T.D. 6/98
Decision released June 26, 1998

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

HUMAN RIGHTS TRIBUNAL

BEFORE: ELIZABETH A.G. LEIGHTON
SHEILA M. DEVINE
LINO SA PESSOA

BETWEEN: NANCY GREEN

Complainant
- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission
- and -

PUBLIC SERVICE COMMISSION OF CANADA
TREASURY BOARD
HUMAN RESOURCES DEVELOPMENT CANADA

Respondents

TRIBUNAL DECISION

TRIBUNAL: Elizabeth A.G. Leighton
Sheila M. Devine
Lino Sa Pessoa

APPEARANCES: Nancy Green, Complainant
Margaret Rose Jamieson, Counsel for the
Canadian Human Rights Commission
Josephine A.L. Palumbo, Counsel for the
Respondents

DATES AND LOCATION OF HEARING: January 13 to 17, 1997
January 20 to 24, 1997
March 21, 1997
March 24 to 27, 1997

October 27 to 30, 1997
December 4, 1997
Toronto, Ontario

INTRODUCTION

On September 4, 1989, Nancy Green brought two complaints to the attention of the Canadian Human Rights Commission. Both complaints were based upon an allegation of discriminatory practice on the ground of disability, specifically dyslexia in auditory processing.

Ms. Green's first complaint named Treasury Board as the Respondent; the second, the Public Service Commission of Canada. The first complaint noted that the discriminatory practice had occurred "on or about October, 1981 and ongoing". It elucidated that "Treasury Board has discriminated against me and people like me by establishing a policy that deprives or tends to deprive me or people like me of employment opportunities on the basis of a disability (dyslexia in auditory process) in contravention of section 10 of the Canadian Human Rights Act".

The second complaint noted that the discriminatory practice had occurred "on or about December 30, 1987 and January 5, 1988" when "the Public Service Commission of Canada . . . . discriminated against me in the provision of services by treating me differently on the basis of a disability (dyslexia in auditory process) in contravention of section 5 of the Canadian Human Rights Act". This complaint was amended on November 30, 1989 to read ". . . . in contravention of section 7 of the Canadian Human Rights Act".

Human Resources Development Canada (hereinafter HRDC) was added as a Respondent in May of 1996. This was done at the request of the Canadian Human Rights Commission. It was done for remedial purposes without objection from either HRDC or counsel for the named Respondents, Treasury Board and the Public Service Commission of Canada.

After many years, during which there was an investigation by the Canadian Human Rights Commission of the September 4, 1989 complaints as well as a conciliation process, the complaints were referred to the Human Rights Tribunal by the Canadian Human Rights Commission.

Hearing days commenced in January of 1997, and final written arguments were received by the appointed Tribunal in February of 1998.

FACTS

In 1975, Nancy Green commenced employment with the Canadian federal government. She had been awarded an Honors Bachelor of Science degree from the University of Waterloo in 1973. Her first job with the federal government was at the PM-2 level, as a Manpower Counselor with the Canada Employment and Immigration Commission (now HRDC). The PM designation refers to a federal government classification system for its employees.

Ms. Green remained a federal public servant, moving forward in her career as she gained experience. From June of 1980 to June 1983, Ms. Green's official position was Co-secretary to the Federal-Provincial Needs Committee (Employment and Immigration Commission). During that time, she received a special assignment to act as a Manager at the Employment and Immigration Commission during a period of economic downturn. From June 1983 to March 1985, Ms. Green was a Co-ordinator for Intergovernmental and External Relations within the Employment and Immigration Commission. From April 1985 to January 1987, she was a Manager of Job Entry and by February of 1987 she was the Acting Director of Job Entry, a PM-5 level position with the Employment and Immigration Commission.

She left this position before she could participate in middle-management training because she took maternity leave. It was while she was on this maternity leave that she learned of the closed competition for the PM-6 position of Manager, Employment Equity Consulting Service in the Employment and Immigration Commission. This position was one which interested Ms. Green, and she applied for it. As this was a closed competition, only persons already employed by the federal civil service were eligible to apply.

The position of Manager, Employment Equity Consulting Service was the management position for an administrative and advisory service set up by the Employment and Immigration Commission to implement the federal Employment Equity Act in Ontario, targeting such groups as women, visible minorities, persons with disabilities and aboriginal people. The objective of the service was to increase the representation of the designated groups at all work force levels in the province.

The position had been designated a bilingual non-imperative position under federal government regulations. This means that the successful candidate for the position need not be bilingual initially but must agree to become bilingual to the level assigned to the position over the period of time specified by the second language training policy. In this case, the position demanded proficiency in French at the B level for reading and writing, and at the C level (the highest level) for oral communication. The designation of the position as bilingual to the BB/C level had been made by its department some time before the competition for the position took place.

Ms. Green's application was "screened in". In other words, she became part of a short-list of candidates to be interviewed. In addition to a personal interview, she participated in an "in basket" exercise, and was rated by the Selection Board. At the end of this phase of the closed competition Ms. Green stood first on knowledge, ability and personal suitability. Two other persons interviewed for the position also qualified for the position at this stage in the process.

On December 31, 1987, Ms. Green was sent to participate in the "Orientation Process", designed by the Public Service Commission to test a candidate's potential to fulfill the Treasury Board policy concerning training for a second language. Ms. Green was not a bilingual candidate for the position, and would have to receive training to reach the BB/C level of proficiency in French. As the position was deemed "non-imperative", she would have the opportunity to participate in this training pursuant to the policy as set forth by Treasury Board. If she had completed the training successfully, she would be fully qualified for the position and a decision could be made by the Selection Board.

The Treasury Board policy concerning the training of federal government employees to learn a second language (be it English or French) allotted a maximum number of hours of training for each proficiency level required. Because the training would take place during normal working hours, and at government expense, this policy endeavored to create some measure of concreteness in the training expenses by this allotment of a "bank of hours" available to employees who would receive the training.

As already noted, testing of candidates for second language training to measure their potential to learn in the allotted time-frame was administered by the Public Service Commission. The tests were based upon the American test called the Modern Language Aptitude Test (hereinafter referred to as the MLAT) and two Pimsleur subtests, all created specifically "to provide an indication of an individual's probable degree of success in learning a foreign language" (quoted from the 1959 edition of the Manual for the MLAT, at p. 3).

These tests specifically measure what were described by the creator of the MLAT, Dr. John B. Carroll, as predictors of abilities which he deemed necessary for the successful learning of a foreign language within a cost-effective time-frame. These specific predictors on the MLAT and the Pimsleur subtests include abilities in sound/symbol discrimination, rote memory for speech sounds, and grammatical structure.

The MLAT was created in the United States by Dr. Carroll. He used seven factors which he felt were important to evaluate a person's potential to learn a foreign language. Those factors were as follows:

(i) verbal knowledge
(ii) linguistic interest
(iii) associative memory
(iv) sound-symbol association
(v) inductive language learning ability
(vi) grammatical sensitivity
(vii) speed of association

The MLAT's original "norms" were American adult males and American children, both of whose native tongue was English. When the test was purchased for use in Canada shortly after the introduction of the Official Languages Act, the MLAT was normed for Anglophone federal civil servants.

The tests which Ms. Green participated in on December 31, 1987 indicated that her potential to learn French within the allotted time-frame for the BB/C level of proficiency was below that permitted by the Second Language Training Policy. After an oral interview with Madame Françoise Thexton, a counselor in the second language Orientation Process, Ms. Green was told that she had received a "negative prognosis". Mme Thexton had verified this result with her supervisor, M. Joyal, before she discussed the "negative prognosis" with Ms. Green during the oral interviews.

In order to receive a "positive prognosis", a candidate for "C" level training must achieve a minimum of sixty per cent as an overall result in the tests, with no great variation between scores

on the various subtests. Ms. Green's results placed her in the bottom 5th percentile range. This meant she received a "negative prognosis". Thus, she was ineligible to participate in the full-time programme for federal government employees to learn the second language necessary for fulfillment of the qualifications for the position of Manager, Employment Equity Consulting Service.

Notwithstanding this set-back with regard to her candidacy for the position, Ms. Green was appointed Acting Manager, Employment Equity Consulting Service within the Canadian Employment and Immigration Commission in January of 1988.

She worked in that position until January, 1989. During that time, her department attempted to comprehend the reason for her "negative prognosis" and to find a method to deal appropriately with its ramifications.

Ms. Green had turned to her department to help her understand her performance on the second language aptitude tests. Mme Thexton, the orientation counselor, had indicated to Ms. Green during the interview portion of the Orientation Process that she suspected that Ms. Green might be a person with a learning disability. This was Ms. Green's first indication that she might have a learning disability.

Ms. Corrine Palmer, an Employment Equity Officer within the Employment Equity Consulting Service arranged for testing of Ms. Green at department expense. This testing was specifically to address the suggestion that Ms. Green might have a learning disability. In March 1988, Ms. Green was tested and diagnosed by Dr. Bernice Mandelcorn, a registered Ontario psychologist whose specialty includes learning disabilities. Ms. Green was diagnosed as an individual with a specific learning disability – "dyslexia affecting auditory processing functioning, i.e. auditory discrimination and rote auditory memory and sequencing skills". (p. 6, Dr. Mandelcorn's Psychoeducational Assessment).

Almost immediately upon receipt of Dr. Mandelcorn's Report and the diagnosis of Ms. Green's learning disability, her department commenced its attempts to accommodate Ms. Green's entry into the second language training programme in spite of her "negative prognosis". These attempts were all based upon her department's acceptance of Dr. Mandelcorn`s diagnosis of Ms. Green's learning disability.

The department was not able, however, to communicate that acceptance to the Public Service Commission personnel. The Public Service Commission took the position that the result of the Orientation Process, and the language aptitude tests in particular, simply indicated a low aptitude for second language learning. This low aptitude was the reason for the "negative prognosis". The Mandelcorn Report and the diagnosis of a learning disability was discounted as being merely another way of saying that Ms. Green had a low aptitude for learning a second language.

Therefore, the department arranged for another testing of Ms. Green. Dr. W.G. Ford, a registered Ontario psychologist and psycho linguistics expert, eventually made a dual-language

assessment of Ms. Green dated September 19, 1989 following five contacts with her. These contacts included an initial interview, two assessment sessions, and two sessions when a presentation of results took place. All sessions were conducted in French and included a number of psychological tests and writing tests such as composition of stories and summaries. The final assessment noted that Ms. Green had a learning disability characterized by an auditory memory and sequencing disorder, and listed recommendations for full-time French language instruction for Ms. Green.

The department had allotted resources for individual French tutoring for Ms. Green in the Fall of 1988. After January 1989, she attended evening classes in French, paid for by the department. Ms. Green had been able to move into the second semester of instruction at the evening classes because she had been able to complete the first semester work during the tutoring phase of her French instruction. By the time she attended at Dr. Ford's office in the Fall of 1989, Ms. Green was able to participate in his assessments using the French language exclusively. He noted in his evidence that "in a short period of time, Nancy Green had learned competence in terms of reading, writing, and oral communication French to the equivalent of a grade 5 to 7 range". (Transcript, p. 640). In other words, Ms. Green's ability to learn French had taken her from a position of no French to the level of a grade 5 to 7 student of French during her part-time French language instruction in 1988 and 1989.

Ms. Green had been advised by Mme Thexton during the interview portion of the Orientation Process that she should attempt to learn French on her own. Mme Thexton thought that she had indicated to Ms. Green that, once Ms. Green had learned some French, she could be re-interviewed and might receive a "positive prognosis" if her knowledge of the French language was then sufficient to indicate that she had a reasonable chance to be successful in the full-time French language training programme. Mme Thexton indicated in her evidence that this strategy had been used by others who had received a "negative prognosis". Mme Thexton, however, could not remember positively that she indicated to Ms. Green that no further testing would be necessary if she were to return to request a re-interview after pursuing part-time French language training.

Ms. Green's evidence was that she was unaware that such a second interview might have been able to overcome her "negative prognosis" had she been able to show in an interview that she did have the potential to learn French to the BB/C level within the allotted time.

The evidence suggests that personnel in Ms. Green's department were either unaware of, or did not use this strategy in their attempts to find some solution to the dilemma that Ms. Green would not be eligible for the PM-6 position if the "negative prognosis" made her ineligible to participate in full-time training to become bilingual, one of the qualifications for the position.

In December 1988, Ms. Green received confirmation that her position as Acting Manager, Employment Equity Consulting Service would end and she would not be considered for the position as she could not meet the language qualification. In February 1989, Ms. Green became an Industrial Consultant, Adjustment Services, HRDC, at the PM-5 level.

On December 16, 1988, Ms. Green had appealed the decision concerning the competition and her disqualification on the basis that her qualifications had not been assessed properly. This appeal was made to the Public Service Appeal Board. On February 23, 1989, A.H. Rosenbaum, Chairman, Appeal Board, Appeals and Investigations Branch of the Public Service Commission, allowed her appeal and recommended that no appointment be made as a result of the original competition. Given that one and one-half years had passed since that competition, he recommended the commencement of a new competition.

That did not happen. Instead of initiating a new competition, HRDC dealt with the position for which Ms. Green had applied in the Fall of 1987 by appointing a surplus employee to the position of Manager, Employment Equity Consulting Service.

From February 1989, to the present time, Ms. Green has remained in her position of Industrial Consultant. Although she applied for PM-6 and EX-1 positions which opened up in 1996 as a result of restructuring, she never reached the interview stage of any of the competitions or processes.

Ms. Green's complaint to the Canadian Human Rights Commission was made in September of 1989. During the conciliation process arising from that complaint, interviews and testing of Ms. Green resulted in a Psychoeducational reassessment report from Dr. Ford in March of 1995. Ms. Green had a further four sessions with Dr. Ford for this reassessment. The reassessment was specifically requested by Treasury Board Secretariat "to determine her specific intervention and training requirements for French Language instruction . . . to identify the most effective training method for Ms. Green as well as an opinion of her chances of success with that method". (December 16, 1994 letter to Canadian Human Rights Commission)

Dr. Ford made seventeen recommendations is his 1995 report. He then reviewed assessment materials, documentation and video-cassettes sent to him by M. Pierre Pronovost , the Director of Official Languages Policy, a Division of the Treasury Board Secretariat. These materials were sent to Dr. Ford so that he could understand more fully the methods used by the federal government to train its employees in a second language.

After he had reviewed these materials, Dr. Ford modified his recommendations to indicate that, in his opinion, Ms. Green would be a successful second language student within the allotted time-frame, using teaching techniques already in place in the training centres for federal employees. He recommended that six hours of consultation by a remedial specialist with the instructors who would be teaching Ms. Green would ensure effective monitoring and intervention techniques during the training period. To date, Ms. Green has not received any full-time French language training, sponsored by the federal government.

LAW AND ANALYSIS
LAW

Nancy Green's complaint against Treasury Board and Human Resources Development Canada, for remedial purposes, is based upon section 10 of the Canadian Human Rights Act (hereinafter, the Act) which reads as follows:

10. It is 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.

Nancy Green's complaint against the Public Service Commission and Human Resources Development Canada, for remedial purposes, is based upon section 7 of the Canadian Human Rights Act, which reads as follows:

7. 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.

Both complaints name the prohibited ground of discrimination as a disability, namely dyslexia in auditory processing. Section 3(1) of the Act reads as follows:

3. (1) 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 defines disability as follows:

"Disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug. 1976-77, c. 33, s. 20; 1980-81-82-83, c. 143, s. 12

All parties accepted that a learning disability is included in this definition.

Interpretation of matters involving allegations of discrimination pursuant to the Canadian Human Rights Act has been described as needing a purposeful basis. In Action Travail des Femmes v. Canadian National Railway Co., [1987] 1 S.C.R. 1114, Dickson, C.J. noted at p. 1134 that "although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained".

At p. 1136 of that decision, he quoted McIntyre, J. in Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150, as follows:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended

or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

Quoting from Ontario Human Rights Commission and O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536, he went on at p. 1136 as follows:

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.

Section 2 of the Canadian Human Rights Act sets forth clearly the purpose of the Act as follows:

2. 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.

As Dickson, C.J. elucidated in Brooks v. Canada Safety Ltd., [1989] 1 S.C.R. 1219, at p. 1234 (and quoting from Action Travail des Femmes, supra)

. . . . discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

Direct discrimination occurs ". . . when an employer adopts a practice or rule which on its face discriminates on a prohibited ground". (Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489, at 505/6).

Adverse effect discrimination "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 upon 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". (Alberta Dairy Pool, quoting from O'Malley, supra, p. 505/6).

At pp. 506/7 of the Alberta Dairy Pool case (supra), Wilson, J. further elucidates that "an employment rule honestly made for sound economic and 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".

Indeed, she indicates at p. 507 that "it is notable that the working rule to which the duty of accommodation applies need not be "reasonably necessary", i.e. it need not be a BFOR. Rather it need only be a "condition or rule rationally related to the performance of the job".

STANDARD AND BURDEN OF PROOF

The parties agree that in a case of this nature, the burden of proof is on the Complainant to establish, on a balance of probabilities, a prima facie case of discrimination. In the case of direct discrimination, once that is done, the onus shifts to the Respondent to establish a justification for the discrimination, on a balance of probabilities. (Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, at 208; Ontario Human Rights Commission and O'Malley, supra, at 558).

In the case of adverse effect discrimination, once the Complainant has established, on the balance of probabilities, a prima facie case, the onus shifts to the Respondent "to show that it made efforts to accommodate the [disability in this case] of the Complainant up to the point of undue hardship". (Alberta Dairy Pool, supra, p. 520).

O'Malley (supra), p. 558, describes a prima facie case as "one which covers the allegations made, and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent-employer".

In this case, the Respondents urge in written submissions that the test for a prima facie case is three-fold in employment complaints such as this. They submit that the test as set forth in Folch v. Canadian Airlines International (1992), 17 C.H.R.R. D/261 (CHRT); Shakes v. Rex Pak Ltd. (1981), 3 C.H.R.R. D/1001; and Grover v. National Research Council of Canada, 92 C.L.L.C./7046 (CHRT) should be adopted. Those cases indicated that the methodology to establish a prima facie case of discrimination in employment complaints is usually to prove the following:

(a) that the complainant was qualified for the particular employment;
(b) that the complainant was not hired; and
(c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaints subsequently obtained the position.

The Tribunal prefers to accept the definition of a prima facie case as enunciated by McIntyre, J. of the Supreme Court of Canada in O'Malley (supra), as follows:

A prima facie case is "one which covers all the allegations made, and which if they are believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent-employer".

ANALYSIS

I TEST FOR PRIMA FACIE CASE

Has the Complainant established a prima facie case of discrimination pursuant to sections 7 and 10 of the Canadian Human Rights Act, as alleged in the Complaint?

As noted in the elucidation of the facts surrounding the Complaint, all parties are in agreement with the following:

1. Nancy Green applied for the PM-6 position, Manager, Employment Equity Consulting Service, a bilingual non-imperative position in the federal public service.

2. Before the Orientation Process, Nancy Green was ranked first amongst those applicants interviewed.

3. Nancy Green participated in the Orientation Process, created by the Public Service Commission to choose candidates whose language aptitude would indicate a good chance of success in the federal government-supported training programme for second language learning.

4. The Orientation Process consisted of two parts. The first was based on the MLAT and Pimsleur subtests. It took place in an area which could be described as a typical "language lab" using earphones and auditory as well as written responses. That testing took place on December 31, 1987. The second part of the Orientation Process was an interview with an orientation counselor which took place on January 5, 1988.

5. Nancy Green's scores on the auditory testing section of the Orientation Process ranked her in the bottom five percentile of candidates, well below the area of acceptance into the second language training programme as enunciated by Treasury Board policy. This ranking was confirmed during the interview portion of the Orientation Process.

6. Nancy Green received a "negative prognosis" after this process was completed. She was deemed ineligible to attend full-time government sponsored second language training.

7. The "negative prognosis" meant that Nancy Green could not qualify for the language requirement of the PM-6 position. Her name was not placed on the eligibility list for the competition for this position.

8. Some months after this "negative prognosis", at the request of and paid for by her department, Nancy Green was tested by Dr. B. Mandelcorn. She diagnosed Ms. Green as being a person with a learning disability, specifically as being dyslexic in auditory processing.

The Tribunal must look carefully at the Orientation Process, as it is seminal to a decision concerning the Complaint and the Complainant's onus to establish a prima facie case of discrimination on a balance of probabilities.

Pursuant to section 46(1) of the Official Languages Act, Treasury Board has the mandate for general coordination and direction of official languages, policies and programmes in federal institutions. One of Treasury Board's policies is the language training policy. This policy establishes the maximum hours allotted for a candidate for language training, at government

expense and during normal working hours, to achieve a specified level of proficiency in the second language. The levels of proficiency for any bilingual non-imperative position are designated by the department where the position is located.

These maximum allotted hours represent time "allowed during working hours through funds that are allocated to the Public Service Commission for that purpose". (Transcript, p. 1794). This policy was implemented in 1977.

In 1987-88, the allotted time for a BB/C level position was "up to 15 months, but not more than 12 consecutively". By November 30, 1988, the hours allotted had been specified as 1860 hours for this level. In addition, at all times, the allotted hours policy has a discretion built into it to allow for the extension of up to six weeks for full-time students nearing the end of their programme who need the extra time to reach a successful conclusion.

Treasury Board has delegated to the Public Service Commission the actual second language training within the parameters of this policy. Before training can begin, candidates are assessed for language aptitude to assure potential success in the second language training

programme. The Personnel Psychology Centre of the Public Service Commission administers the tests which are used to assess whether the candidates have the necessary language aptitude.

It is important, therefore, that the Tribunal look closely at the language aptitude tests used in the Orientation Process. They were described in some detail by Mme Thexton in her evidence.

MLAT

(i) Number learning - heard in the Kurdish language
- tests short term memory of sounds heard
- moves very quickly
- demands an ability to sequence using auditory skills

(ii) Phonetic script - heard in a phonetic language which has been designed especially for the test
- measures ability to associate sounds and symbols
- requires an ability to remember sounds with no known meaning

(iii) Spelling clues - measures sound/symbol association where meaning is added
- very high speed testing

(iv) Words in sentences - measures sensitivity to grammatical structure
- requires intuitive feel for grammar

(v) Paired associates - heard in Kurdish language
- measures short term and random memory

- uses a visual foundation by associating Kurdish sounds with their English meanings.

These subtests are weighted for the final scoring; parts (iii) and (iv) are given extra weight when scoring.

PIMSLEUR TEST (subtests 5 and 6, only)

(5) - tests sound (specifically tone) discrimination
- uses an African language

(6) - tests coding/association between sound and symbol
- uses "nonsense" words

As noted above, the tests appear to concentrate mostly upon auditory sequencing, and sound/symbol association. Dr. Ford, the psychologist who tested and in 1995 re-tested Ms. Green and who gave expert evidence regarding learning disabilities, and Ms. Green's learning disability specifically, took "exception with the language testing process which defines ' aptitude' very narrowly within the domain of auditory memory sequencing. Their definition of ' aptitude', I feel, is very limited and hence restrictive and discriminatory to people with auditory processing disorders". (Transcript, p. 686). His evidence indicated that persons with learning disabilities have often developed compensatory strategies. In testing situations or "situations of new learning, the use of [these] compensatory strategies requires more time" (Transcript, p. 680). He also indicated that a person with a learning disability may not even be aware of using a compensatory strategy.

Dr. Ford's assessments of Ms. Green had indicated that the compensatory strategies which she had created, unbeknownst to herself, included requesting clarification of knowledge being imparted to her, repeating knowledge, and working with great care and attention.

He indicated in his evidence that these strategies are "very effective in situations in which time is not a critical element . . . learning can be new learning or learning can be using your existing knowledge base to problem-solving (sic). In situations of new learning, the use of compensatory strategies requires more time. In situations where you're co-ordinating and working with information that you have already, the amount of additional time is not necessarily excessive or beyond. In terms of learning something for the first time, if you have the opportunity to use a strategy, then you can cut down on the times as well". (Transcript, p. 680-81).

Dr. Ford indicated in his evidence that, based upon his assessments of her, he concluded that Ms. Green had developed strategies which had allowed her to learn to such an extent that she had been unaware of her disability, and of the strategies which she used, until she was assessed in 1988.

The second portion of the Orientation Process was the Interview. Mme Thexton was the Orientation Counselor for the Public Service Commission who saw Ms. Green on January 5,

1988, after she had completed the language aptitude testing portion of the Orientation Process. The placement test portion of the interview is simply "a test of auditory discrimination, a test to see if they understand French, of comprehension" according to Mme Thexton`s evidence (Transcript, p. 555). The comprehension level will affect the candidate's placement level for the training, assuming a positive prognosis.

Mme Thexton also noted that "if aptitude is indicated as below average you want to be sure that this is in fact the truth and that there are not other factors that have interfered... you want to verify the test... if it is weak, you want to be sure really there is a weakness there" (Transcript p. 560).

Hence, the interview portion is that aspect of the Orientation Process which explores the test results and factors which might have affected those results. In this case, Mme Thexton was a seasoned and able counselor who "always viewed [her] role as double. One was to make an assessment for the Public Service Commission of whether or not the candidate could reach the objective in the time allowed... but... also... a counselor to try and help the candidate... so that they wouldn't feel stupid... because a perceptual difficulty has nothing to do with the intelligence of a person and the value of the person as a person". (Transcript, p. 561-62)

During the interview, Mme Thexton validated the test results. She confirmed Ms. Green's need to begin language training at Lesson One, as she had no previous French language training, and she counseled Ms. Green because she was in an emotionally distraught state, having received the "negative prognosis". In addition, she indicated to Ms. Green that she believed, from the responses which Ms. Green had made on the tests, that she might be a person with a learning disability. Mme Thexton indicated in her evidence that she had "quite often seen candidates who had taken the tests who presented similar difficulties". (Transcript, p. 514)

Mr. Joseph Ricciardi, Senior Program Officer in the Official Language and Employment Equity Division of the Human Resources Branch, and a witness for the Respondent, Treasury Board, confirmed for the Tribunal the role and responsibilities of Treasury Board with regard to official languages.

M. Denis Petit was a witness for the Respondent, Public Service Commission. He is "le Chef du Service de l'Orientation". For fifteen years before he was appointed to this position, he acted as an orientation counselor, the person who conducts the interview portion of the Orientation Process. He described the language aptitude test as follows: "... ce n'est pas un test linguistique comme tel. C'est un test d'aptitude, un test qui évalue les capacités ou les aptitudes des clients à atteindre... (Transcript, p. 1617)

M. Petit also noted that the MLAT and the portions of the Pimsleur test which were used "étudie les sons, la perception des sons, la compréhension des sons, distinction lorsqu'on parle des langues comme ça... de discrimination des sons...de verifier l'acuité auditive des candidats, la discrimination auditive qu'on appelle, possibilité de reconnaître divers sons... capacités des candidats à l'encodage, décodage... la capacité, la réaction à la grammaire... d'identifier les fonctions d'une phrase... vise à évaluer la mémoire photographique, mémoire à court terme". (Transcript p. 1620-24)

The tests had been modified " par le service d'orientation, il y a ... la batterie correspondante au Modern Language Aptitude/Pimsleur qui est le test d'aptitude aux langues vivantes que la Commission a développé, a validé, standardisé et dont on a vendu les droits, il y a de nombreuses années, au même propriétaire Centre de psychologie, même propriétaire que les tests Modern Language Aptitude et Pimsleur." (Transcript p. 1627)

Thus, two witnesses for the Respondents, confirmed the evidence presented by the Complainant concerning the policies of the Respondents, Treasury Board and the Public Service Commission of Canada. Mr. Ricciardi and M. Petit confirmed the evidence of the Complainant concerning the Orientation Process and the policies behind it.

Dr. Georges Sarrazin, a psychologist registered in Ontario and Quebec and a full professor of psychology at the University of Ottawa was the Respondent's expert witness in the area of test construction, measurement, assessment, evaluation and development. He gave extensive factual and opinion evidence about the tests used by the Public Service Commission in its selection of candidates for second language training.

As already noted, the MLAT has been designed chiefly " to provide an indication of an individual's probable degree of success in learning a foreign language" according to the introduction to its own Manual. Dr. Sarrazin indicated that its design was also useful "if you want to be able to identify the difficulties... you take each of the subtests individually... so that you can identify what are the deficiencies...". (Transcript, p. 3055-59) He concluded, therefore, that not only is this test helpful in making a prognosis of success, but also it can be used as a diagnostic tool, to point out to teachers a particular student's special needs, if any.

Dr. Sarrazin presented the Tribunal with a compilation of articles he had gathered to give an overview of the history of the MLAT, including its validity and evolving use. Although his opinion is that the MLAT is the best predictor of success in second language training with a limited time-frame, a number of the articles which he cited in his evidence appear not to have shared that opinion.

For example, the 1973 article entitled "Prediction of Success in College Foreign Language Courses" by Jerry B. Ayers, Florinda A. Bustamante, and Phillip J. Campana noted that "grade point average was the best predictor of success [in foreign language training when compared with the MLAT, amongst others] because good students will basically succeed at anything they do". (Transcript, p. 3217)

The 1995 article entitled "Prediction of Performance in First-year Foreign Language Courses: Connections Between Native and Foreign Language Learning" by Richard L. Sparks, Leonore Ganschow and Jon Patton indicated that "the eighth grade English score was the largest contributor for the prediction in foreign language grade, if you compared it to [the MLAT, spelling and phonetic awareness] ." (Tab 5, Respondent's Expert Document Material/R-56 at p. 652)

A 1997 study entitled "Prediction of Foreign Language Proficiency" by Richard L. Sparks, and others, found that native language proficiency was important, especially with adult populations,

as a contributor to success in foreign language training. (Tab 6, Respondent's Expert Document Material/R-56)

The study entitled "Identifying Native Language Difficulties Among Foreign Language Learners in College: A "Foreign" Language Learning Disability?" by Leonore Ganschow and others, concluded that the best predictor of foreign language learning success was the combination
of the MLAT, WRAT (an intelligence test) spelling subtest, and writing samples. (Tab 10, Respondent Expert Document Material/R-56)

The study entitled "Foreign Language Learning Disabilities: The Identification of Predictive and Diagnostic Variables" by Anna H. Gajar agreed with Dr. Sarrazin's assessment of the performance of persons with learning disabilities on the MLAT. "Persons with learning disabilities would perform significantly more poorly than the comparison group on the MLAT... [because the abilities which the MLAT is designed to measure] have been cited in the learning disabilities literature as potential areas of deficit for purposes of learning disabilities". (Transcript, pp. 3234-53 and Tab 9, Respondent's Expert Document Material/R56)

Dr. Carroll had identified phonetic coding ability, grammatical sensitivity, and inductive ability as among the predictors of success in learning a foreign language in an allotted time. These abilities are the abilities which are the basis for the MLAT.

CONCLUSIONS TO QUESTION I (p. 14)

The Orientation Process is the child of the Public Service Commission, to whom the actual day-to-day implementation of the Treasury Board policy concerning second language training was delegated. As described already, the process consists of two distinct portions. The language testing portion, however, appears to be the most relevant for potential candidates for the language training program. A candidate's standing on the tests is crucial to the decision to allow one to proceed to training. A positive prognosis is "given when it is likely that the level of language required can be reached through continuous full-time courses in the time allowed". (Transcript, p. 537) A negative prognosis is "given when it is unlikely that the level of language required can be reached through continuous full-time courses in the time allowed". (Transcript, p. 537) This negative prognosis means the candidate is not allowed to participate in the full-time language training programme.

On their face, the language aptitude tests are constructed so that no one candidate has a better chance than another. The use of the Kurdish language and nonsense words is an attempt to create equality amongst candidates.

The issue is whether the almost exclusive use of auditory discrimination testing as the basis for the test of an aptitude to learn another language has inadvertently created a discriminatory practice against persons who have a learning disability, especially in the auditory discrimination area.

In other words, has the Public Service Commission's implementation of Treasury Board policy adopted a standard to test aptitude to learn a second language which is, on its face, neutral and which is meant to apply to all employees equally but which has a discriminatory effect upon persons with a learning disability, specifically in the auditory discrimination area?

The answer is clearly yes. The Complainant presented evidence which shows that the language aptitude tests chosen for use in the Orientation Process as the basis for selecting persons with an aptitude to learn a second language within an allotted time-frame (those with a "positive prognosis") rather than those with a low aptitude for such learning (those with a "negative prognosis") test the very skills which persons who have the specific learning disability known as dyslexia in auditory process do not have.

Has the Complainant, therefore, met the burden of establishing a prima facie case? Yes. Ms. Green, who has been diagnosed with the specific learning disability, dyslexia in auditory process, has been discriminated against in the course of employment because of the adverse differentiation based upon her learning disability.

The policy upon which this discriminatory treatment rests was established by her employer, Treasury Board, and has affected her chance for promotion because she was deprived of the opportunity to attend the full-time second language training programme. It was her learning disability which did not allow her to present her aptitude to learn a second language in a manner that is equivalent to other civil servants.

Therefore, the Tribunal finds that the evidence presented supports a prima facie case of adverse effect discrimination pursuant to both sections 7 and 10 of the Canadian Human Rights Act.

II DUTY TO ACCOMMODATE

Having found that there was a prima facie case of adverse effect discrimination, what steps did the employer take to accommodate Ms. Green's learning disability?

Unlike an employer's response of justification for a directly discriminatory rule or behaviour which an employer in the case of direct discrimination may make, in cases of adverse effect discrimination "there is no question of justification raised because of the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation (Alberta Dairy Pool, supra, p. 514/15)... The onus is on the employer to show that it made efforts to accommodate the (disability, in our case) of the complainant up to the point of undue hardship" (Alberta Dairy Pool, supra, p. 520).

"Undue hardship" may include a consideration of such things as financial cost, disruption of a collective agreement, problems of employee morale, the interchangeability of the workforce and/or its facilities. (Alberta Dairy Pool, supra, p. 521) When deciding how far the employer's attempts to accommodate his employee must go before "undue hardship" is reached, the factors which concern the employer must be balanced against the right of the employee to be free from

discrimination. As Sopinka, J. noted in Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970

The case law of this Court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry. The approach of Canadian court is quite different from the approach taken in U.S. cases. (p. 983)

The use of the term "undue" infers that some hardship is acceptable; it is only undue hardship that satisfies the test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. (p. 984)

The concern for the impact on other employees... (demands that) more than minor inconvenience must be shown... The employee must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. (p. 984-85)

...The objection of employees based on well-grounded concerns that their rights will be affected must be considered... objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on [a prohibited ground]. (p. 988)

The mere fact that the employer might have been required to defend an ill-founded grievance cannot justify failure to accommodate.
(p. 988)

Discrimination in the workplace is everybody's business. (p. 991, quoting from Office and Professional Employees International Union, Local 267)

At pp. 994 and 995 of this case, Sopinka, J. continues to comment on the duty to accommodate, and notes the duty of the complainant to participate in accommodation.

The search for accommodation is a multi-party inquiry... a duty on the complainant to assist in securing an appropriate accommodation ... does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution... When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed... The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

In this case, the fact that Ms. Green had a learning disability came to her attention after the language testing had been completed.

According to the evidence presented to the Tribunal, Ms. Green's immediate line department was concerned for her and for their loss of the first ranking candidate (before the language qualification was addressed) for the PM-6 position in their department. In order to give themselves some time, Ms. Green was appointed as Acting Manager and the closed competition was put "on hold".

After her conversation with Mme Thexton, at the interview portion of the Orientation Process, Ms. Green questioned whether she had a learning disability. She requested help almost immediately after that interview from the Acting Chief of Employment Equity, Human Resources Planning and Multiculturalism, Ms. Corrine Palmer.

Ms. Palmer indicated in her evidence that "it was our responsibility to follow up on that (Ms. Green's indication that she might be a person with a learning disability) and to ascertain whether in fact she did have a disability that might be affecting her diagnostic test, language test results, and, if so, if there were ways of accommodating that, which was our obligation as a department and employer under our Employment Equity policies". (Transcript pp. 727-28)

Ms. Palmer contacted the Association for Adults and Children with Learning Disabilities, and received from them the name of Dr. Bernice Mandelcorn. She referred Ms. Green to Dr. Mandelcorn. Ms. Palmer specifically asked Dr. Mandelcorn for an assessment of Ms. Green with a focus on the diagnostic/aptitude test used in the Orientation Process and Ms. Green's capacity to learn a second language. The Director of Personnel in Ms. Green's department, Mr. Norm Button, authorized payment for this assessment and report.

By March 24, 1988, Dr. Mandelcorn had tested Ms. Green and had diagnosed her as a person with a learning disability, with "tremendous difficulty with auditory processing, particularly when there are no visual clues". Her report was sent to Ms. Green's department and Ms. Palmer indicated "there was general support for the notion of providing the reasonable accommodation, the training, but there were some questions as to how that would affect the results of the competition which had still not been finalized". (Transcript, pp. 732-33)

On April 18, 1988, Mr. Norm Button wrote a letter to Ms. Vera McLay, Director of the Official Languages Secretariat, Staffing Programmes Branch (Public Service Commission) in Ottawa. He enclosed a copy of Dr. Mandelcorn's report respecting Ms. Green. His letter set forth clearly "that what is required is some accommodation for Mrs. Green in the context of the language training that she requires. These accommodations may take the form of a different method of instruction and dependent upon the method, the period of instruction". He noted, as well, that a response would be appreciated "at your earliest convenience (as) we are holding the results of the closed competition pending a decision on this matter".

After a second request for a reply, Vera McLay responded in a letter dated June 29, 1988. It was received by Norm Button on July 6, 1988.

Ms. McLay first indicated that the delay in her reply had been "due to our having explored every possible means available under the Official Languages Exclusion Approval Order, the legal instrument that permits the appointment of unilingual persons to bilingual positions". She elucidated that certain candidates for bilingual non-imperative positions could be appointed in spite of a negative prognosis. This could be done using "two safeguard mechanisms... an override to a negative prognosis and a pre-appointment (as opposed to a post-appointment) exclusion on compassionate grounds".

Ms. McLay indicated in her letter that "the policy on the override provision (TBS/PSC Circular 1981-29, p. 7) limits its use to"... exceptional circumstances (isolated post, unique position, rare specialty, etc.). She rejected the ability to use this mechanism because Ms. Green was not the only qualified candidate for the Manager position at the completion of the interview phase of the competition.

She continued to indicate that the mechanism of "an exclusion on compassionate grounds" had been considered as well. She noted that the "purpose of pre-appointment compassionate exclusions is to ensure that the requirement to demonstrate aptitude should not create a systemic barrier to the appointment of physically (or, less frequently, psychiatrically) disabled persons. In pre-appointment exclusions, therefore the Public Service Commission's role is to ascertain whether a candidate's disability is indeed such that it would prevent that person from demonstrating sufficient aptitude (e.g. deafness, blindness, etc.)".

Given the report of Dr. Mandelcorn, this reasoning would appear to fit into Ms. Green's need for accommodation and her department's request for help in getting that accommodation. Ms. McLay, however, continues her letter, as follows:

I should like to emphasize that it was never the intent of the government's 1981 official languages policies nor of the Commission's Official Languages Exclusion Approval Order to grant exclusions because of a candidate's low aptitude. I emphasize this point because some people hold the opinion that, since low aptitude can be considered a type of learning disability, it should be added to the list of disabilities that are considered grounds for exclusion. Neither TSB nor the PSC shares that opinion. Whether one accepts the definition of low aptitude as a learning disability is irrelevant since the issue is the intent of government policies.

Just as a low aptitude for, let us say, mathematics would not be considered as reasonable grounds for excluding a candidate from having to meet the basic professional qualifications for an appointment as a statistician, so a low aptitude is not considered sufficient to justify an exclusion from having to meet the basic language requirements of a position.

Our detailed examination of Mrs. Green's case does not reveal any disability that would justify our granting an exclusion. The psychologist's report merely confirms the results of the orientation process, namely that Mrs. Green has a low aptitude for learning a second language (or, as the psychologist prefers to phrase it, a language learning disability).

The one point in both the psychologist's report and the orientation file that had the potential to meet the Commission's criteria for an excludable disability was the reference to Mrs. Green's low

auditory discrimination skills. While poor auditory discrimination per se is not grounds for exclusion, it can sometimes indicate a more serious impairment that can constitute sufficient grounds. When Mrs. Green's hearing was tested, however, the results showed that she does not have such an impairment.

Thus, after examining every possible element in this case, we can find no grounds to allow you to add Mrs. Green's name to the eligibility list for competition #87-EIC-CC-ON-167.

In closing, I should like to add that a negative prognosis merely indicates that the person needs more language training time that (sic) the maximum allowed at government expense for the target level (in this case level C). Mrs. Green might obtain a positive prognosis for a lower target level or she could take, on her own time, sufficient language training to obtain a positive prognosis on the orientation process the next time she applies for a bilingual position.

Ms. McLay's letter is clear that both the Public Service Commission and the Treasury Board Secretariat share the opinion that the "type of learning disability" characterized by low aptitude in the Orientation Process testing phase should not be added to the list of disabilities to be considered when an exclusion on compassionate grounds is requested.

Mr. Ricciardi, who gave evidence of the Treasury Board Secretariat's official position, indicated, however, that Treasury Board accepted that learning disabilities are included in the definition of disability and did not elucidate further concerning types of learning disabilities not to be so included.

At the department level, Ms. Palmer indicated that Ms. McLay's response generated "disappointment... that there hadn't been a more positive response to the request for special consideration. The letter did not acknowledge that a learning disability was in fact a disability within the definition of persons with disabilities and therefore did not provide any type of option for accommodation". (Transcript p. 737)

The department persisted, however, in its attempts to find some accommodation for Ms. Green, even though it was felt that the issue had become whether a learning disability was a disability to be accommodated.

The department took up the suggestion from Mme Thexton that Ms. Green should have some tutoring, or some French lessons, to give her more grounding in the language. She might have eventually been given a "positive prognosis" without having to redo the language aptitude test had she been successful with these lessons. It appears from the evidence, however, that this information was not clearly communicated to Ms. Green or to members of her line department. It should be noted that Ms. Green was assessed by Dr. Ford much later in French, but she was never
clearly and fully informed that she could attempt to become eligible for full-time second language training by participating again in the interview/placement test portion of the Orientation Process after a period of part-time learning.

In essence, although her department did try to help Ms. Green by providing the French language training on a part-time basis, the McLay letter ended the attempts to accommodate her disability within the sphere of the testing for aptitude or within the full-time second language learning area.

It would appear that part of the difficulty lay with the hierarchical nature of the federal civil service and problems of communication which appear from the evidence to be pervasive.

Ms. Palmer's evidence indicates the problem. She indicated that it was her responsibility to take "appropriate action [concerning Ms. Green] from the employment equity perspective... but on staffing actions that were being taken, I was not responsible for making those directions, taking those actions, or informing her of them". (Transcript, p. 805)

By late summer of 1988, Ms. Green`s line department was still writing letters to Treasury Board and to Public Service Commission officials to attempt to find some method to accommodate her. For example, Mr. David Morley, Executive Director of Employment and Immigration Ontario Region wrote Mr. George Tsai , Sous-secrétaire aux Langues Officielles in Ottawa, to request advice and help in creating an accommodation for Ms. Green. The line department felt, however, that attempts were fruitless. Indeed, they were. The eligibility list for the PM-6 position was posted without Ms. Green's name on it as it was decided that she was not fully qualified for the position because of the "negative prognosis". Her resignation as Acting Manager was requested in late 1988.

Although much evidence was presented concerning the cost of training Ms. Green using recommendations found in the report of Dr. Mandelcorn, and the re-assessment of Dr. Ford, these considerations did not arise until years after Nancy Green had left her PM-6 acting position, and were in response to her complaint to the Canadian Human Rights Commission and its attempts to understand the positions of the parties involved in that complaint. From the evidence, the issue of the cost to accommodate Ms. Green was not contemplated in response to the knowledge of her learning disability nor to the requests of her department to accommodate her.

The evidence clearly indicates an almost total lack of accommodation on the part of the Respondents, Treasury Board and the Public Service Commission.

SYSTEMIC DISCRIMINATION

Ms. Green`s complaint against Treasury Board noted the time of the discrimination as ". . . . ongoing" and noted that the discrimination was alleged to be not only of herself but also of "people like me".

Systemic discrimination "means practices or attitudes that have, whether by design or impact, the effect of limiting an individual`s or a group`s right to the opportunities generally available because of attributed rather than actual characteristics.... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone`s potential, or whether it is the accidental bi-product of innocently motivated practices or systems. If the barrier is affecting some groups in a disproportionately negative way, it is a signal that the practices that

lead to this adverse impact may be discriminatory". (Abella Report on Equity in Employment, p. 2)

When one digests the commentary on systemic discrimination found in the Abella Report on Equity in Employment, it is evident that the practices and the attitudes within an organization can create the problem of systemic discrimination.

Almost all of the evidence presented to this Tribunal from witnesses for all parties involved, created the picture of well-developed and solid theories of employment equity and human rights being advanced in policies and on paper.

It would appear from the evidence that employees involved in this matter, while having good intentions, had little or no effective training in how to deal with the theory of accommodation. In addition, they indicated in their evidence that they had no authority to make a recommendation or a decision concerning the need to accommodate a person with a learning disability whose ability to participate in second language training could not be established by the usual methodology, the Orientation Process.

THE PUBLIC SERVICE COMMISSION

Pam Ward, the Policy Advisor of the Staffing Programmes Branch of the Public Service Commission, Ottawa, indicated that in the selection process for a competition, if a "candidate is handicapped, we have a policy of accommodating to the extent possible, that handicap... (but) the candidate has to tell the Staffing Officer on the selection board that they are handicapped. As soon as (that officer) finds out ... the Staffing Officer contacts the Personnel Psychology Centre of the Public Service Commission and they deal with a registered psychologists (sic)... (who makes) recommendations on how the tests are to be modified... what the accommodation policy is designed to do is put everybody on an equal footing" (Transcript p. 1371-72). She went further to say that "(in Ms. Green's case) it might include special testing... (or) accommodation has been to delete or not do certain of the subtests, do other subtests that that person would be able to do and still maintain and show that they are qualified" (p. 1380).

The Public Service Commission appears to have been familiar with this policy and method of accommodation in testing, as Ms. Ward indicated "we have been adapting tests for the past twenty years" (Transcript p. 1404).

The difficulty in proceeding with this fine articulation of the theory arose, according to Ms. Ward's evidence, because "it depends on when in the process we discover (the disability). If we discover it before any testing is done, we can accommodate the test. If we discover it after, there is very little we can do about it because in each process, a person is entitled to be tested once and only once for that process... if it's after the fact, and after the establishment of an eligibility list, no, we cannot because an eligibility list is a binding legal document... signed by a certified accredited Staffing officer" (Transcript p. 1401).

The position of the Public Service Commission as articulated by Ms.Ward was that it could not accommodate Ms. Green "after the diagnostic test... because... you're entitled to a diagnostic test once per selection process... and modifying it for them would have been seen by the Commission

as giving an unfair advantage to one candidate over another by allowing the test twice" (Transcript p. 1503)

Consequently, the theory, as enunciated by Ms. Ward, is that "the Commission is a strong proponent of human rights and will do everything. All its policies are reviewed constantly to make sure that there is no discrimination. When we set policy, we ensure that we look at the whole employment equity..." (Transcript p. 1415).

The reality which Ms. Ward goes on to indicate in her evidence is that "for this particular staffing action, the Public Service Commission considered it had no obligation to remedy the adverse effect [of the diagnostic tests]". (Transcript p. 1506) From the evidence it would appear that it did nothing to accommodate Ms. Green because the after-the-fact finding of a learning disability did not fit neatly into Public Service Commission policies and procedures which had been created to administer the Treasury Board policy. No one in the Public Service Commission appeared to know how to step outside the rigidity of the practices and procedures established in order to deal with this unusual situation.

The rights which Ms. Green had as a person with a disability - the right to have that disability accommodated to the point of undue hardship by her employer, so that she would be on "a level playing field" as she competed for advancement in her career - were part of the policies of the Public Service Commission. It would appear from the evidence, however, that its attitudes and practices created a situation where it could not implement its own human rights and employment equity policies.

TREASURY BOARD

Mr. Ricciardi presented Treasury Board`s official position. He noted that, although the Public Service Commission made policies concerning the Official Languages Act and communicated those policies to departments, Treasury Board Secretariat also had "an official languages network... official languages coordinators in departments, and agencies that are the recipients of the information as to policies and procedures that they should follow". (Transcript, p. 1784) There was no training module, however, to assist those employees responsible for dealing with a "negative prognosis" in the language testing portion of the Orientation Process.

Notwithstanding the presence of Treasury Board Secretariat coordinators in departments and the distribution of Treasury Board Circulars concerning policies, Mr. Ricciardi noted that Treasury Board "cannot order the Commission on how to run a competition". (Transcript, p. 2019)

Mr. Ricciardi testified that he had access to Ms. Green's dossier during her tenure as Acting Manager, and he felt there were policies existing at the time which possibly could have rectified the situation. He noted in his evidence that the language aptitude test could have been adapted, or Ms. Green could have been excluded from the necessity to be bilingual on compassionate grounds.

He indicated that "we had the opportunity to do something post-factum, rather than before... which would have been the case if it had been known that she had that disability... [but when he was moved to another branch] the case went on to someone else". (Transcript, p. 1914)

Mr.Ricciardi`s evidence indicates that, although Treasury Board had a policy framework present to accommodate a person like Nancy Green, it took no steps "to address the aptitude test as a systemic barrier for persons with diagnosed learning disabilities after it learned of the Nancy Green case... one simply doesn't proceed from one - a single case, to change of policy, overnight" (Transcript p. 2059-63). The fear as Mr. Ricciardi articulated it was that "when we're talking about accommodations and adjustments, you'll be looking at different types of candidates. I don't think it is possible to assure ahead of time that one type accommodation would necessarily accommodate all situations" (Transcript p. 2098). Based upon this thinking, the procedure followed appears to have been that nothing was done.

Specifically, no accommodation for Ms. Green was addressed because, as Mr. Ricciardi testified "... the process took over... she put in an appeal. That had to be heard before we would consider taking any action. It was a staffing matter under the Public Service Employment Act... the competition was canceled... we were starting over". (Transcript pp. 2078-79)

M. Denis Petit, le Chef du Service de l'Orientation, seemed most convinced of the effectiveness of the Orientation Process. He indicated that, although there may have been policies to rectify the situation, or to accommodate Ms. Green,

"ma responsabilité réfère à l'évaluation des aptitudes en fonction de l'apprentissage d'une langue seconde... je n'ai pas l'autorité de les empêcher... je n'ai pas plus l'autorité de leur donner les ordres ou des commandements.
Notre service est un espèce de service de consultation... c'est pas nous qui fixons le cadre". (Transcript p. 1717-18)

M. Petit did not indicate in his evidence any consultative service offered by his department, to anyone attempting to accommodate Ms. Green, using or not using established policies.

HRDC

Ms. Jackie Akeson, Acting Director of Human Resources, HRDC, Ontario Region, gave evidence on behalf of the position of HRDC. She commented that "HRDC and Ontario Region has (sic) an exemplary record when it comes to Employment Equity, particularly in the area of disability... we have always accommodated to the extent possible... we always do our utmost to ensure that people have been treated fairly..." (Transcript, p. 2650-5)

Her evidence, however, also contains the contradictory statements that "if the experts say she has one (a learning disability), then we (HRDC) accept that" and "I don't think the test itself constituted a barrier. The disability is the barrier". (emphasis added)

Ms. Akeson continues as follows:

Just going back to your original question where you asked if the aptitude test had created a barrier to her progression. I would have to say "no". The basis for that was the 20-or-so competitive processes that were English only that we provided information. So there were lots of other opportunities for progression. All the positions in Ontario Region are not bilingual, imperative or non-imperative. The majority of them are English.

I would say that that did not hamper her progression. It did have an impact on that specific situation, but that was known after the fact... The fact that she did not pass the test did not allow us to place her in that position... it is a fact that she did not pass the test. The diagnosis was not positive; therefore, she could not be placed in the position...
I would not want to use the word ‘ barrier'. It is a lack of knowledge. If you had failed on knowledge or personal suitability or on other things, is that a barrier to being placed in the position? I don't think so... I think it is a criterion that was not met. (Transcript, pp. 2889-93)

M. Pierre Pronovost is the Special Advisor, Legislative Policy (Official Languages). His testimony concerned the work done by the Treasury Board Secretariat to estimate costs to train Ms. Green to reach the level required by the PM-06 position of Manager, Employment Equity Consulting Service. These costing estimates began in 1994 in response to the Canadian Human Rights Commission investigation of Ms. Green's complaint.

At p. 2338 of the Transcript, M. Pronovost indicated that his "understanding here is ... we're talking of a ... situation where the language aptitude test shows that you cannot reach the level within the allotted time".

His reading of Dr. Mandelcorn's Report, as well as his personal dealings with Dr. Ford, were formed by M. Pronovost's insistence that the results of the language aptitude tests showed that Ms. Green could not reach the BB/C level in the allotted time-frame if she were to be sent to the French language training program sponsored by her employer.

When Dr. Ford suggested after his re-assessment of Ms. Green in March 1995 that she would need no extra training time, nor specialized training, M. Pronovost rejected that professional opinion and indicated in his evidence that "we are certainly not going to put Ms. Green in a training environment which is supposed to be for people who... do not have a disability" (Transcript p. 2330). Indeed, he describes Dr. Ford's advice as "not really very credible for someone like Ms. Green... (with) auditory dyslexia when this is for people who have passed the language aptitude test. This is for people who are thought to be able to do it" (Transcript p. 2227ff).

Based upon this position taken by M. Pronovost, it would appear that he did not comprehend the psychologists' statements that Ms. Green had created for herself compensatory abilities such as well-developed strategies to aid her when she was learning new tasks. Indeed, the costs which M. Pronovost developed included costs to create well-developed strategies for Ms. Green in the second language training programme.

The Tribunal finds that the evidence of costs to accommodate Ms. Green's learning disability, given by M. Pronovost, is based upon an incorrect premise.

M. Pronovost indicated in his evidence that he and Dr. Ford "didn't seem to understand one another". (Transcript, p. 2207) The evidence which M. Pronovost presented confirmed this statement. He could not understand that Ms. Green's language aptitude test results could not predict her success as a full-time second language student because of her learning disability.

From the evidence, there appears to be a lack of understanding about the nature of learning disabilities and effective action needed to accommodate them. This lack of understanding may be the cause of the common thread of inability to meld the fine human rights theories of the employer with the practical procedures which have to be taken at all levels to make those theories work.

CONCLUSION

In conclusion, the Tribunal finds that the Complainant has satisfied the test of a prima facie case as enunciated by the Supreme Court of Canada. There is sufficient and complete evidence before the Tribunal to find, on balance of probabilities, that Nancy Green's employers, Treasury Board, the Public Service Commission and HRDC pursued practices that tended to deprive her and other individuals like her of employment opportunities because of a learning disability, a prohibited ground of discrimination under the Canadian Human Rights Act.

More particularly, the practice of the employer was to differentiate adversely in relation to the employee, in the course of employment because of a learning disability, a prohibited ground of discrimination under the Canadian Human Rights Act.

Thus, a prima facie case has been presented to address the complaint of Ms. Green, under sections 7 and 10 of the Canadian Human Rights Act.

Ms. Green was adversely impacted by the employer's practices in two ways. Most immediate was the deprivation of the opportunity to attend full-time second language training. As a consequence of this opportunity lost, she failed to advance to the PM - 6 management position. This was an opportunity lost as well.

Over the following years, there was clear evidence of the adverse impact of the discrimination on Ms. Green's career aspirations.

The Respondent employers' evidence indicated that, although the line department's immediate response was to accommodate Ms. Green's learning disability, in the final analysis the duty to accommodate was not met.

The practices and attitudes of the employers, as enunciated in the evidence heard by the Tribunal, point to systemic discrimination by the employers towards persons in their employ who have a learning disability.

Therefore, the Tribunal finds the Respondent employers did not address the prima facie case of adverse effect discrimination in any way which could help the employers prove, on a balance of probabilities, that they had accommodated their learning disabled employee to a point of "undue hardship" and thus could avoid liability for the discriminatory practice.

REMEDIES

Before the Tribunal addresses the remedies available to Nancy Green, personally as the individual involved in the discriminatory practice of the named Respondents, it should address the underlying systemic discrimination which the evidence presented during the hearing painted for the Tribunal.

As noted already, all of the Respondents presented to the Tribunal, through their witnesses, a picture of employees who espoused laudable theories and policies of non-discriminatory practice.

If the practices and procedures had been based on these policies, most of which are written policies, this complaint would never have been made. The practices and procedures would have ensured that Ms. Green's learning disability was acknowledged and accommodated and that, consequently, she would have been a fully qualified candidate for the PM-6 position for which she applied in the Fall of 1987. This did not happen because personnel involved in the interpretation of the policies appeared from the evidence to be caught by systemic attitudes concerning persons with learning disabilities and exacerbated by a complex system of intersecting responsibilities.

From the evidence, some attitudes ranged from a misunderstanding of the nature of learning disabilities to views that inaction was caused by a foundation of "that's not my department".

Therefore, the Tribunal finds that all three Respondents must learn how to effectively implement their own policies. To do this the Tribunal ORDERS that:

1. Treasury Board work with the Canadian Human Rights Commission to create, within six months of this decision's release, an education and training programme for all its employees concerning mechanisms to effect the accommodation of persons with learning disabilties in their employment.

2. Treasury Board utilize the aforementioned education and training programme to train personnel of Treasury Board, the Public Service Commission, and Human Resources Development Canada within eighteen months of the release of this decision.

3. a procedure, agreed upon by the Respondents, Treasury Board, the Public Service Commission of Canada, and HRDC, be implemented to review cases where an individual with a disability appears not to come within the parameters of any one policy or procedure already established.

4. Treasury Board review its policies concerning access to language training to ensure that such policies clearly state and communicate the mechanisms to accommodate candidates with learning disabilities for the Orientation Process and language training, whether those candidates self-identify before the Orientation Process or as a result of it, AND to ensure that these policies are a part of the training programme created pursuant to Order #1.

5. the Public Service Commission create an alternate method to test the aptitude of persons with learning disabilities to complete the language training programme in the allotted time frame, a method which takes into consideration the nature of the disability AND the nature of the compensatory strategies used by persons with learning disabilities.

The Tribunal turns now to the specific discriminatory practice which has been found to have been the cause of Nancy Green's loss of an employment opportunity because she was differentiated adversely from other employees in the course of her employment.

The principle which the Tribunal will address is that enunciated in section 53 of the Canadian Human Rights Act, that of "restitutuio in integrum" – to attempt to make the victim of the discrimination "whole", to create for the victim the life which, but for the discriminatory practice, the victim envisioned.

In light of the evidence presented to the Tribunal, on a balance of probabilities, Nancy Green would have (were it not for the discriminatory effect of the testing portion of the Orientation Process) received a "positive prognosis" of her aptitude to learn a second language to the level designated, within the time frame allotted by the Treasury Board policy. Ms. Green's aptitude to learn French was evident from the evidence of her ability to learn using the tutoring provided by her department as well as her later participation in French language night classes. She learned enough in the tutorial stage to progress successfully to the second semester night course. She learned enough in both these learning areas to be able to participate in a dual-language assessment by Dr. Ford, conducted in French. The Tribunal agrees, after hearing this evidence, with the expert opinion of Dr. Ford that Ms. Green would have been a successful second language learner in the government-sponsored full-time training course, using the time frame dictated by Treasury Board policy, and without any more specialized teaching techniques than were already offered to those who were in the programme.

But for the discriminatory nature of the testing portion of the Orientation Process, on a balance of probabilities, Ms. Green would have been appointed to the PM-6 position, Manager, Employment Equity Consulting Service in January of 1988. While in that position, the evidence indicated that she would have participated not only in the second language training and would have become bilingual at the BB/C level, but also in management training sessions. Both of these opportunities were denied to Ms. Green as was the actual PM-6 position because of the discriminatory practice of the Respondents.

Based upon the evidence aforementioned, the Tribunal ORDERS that:

1. Nancy Green be appointed immediately to a position at the PM-6 level, on an indeterminate basis without competition. If such a position is not immediately available, Ms. Green's salary, from the date of the release of this Order, shall be at the PM-6 level.

2. Nancy Green receive from her employer a lump sum compensation for wages lost due to the discriminatory practice to December 31, 1997 in the amount of $69,895.25. In addition, Nancy

Green shall receive an amount calculated as the total sum of payments, paid monthly, in the amount of $825.66 each, from January 1, 1998 to the date of the release of this decision.

3. Nancy Green receive from her employer a "gross up" to compensate her for adverse income tax implications due to her non-receipt of annual income at the PM-6 level from the date of the discriminatory practice and the receipt, in compensation thereof , of the lump sum payment made pursuant to Order 2. This "gross up" can be calculated by the compensation department of the Public Service Commission. The Tribunal will retain jurisdiction concerning this issue. If a figure mutually approved by Ms. Green and her department cannot be reached, the Tribunal will hear submissions upon this issue.

4. Nancy Green's pension with her employer be adjusted to reflect her employment salary at the PM-6 level from February 11, 1988 to date.

5. Nancy Green be admitted, at the earliest and most convenient time to Ms. Green, to the full-time government-sponsored French language training programme for training to the BB/C level of proficiency, such training to be given to Ms. Green in the regular programme with any accommodations of her learning disability to be made within the context of that regular programme.

6. Nancy Green`s "negative prognosis" with respect to the language aptitude tests be removed and eliminated from any files held by her employer. As the evidence of the Respondents indicated some lack of communication between and amongst departments concerning the files created for Ms. Green's appeal, or complaint, or simply concerning her employment records, a report of the elimination of that "negative prognosis" from all files shall be given to Ms. Green by September 15, 1998.

7. Nancy Green receive management training appropriate to her position as a PM-6, and with a view to her further advancement to executive levels in the federal civil service.

The evidence of Ms. Green's immediate departmental superiors was clear. At the time of the discriminatory practice, Ms. Green had been an exemplary employee, whose annual performance appraisals ranked her well above average. Indeed, her steady upward movement within the Canadian Employment and Immigration Commission from the time of her first employment to 1987 indicated that she was an employee on an upward career path. She characterized herself in 1987 as a woman with a career. Most of her employers were in accord with this assessment and described her as a promotable employee who should receive management training to help her continue her upward mobility.

Even after her experience with the "negative prognosis", Ms. Green continued to be a federal civil servant evaluated as "totally dedicated and committed... a very competent individual". This is the description of Nancy Green given by her supervisor for her annual evaluation made while she was employed as Acting Manager, Employment Equity Consulting Service and knew that this PM-6 position would not be hers due to her "negative prognosis" and her recently diagnosed learning disability. She continued to be the consummate professional in her employment duties.

This attitude continued as she failed to progress after February 1989. From the evidence, Ms. Green worked beyond expected workloads and received accolades from not only her supervisors but also from those with whom she worked as an industrial consultant.

Ms. Green must have felt caught, then, in a "Catch-22" type of situation when she saw people whom she had hired promoted to positions at the PM-6 and EX-1 levels. She was rejected for these PM-6 and EX-1 positions in 1996-97 based upon her lack of management training. It was this training that she was denied due to the discriminatory practice of the employer who was now using the lack of training as a reason for her rejection for promotion.

It appears that no consideration was given to her continued exemplary record. The Tribunal was startled by the evidence that Ms. Green was not successful in any application for thirty + PM-6 or EX-1 positions some of which were available, from the evidence of Ms. Akeson, to candidates who merely expressed an interest in them. Combined with comments made to Ms. Green personally and evidence of witnesses from Ms. Green's 1986-87 Employment Equity department to the effect that some persons who created difficulties would never get ahead, this rejection indicates to the Tribunal that, on a balance of probabilities, Ms. Green's self-evaluation that her career was "over" was correct. The discriminatory practice of the employer led to ten years of employment doldrums for Ms. Green. In her own words, her career had become a "job".

She continued, however, to have pride in her own work; but for the discriminatory practice of her employer, there is a reasonable likelihood that Ms. Green's career would have bloomed further and promotions well beyond the PM-6 level would have moved Ms. Green along her career path.

8. at the first reasonable opportunity, and after Ms. Green has completed the appropriate management training pursuant to Order #7, Nancy Green be appointed to a position at the EX-1 level, on an indeterminate basis, without competition.

In addition, the Tribunal takes into consideration the frustration and loss of self-respect which the evidence clearly indicated the past ten years of dealing with systemic discrimination has caused to Nancy Green. The refusal of the employer at most levels to acknowledge or accommodate her learning disability was exacerbated by its practices and attitudes.

9. pursuant to section 53 (3) of the Canadian Human Rights Act, Nancy Green shall receive from the Respondents special compensation in the amount of $5,000.00.

In order to place Ms. Green firmly in a position in which she should have found herself in 1987, the Tribunal additionally ORDERS that

10. compound interest at the Canada Savings Bond rate shall be calculated from the date of the discriminatory practice, January 5, 1987, on all amounts owing to Ms. Green, including the special compensation under section 53(3) and shall be paid to Nancy Green by the Respondents.

11. the Respondents shall pay to Nancy Green the amount of $4,057.22 for the costs of legal advice.

Dated this day of , 1998.

Elizabeth A.G. Leighton
Chairperson

Sheila M. Devine
Member

Lino Sa Pessoa
Member