidence that Mrs. Dunmall was classified as G4 for anything other than honestly held (although apparently incorrectly held) beliefs by the doctors involved at the time that such classification was appropriate for her. Certainly there was no evidence of questionable motives.

We are satisfied from the evidence that in the first instance (i.e. before dealing with the waiver procedure), a properly applied medical rating system in the Canadian Armed Forces is valid. Drawing a line which renders certain persons unfit by categorizing them as G4 or below is not inconsistent with the objective test of Etobicoke, supra. However, persons and conditions must be categorized having regard to the requirements of the objective test in Etobicoke, supra.

The medical evidence in this case does not support the way in which the categorization system was applied. A G4 classification for dental hygienists with mild calf claudications with occluded iliofemoral grafts in stable condition is not, in our view, related in an objective sense to the

adequate performance of the employment concerned. On the contrary, the medical

evidence indicates that climate, environment and medical care considerations are not significant in the case of such persons.

Any safety risk to the individual, fellow employees or the general public in respect of the G factor would be, at most, minimal. Based on the flexible approach to safety risk established in Central Alberta Dairy Pool, supra, we are satisfied that any minimal safety risk, in the context of the G factor categorization, should not disqualify such persons from employment opportunities. Categorizing such individuals as G4 and refusing to employ them for this reason does not meet the objective test of Etobicoke, supra.

Had the process ended with this categorization of Mrs. Dunmall as G4 (without the waiver process), the BFOR defence would fail.

In coming to this conclusion, we have not ignored the evidence which indicated that Mrs. Dunmall could be compromised in situations of physical stress, that some of her limitations might be discovered only in situations of such stress and that she could be told to do things under orders that she might not be able to do. These are considerations to be taken into account in the assessment of the occupational or O factor which deals with physical stress and activity. These findings do raise questions related to risk to the employee, fellow employees and the public

of more significance than in the case of the G factor considerations. However, in respect of the 0 factor, the medical authorities graded Mrs. Dunmall as 03, a grade that does not render a candidate ineligible for employment but which does recognize that the individual may have a moderate medical disability which prevents her from doing heavy physical work or operating under stress for sustained periods.

While the Respondent raised questions of safety risk related to physical stress before this Tribunal, the evidence does not indicate that Mrs. Dunmall was rejected for this reason. The 03 categorization given to Mrs. Dunmall indicates that the Canadian Armed Forces considers that it is able to deal with situations of physical stress disability such as hers with out compromising its safety standards. The medical authorities did not find that Mrs. Dunmall was ineligible or presumably that her condition created

any unacceptable risk to the safety to herself, her fellow employees or the public on this ground. Since these considerations were not the basis for Mrs. Dunmall's rejection, they need be considered no further by this Tribunal.

THE WAIVER PROCEDURE

We now turn to the waiver procedure. Because Mrs. Dunmall was discharged in 1969 on medical grounds, her enrolment in Class "C" Reserve Service would have required a medical

waiver,viz QR&O 6.01(2)(b)(i) and CFAO 9-54, Paragraph 6. Further, even if refusal to employ Mrs. Dunmall on the basis of her failure to meet medical standards in the first in stance was justified, the waiver procedure was pursued.

Having regard to the dicta in Brossard, supra and the majority in Central Alberta Dairy Pool, supra, it is necessary to determine whether the employer's rule is "reasonably necessary" or whether there is a reasonable alternative to burdening the members of a group with a given rule? In Brossard, supra, the Supreme Court found that while an anti-nepotism policy was justifiable, the one in that case was disproportionately stringent because it resulted in a total ban on the hiring of relatives regardless of the circumstances. At page 343, Wilson J. suggested that a less drastic means of avoiding a threat to the integrity of a town's administration would be:

. . . if a watchful eye were kept on the situation and discretion exercised in order to keep the hiring of relatives (assuming their ability to do the job concerned) within reasonable proportions?

In the case at bar, a waiver procedure existed. A person who is ineligible for re-enrolment because she fails to meet medical standards and because she was previously discharged for medical reasons may apply for a waiver. The practice in respect of waivers for Class "C" positions was described by

Lieutenant Colonel Moffatt. He testified that the decision to grant or not grant a waiver is that of the administrative authority, but it is or should be made on medical advice. He was asked about the procedure.

THE CHAIRMAN: But in any event, it's Colonel Moffatt's evidence that DMTS makes a recommendation, but the ultimate authority to decide whether or not to grant a medical waiver is DMMD?

THE WITNESS: Yes.

MS. GILLIS: Colonel Moffatt, could I ask a question? What would be the reason you would request a waiver?

THE WITNESS: Well, if the person -- you are required to take a medical before you come on duty. Obviously, we want to make sure the person is capable of doing the job. If, for some reason, the medical category sign is below the specifications called for for that position, then we would look and see what the -- you know, what was the cause of that medical condition and whether the person could function in that job or not, and not being a doctor, I don't know anything about it, so I would ask DMTS and if they said, yes, we can do it, I can't imagine a case where -although the approving authority is ours -- we would override what the doctors told us. We would go along with whatever they suggested, and there are all sorts of various categories of medical conditions, and they would explain to us what that meant and what the person could or could not do in their job. So, once we got that information, then we could make a sensible decision.

(Transcript pp. 320-321)

We find it significant that the administrative authority that has the final decision-making power would virtually always go along with whatever was suggested by the medical authority.

This waiver procedure, if it is followed, would in our opinion meet the objectives outlined by Wilson J. in Brossard, supra - avoiding a threat to the integrity of the Canadian Armed Forces to perform its functions while providing a reasonable alternative to burdening all those who do not meet medical standards at the first instance. In this case, however, the waiver procedure was not followed. After rejection as being medically unfit, Mrs. Dunmall applied for a medical waiver. By memorandum of Colonel Phillips, DMTS, dated February 8, 1982, DMTS concurred:

. . . with administrative authority granting a waiver of medical standards provided that she is employed strictly within the limitations of her medical category G4 03 and provided this category has not deteriorated since it was awarded.

(Exhibit R-1, Tab 15)

The waiver was attached to Mrs. Dunmall's Supplementary List application which was dated February 22, 1982 and forwarded to DPIS on February 23, 1982. Inexplicably, on April 15, 1982 DPIS refused the waiver and re-enrolment. The written message stated:

Based on med cat and current medical condition enrol to suppres not authorized.

(Exhibit R-1, Tab 21)

Colonel Moffatt was asked about this refusal.

THE CHAIRMAN: Okay. So, that would be tab 15. That's the document that's dated 8 February 82, right?

THE WITNESS: Yes, sir.

THE CHAIRMAN: Now, that document says that Colonel Phillips concurs with the administrative authority granting a waiver of medical standards. So, how do we get to tab 21 where it says that, based on med cat and current medical condition, she is not authorized?

THE WITNESS: Beats me, sir. What I think has happened here is that the DPIS have just looked in their book of medical specifications and said this doesn't fit, and it's denied.

THE CHAIRMAN: Well, certainly not on the basis of tab 15, because tab 15 grants it.

THE WITNESS: Tab 15 recommends that it be granted. They cannot grant a waiver.

THE CHAIRMAN: I understand that, but tab 21, which I guess is the authoritative document --

THE WITNESS: Yes, it is.

THE CHAIRMAN: -- says based on med cat and current medical condition, and your evidence is they would have based that on tabs 15, 16 and 17?

THE WITNESS: I would think so, unless they know something that we don't.

THE CHAIRMAN: Certainly not in the evidence.

THE WITNESS: No, not that I know of.

THE CHAIRMAN: And you said, in your direct evidence, that it would be very unlikely that DPIS would go off and make its own decision that would be inconsistent with the medical recommendation?

THE WITNESS: I certainly wouldn't if I was in that position, you know. DPIS are no more doctors than DMMD are.

(Transcript pp. 378-379)

The onus, once a prima facie case of direct discrimination is proven, is on the employer to demonstrate that its practices giving rise to the discrimination are based on a BFOR. Reasonable medical standards with a waiver procedure that is not disproportionately stringent do, in our view, qualify as practices based on a BFOR. However, the employer must demonstrate that in refusing the opportunity for employment on medical grounds, it followed the justified practices. In this case, the employer has failed to do so. Here, DPIS denied the waiver and the application for enrolment allegedly based on the medical category and current medical condition of Mrs. Dunmall. No witness was called who could tell the Tribunal why the administrative authority, DPIS, denied the request when the medical authority, DMTS, concurred in the waiver and the employing of Mrs. Dunmall.

Colonel Moffatt, when asked the reason for DPIS refusing in light of the recommendation of DMTS, said:

Beats me, sir.

(Transcript p. 378)

And when asked about DPIS making a decision inconsistent with the medical recommendation, he stated:

I certainly wouldn't if I was in that position, you know. DPIS are no more doctors than DMMD are.

(Transcript p.379)

It may be that there was some information in the possession of DPIS that might have justified the refusal, but that was not provided to this Tribunal. The evidence we have is that based on her medical category and current medical condition, a waiver could be granted and Mrs. Dunmall could be employed insofar as DMTS was concerned. The decision to refuse to enrol Mrs. Dunmall allegedly based on the same grounds, i.e. medical category and current medical condition, is inconsistent with the medical advice. The evidence before us does not satisfy us that the denial of the waiver was reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, her fellow employees and the general public. The

objective test of Etobicoke, supra has thus not been met. The Respondent has not, in our opinion, satisfied the onus upon it such that we could accept the BFOR defence in this case. We find the complaint to which this inquiry has been substantiated.

DAMAGES

Mrs. Dunmall asks for:

(1) Two years' wages at the level at which she would have been enrolled;

(2) Compensation for loss of self-respect;

(3) Interest.

WAGES

The Complainant concedes that if she is entitled to an award for loss of opportunity to receive income from the Canadian Armed Forces as a dental hygienist, there must be subtractedthe earnings she otherwise obtained for the period during which she would have likely been employed by the Canadian Armed Forces.

The Tribunal was provided with pay scales for dental hygienists for periods beginning April 1981, October 1981, April 1982 and April 1983 for various ranks, from private through

master warrant officer. Based on the evidence that the Complainant would most likely have re-entered at the sergeant level, in February 1982, the applicable gross monthly salary would have been $1,824.00 for two months, then $2,040.00 for 12 months starting in April 1982 and then $2,159.00 for 10 months beginning April 1983.

The Complainant earned gross wages at Associated Crown & Bridge Laboratory Ltd. from January to June 30, 1982 in the amount of $7,197.45. As mitigation, the wages earned from February through June 1982 of $5,997.00 must be deducted.

The Complainant received $1,620.00 in Unemployment Insurance Compensation ("UIC") payments in 1982 (after June 30 and $5,112.00 in UIC benefits in 1983.

Under Sections 37 and 38 of the Unemployment Insurance Act, R.S.C. 1985, c. U-1, UIC benefits must be repaid where the Complainant receives an award for payment of compensation for loss of wages during a period for which she is compensated. The amount of UIC received by the Complainant during the period of our award must be deducted from the amount payable to her. However, the Respondent should pay this sum to the Receiver General of Canada.

The Complainant asserted a claim for two years' lost wages, based on the denial of a position the first year and the likelihood that her position would have been extended one further year.

The Respondent attempted to show through the evidence of Lieutenant Colonel Moffatt that even if the Complainant was placed on the Supplementary Reserve List, she may not have been hired because of certain priorities in manning requirements. While the evidence was such that at the base in Winnipeg at the relevant time, 16 of 17 dental positions were filled, the evidence was also that there was an opening in February 1982 for a dental hygienist due to retirement. Lieutenant Colonel Moffatt's evidence was reflective only of positions and manning in Winnipeg and not with respect to employment of dental hygienists elsewhere. In addition, he did not testify as to the number of vacant position filled. Finally, we must give weight to the letter of September 21, 1981 of Colonel Richardson, the officer commanding #14 Dental Unit, to Mrs. Dunmall that:

We have opportunities for Hygienists

(Exhibit R-1, Tab 2)

and his letter dated September 29, 1981 (Exhibit R-11) to ARAF requesting that Mrs. Dunmall's enrolment for employment be proceeded with. While the ultimate hiring authority was not his, no evidence was led to suggest that his request would not have been of significant influence in the decision as to whether or not to hire Mrs. Dunmall.

Mrs.Dunmall had not passed security clearance, but there was no evidence that this would have been a problem for her.

We conclude that there was a reasonable likelihood of Mrs. Dunmall being hired. The period of employment for Class "C" Reserve Force personnel was according to CFAO 9-54, normally three months to one year, while in exceptional circumstances employment could be authorized for longer periods. Mrs. Dunmall's evidence was that she considered applying for a Class " B " position but that she was told by Colonel Richardson that this would not meet his requirements as it would be for up to three months only. It is therefore not likely that her period of employment in a Class "C" position would have been for only three months.

However, we have little evidence of exceptional circumstances such that her Class "C" position would have been authorized for a period of longer than one year. Professor Margery

Forgay, acting director of the School of Dental Hygiene, University of Manitoba, testified that there was a shortage of dental hygienists at the relevant time. However, in our view, this evidence is not sufficiently linked to the specific circumstances of this case such that it would justify us in concluding that the exceptional circumstances condition of CFAO 9-54, Section 4 would have been satisfied such that Mrs. Dunmall would have been employed for more than one year.

Under the circumstances, we are of the opinion that there was a reasonable likelihood that Mrs. Dunmall would have been employed for one year in a Class "C" Reserve Force position as a dental hygienist at the sergeant level. We are therefore awarding her one year's wages at the sergeant level for the period February 1, 1982 to January 31, 1983.

DAMAGES UNDER SUBSECTION 53(3)(b)

Counsel for the Complainant asserted a claim pursuant to subsection 53(3)(b) of the Act for compensation in respect of hurt feelings and loss of self-respect suffered by her. There is evidence that the Complainant did suffer hurt feelings and a loss of self-respect. She said that she felt devastated upon her rejection. Further, the denial of a waiver appears to have been arbitrary. This Tribunal awards her $2,500.00 under subsection 53(3)(b).

INTEREST

The Tribunal was given to understand that the issue of interest was presently the subject of appeal to the Federal Court of Appeal in Morgan v. Canadian Armed Forces (Court File A 741 90). It would therefore not be productive for this Tribunal to embark upon an analysis of the legal basis for a claim for interest. Indeed counsel did not address the subject extensively. For the reasons in the tribunal decision in Morgan v. Canadian Armed Forces (1989), 10 CHRRD/6386 and the review tribunal decision in the same proceedings (1990), 13 CHRRD/42, we would include in the compensation payable to the Complainant an interest component with respect to wages. In Morgan, supra, the Canada Savings Bond rate was used. However, we see no relationship between the Canada Savings Bond rate of interest, which is close the most favourable borrowing rate for the Government of Canada, and the cost of money to individuals. The purpose of an award of interest is to make the claimant whole (Attorney General of Canada v. Rosin (1990), 34 C.C.E.L. 179 at 200). We fixed the rate at the prime rate from time to time of the Royal Bankof Canada plus one percentage point which is probably close to the most favourable borrowing rate for individuals.

The period shall commence from the date when Mrs. Dunmall would have been paid had she been employed commencing February 1, 1982 and shall terminate on the date of payment. The

amount on which interest is payable is the amount that would have been paid to Mrs. Dunmall by the Canadian Armed Forces from time to time less the amounts she received from Associated Crown & Bridge Laboratory Ltd. and Unemployment Insurance. Interest shall also be payable to the Receiver General of Canada on the amounts of unemployment insurance paid to Mrs.

Dunmall from the date such payments were made to the date of payment. Interest shall be compounded annually.

INCOME TAX

The Respondent shall withhold at source and remit to the Receiver General of Canada directly any amount in respect of income tax that is payable by the Complainant on account of the award of compensation herein.

DETAILED CALCULATIONS

Should the parties be unable to agree to detailed calculations, this tribunal will retain jurisdiction, upon application within 45 days of the date of issue of this decision, to determine the amounts payable to Mrs. Dunmall and the Receiver General of Canada.

ORDERS

Having found that the complaint to which this inquiry relates has been substantiated, this Tribunal orders that the Respondent compensate the Complainant in the following manner:

a) Gross wages at the sergeant level for the period February 1, 1982 to January 31, 1983 at the then currently applicable wage rates less:

(wages received by the Complainant from Associated Crown & Bridge Laboratory Ltd. for the period February 1 to June 30, 1982;

(ii) unemployment insurance received by the Complainant for the period July 1, 1982 to January 31, 1983;

b) Interest at the prime rate from time to time of the Royal Bank of Canada plus one percentage point compounded annually on the gross wages less unemployment insurance and less wages received from Associated Crown & Bridge Laboratory Ltd. payable from time to time to the date of payment.

c) Compensation in respect of hurt feelings and loss of self-respect in the sum of $2,500.00.

2. The Respondent is ordered to pay to the Receiver General of Canada the amount of unemp]oyment insurance paid to the Complainant for the period July 1, 1982 to January 31, 1983 and interest on the amount paid at the prime rate of the Royal Bank of Canada from time to time plus one percentage point compounded annually to the date of payment.

3. The Respondent is further ordered to withhold at source and to remit to the Receiver General of Canada directly any amount in respect to income tax that is payable on the award of compensation herein.

DATED this 29th day of August, 1991.

Marshall E. Rothstein, Chairman

Donna M. Gillis

Raymond W. Kirzinger

ADDENDUM

OBSERVATIONS OF THE CHAIRMAN AND MR. KIRZINGER WITH RESPECT TO DELAY

The complaint in this matter was made on July 21, 1982. The matter was finally brought to a hearing in the fall of 1990, some eight years after the complaint was lodged. It is true that this was a complex case which required that evolving difficult legal issues be addressed. Indeed this Tribunal has had to take considerable time to issue this decision. However, no explanation was given as to why it took eight years to bring the matter on for hearing. All parties were asked the reason for the delay. Counsel appearing before us were not originally involved and could offer no insight into the reason for delay. Mrs. Dunmall, when asked, indicated that she had made inquiries from time to time but had never received an explanation for the delay. We can only infer that Mrs. Dunmall was the victim of either or both of the Canadian Armed Forces or Canadian Human Rights Commission bureaucracies. Somehow her case was allowed to drag on for a totally unacceptable period of time. (Our observations specifically exclude any negative inference on counsel appearing before us since they had become

involved only shortly before the hearing and cooperated in expediting the proceedings.)

We regret that we have no jurisdiction to make an award to Mrs. Dunmall on account of the frustration and delay to which she has been put by persons and considerations that were totally beyond her control.

DATED this 29th day of August, 1991.

Marshall E. Rothstein, Chairman

Raymond W. Kirzinger