T.D. 5/98
Decision released on June 23, 1998

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

HUMAN RIGHTS REVIEW TRIBUNAL

BETWEEN:

CANADIAN NATIONAL RAILWAY
(TERRA TRANSPORT)
Appellant
(Respondent)
and

CANADIAN HUMAN RIGHTS COMMISSION
Respondent
(Commission)
and

BARRY CRAMM
Respondent
(Complainant)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
Respondent

DECISION OF REVIEW TRIBUNAL

TRIBUNAL: Anne L. Mactavish Chair
Hendrika M. Adams Member
Allen M. Ruben Member

APPEARANCES: Manon Savard and Maeve Baird
Counsel for the Appellant

Margaret Rose Jamieson
Counsel for the Canadian Human
Rights Commission

Barry Cramm
On his own Behalf

Rebecca Phillips
Counsel for Brotherhood of
Maintenance of Way Employees

DATES AND PLACE OF HEARING: March 2-4 and May 4-5, 1998
St. John's, Newfoundland

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I. INTRODUCTION

This is an appeal to a Review Tribunal pursuant to Section 55 of the Canadian Human Rights Act (the ‘ CHRA'). Canadian National Railway (Terra Transport) (‘ CN'), one of two Respondents named in Mr. Cramm's complaint, appeals from an order of a Human Rights Tribunal (the‘ original Tribunal') rendered on October 16, 1997. The original Tribunal sustained Mr. Cramm's complaint, and found that CN and its co-Respondent, the Brotherhood of Maintenance of Way Employees (‘ BMWE'), had breached the provisions of Section 10(b) of the CHRA by entering into an agreement that adversely affected Mr. Cramm and others on the basis of disability. Various remedial orders were made by the original Tribunal. No appeal was taken from this decision by the BMWE.

II. OVERVIEW OF THE FACTS

Mr. Cramm began working for CN in Newfoundland in 1974, eventually obtaining a position as a Track Maintainer. On September 11, 1980 Mr. Cramm was involved in an accident while on the job and was seriously injured. He was off of work from September 11, 1980 until March of 1984. Mr. Cramm was in receipt of Workers' Compensation benefits from the date of his injury until June 1, 1981, when the Newfoundland Workers' Compensation Commission determined Mr. Cramm was fit to return to work. No appeal appears to have been taken by Mr. Cramm from this decision. Mr. Cramm did not feel that he had recovered sufficiently from his injuries so as to enable him to return to work until March, 1984. Considerable evidence was put before the original Tribunal with respect to Mr. Cramm's medical history, including evidence that may not have been before the Worker's Compensation Commission. The original Tribunal found as a fact that Mr. Cramm was disabled from September, 1980 to March, 1984. No appeal has been taken from that finding.

In October, 1988 CN notified its employees, including Mr. Cramm, of its intention to close the railway in Newfoundland. Mr. Cramm was further advised that his position as a Track

Maintainer was being abolished, effective October 28, 1988. Notice of the impending closure had previously been given to Mr. Cramm's union, the BMWE, pursuant to Article 8 of the Employment Security and Income Maintenance Plan (‘ ESIMA') dated June 18, 1985, which Plan formed part of the contractual arrangements between CN and the BMWE. Notice under Article 8 of the ESIMA was to be provided in cases where employees were going to be affected by a technological, operational or organizational change.

Under the provisions of the ESIMA, CN employees affected by technological, operational or organizational changes had certain rights, the extent of which was dependant upon each employee's years of Cumulative Compensated Service (‘ CCS'). CCS is defined in Definition G of the ESIMA. The relevant portions of the July 29, 1988 version of the ESIMA read:

G. "Cumulative Compensated Service" means:

i) one month of Cumulative Compensated Service which will consist of 21 days or major portion thereof ...

iii) For an employee who renders compensated working service in any calendar year, time off duty, account bona fide illness, injury, authorized maternity leave, to attend committee meetings, called to court as a witness or for the (sic) uncompensated jury duty, not exceeding a total of 100 days in any calender year, shall be included in the computation of Cumulative Compensated Service.

Employees with more than 8 years of CCS who held permanent positions at the time of the technological, operational or organizational changes were entitled to Employment Security. The nature of Employment Security will be discussed more fully in the next section of this decision.

As of October, 1988, the point at which Mr. Cramm's rights with respect to Employment Security crystallized, Mr. Cramm had less than the requisite 96 months of CCS so as to be eligible for Employment Security. The evidence as to precisely how much CCS Mr. Cramm in fact had was very unsatisfactory, and changed repeatedly in the course of the hearing before the original Tribunal. It appears that he probably had somewhere between 87 and 91 months of

CCS, although no specific finding in this regard was made by the original Tribunal. It is, however, common ground that Mr. Cramm did not accumulate CCS during the majority of the time that he was away from work by reason of the operation of Definition G, and that if he had been able to count this time as CCS, he would have been entitled to Employment Security following the closure of the railway in Newfoundland.

It is the provisions of the ESIMA negotiated by CN and the BMWE that do not allow Mr. Cramm to fully accumulate CCS while on disability that form the basis of Mr. Cramm's human rights complaint. Mr. Cramm alleges that the agreement adversely affects him and other employees on the basis of disability.

Notwithstanding the abolition of his position as a Track Maintainer, Mr. Cramm continued to work for CN until December 5, 1990 performing duties associated with the dismantling of the railway. His continued employment with CN did not affect his entitlement to Employment Security, his rights in that regard having crystallized in October, 1988. Since 1990 Mr. Cramm has been employed sporadically, primarily as a fisherman.

III. SCOPE AND STANDARD OF REVIEW

An appeal to a Review Tribunal is governed by the provisions of section 56 of the CHRA. An appeal lies to a Review Tribunal on any question of law or fact or mixed law and fact. A Review Tribunal may dispose of an appeal by dismissing it, or by allowing it and rendering the decision or making the order that, in the opinion of the Review Tribunal, the Tribunal appealed from should have made. To the extent that the issues raised by this appeal involve questions of law, the parties are in agreement that the Review Tribunal must intervene if it concludes that the original Tribunal erred in law in reaching its decision.

The powers of a Review Tribunal may be modified where the Review Tribunal hears additional evidence (Attorney General of Canada v. Lambie and the Canadian Human Rights Commission, [1996] F.C.J. No.1695, (1996) 124 F.T.R. 303 (F.C.T.D.). In this case the Review Tribunal did permit the calling of additional evidence by the Appellant. Mr. Scott MacDougald, the Manager of Labour Relations for CN, testified with respect to certain changes to the ESIMA which occurred in 1995. Mr. MacDougald's testimony related to one of the grounds of appeal regarding the issue of remedy. Although additional evidence was received by the Review Tribunal, in light of the conclusions we have reached on the issue of liability, it has not been necessary to consider Mr. MacDougald's evidence. Accordingly, our conclusions have been arrived at based upon the evidence that was before the original Tribunal, applying the standard referred to in the preceding paragraph.

IV. THE APPEAL

The first ground of appeal raised by CN is that:

The Human Rights Tribunal erred in finding that the definition of Cumulative Compensated Service contained in paragraph G(iii) of the Employment Security Agreement offended section 10(b) of the Canadian Human Rights Act, and in particular the Human Rights Tribunal erred in finding that the definition of Cumulated Compensated Service tended to adversely discriminate against employees on the basis of disability.

This ground of appeal raises two distinct arguments, each of which will be dealt with in turn. It should be noted that neither the BMWE nor Mr. Cramm made any submissions with respect to either aspect of this ground of appeal.

a) Issue 1: Does the definition of Cumulative Compensated Service contained in paragraph G (iii) of the ESIMA offend section 10(b) of the CHRA?

i) Position of the Appellant

The Appellant contends that the ESIMA is not an agreement contemplated by section 10(b) of the CHRA, and further argues that, in failing to consider whether or not the agreement in question came within the language of section 10(b) of the CHRA, the original Tribunal erred in law.

Section 10 of the CHRA provides:

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

a) to establish 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.

The Appellant submits that not every employment-related agreement will be subject to the application of section 10(b) of the CHRA. According to the Appellant, Parliament has clearly stated that it is only those types of agreements enumerated in the sub-section that will be susceptible to attack. Further, before an individual or class of individuals can benefit from the protection of section 10(b), the Appellant argues that the agreement has to deprive the individual or class of individuals of an employment opportunity.

CN contends that the wording of the French version of the CHRA is even clearer as it expressly states that the agreement in issue must be "susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus..."

In addition, the Appellant submits that the words "any other matter relating to employment" must be read ejusdem generis to the words immediately preceding, and that the application of section 10(b) should be limited to agreements of the same type as those expressly referred to in the sub-section, that is agreements that are related to access to employment and participation in the workplace. In support of its position CN relies upon the comments of Mr. Justice McQuaid

of the Federal Court of Appeal in Stevenson v. Canada (Canadian Human Rights Commission), [1984] 2 F.C. 691, where he stated:

As I see this section [section 10], it does not address a retirement situation but rather concerns itself with the initial hiring procedures and practices, as well as training and similar matters consequent upon hiring. "Any other matter relating to employment or prospective employment", as referred to in subsection (b) thereof, I would read ejusdem generis to the words immediately preceding. (at p. 721-722)

The Appellant argues that a similar conclusion with respect to the ambit of section 10(b) was reached by Mr. Justice Marceau, also of the Federal Court of Appeal, in Canada v. Mossop, [1991] 1 F.C. 18, where he stated:

Was it the intention that every employment benefit be seen as an employment opportunity? I seriously doubt that it was so; certainly the French version and even the English version, I venture to add, suggest a narrower meaning, namely that essentially hiring and promotion were considered. And such limitation would not be without reason, if it is borne in mind that section 10, unlike sections 7 and 9, is not only concerned with actual discrimination but reaches into possible or eventual discrimination, and therefore calls for a broader and more intrusive analysis of the purpose and effect of general policies and agreements rather than only an assessment of a specific situation of fact. (at pp. 30-31)

The Appellant acknowledges that this comment was made in obiter and was not addressed by the Supreme Court of Canada in its subsequent consideration of the matter.
According to the Appellant, the ESIMA provides employment benefits only, and does not therefore constitute an agreement relating to recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment.

The Appellant argues that CN employees only derive a benefit from the ESIMA once all of their employment opportunities have been exhausted in accordance with the relevant collective agreements, and that the ESIMA does not affect access to employment nor does it affect the employee's opportunities for advancement, once hired.

ii) Position of the Canadian Human Rights Commission

Counsel for the Canadian Human Rights Commission argues that the restrictive interpretation of section 10(b) advocated by the Appellant misinterprets the judgments of the Federal Court of Appeal in Stevenson and Mossop and further, is contrary to the direction that has been provided by the Supreme Court of Canada with respect to the interpretation of human rights legislation. Human rights legislation should be viewed as a fundamental law and given a large and liberal interpretation so as to ensure the objects of the legislation are attained. We should not search for ways to minimize rights and to enfeeble their proper impact. Counsel cites cases such as Ontario Human Rights Commission v. O'Malley, [1985] 1 S.C.R. 536, Roberts v. Ontario (1994), 19 O.R. (3d) 387 and CN v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114, amongst others, in support of this contention.

The Commission further argues that both the French and the English versions of section 10(b) are capable of being interpreted as encompassing the complete employment relationship. "Employment opportunities" as well as "les chances d'emploi ou d'avancement" must cover, on any purposive interpretation, incidents of the employment relationship.

Finally, the Commission submits that the ESIMA protects employees from technological, organizational or operational change. The agreement provides continued access to the employment relationship and should be viewed as "any other matter relating to employment".

iii) Nature of the ESIMA

In addition to introducing the ESIMA into evidence, considerable evidence was led before the original Tribunal with respect to the nature of the agreement and its bargaining history and purpose.

Prior to 1985, there existed a job security plan between CN and its various bargaining units, including the BMWE. The plan provided for supplementary unemployment benefits, retraining, severance payments for employees who had lost their jobs and other such benefits. In 1985, CN and a number of its unions negotiated a new contract which contained, in addition to the pre-existing job security program, a new arrangement known as "Employment Security" which was available to longer service employees. By all accounts, this was an extremely rich program.

The terms of the ESIMA have evolved over the years. For the purposes of this decision the provisions of the ESIMA, as it existed in the fall of 1988, will be considered as it is clear on the evidence that Mr. Cramm's rights under the ESIMA crystallized in October of that year when he was given notice of the impending closure of the Newfoundland railway.

Under Article 7 of the ESIMA, an employee with 8 years of CCS was protected from lay-off, if the lay-off would have otherwise occurred by reason of technological, operational or organizational change. In such cases, the affected employee would be entitled to 100% of his or her salary and related benefits from the date of lay-off until retirement. In order to remain eligible for employment security benefits, the employee would have to exercise his or her seniority rights in accordance with the terms of the agreement with respect to positions within the bargaining unit. Where no positions were available within the jurisdiction of the employee's union, the employee could be placed in a position with another union. Any of these positions could require the employee to relocate to a new geographical area, in accordance with the terms of the agreement.

Article 5 of the ESIMA makes provision for the training of employees. Under the terms of Article 5.1, an employee who has Employment Security who has had his or her position abolished, and who is unable to hold work due to lack of qualifications, may be trained for other positions in accordance with the provisions of the Article. Refusal by an employee to take training could result in the loss of Employment Security rights.

The ESIMA deals with a number of other issues including severance payments, ‘ top-up' of unemployment insurance benefits, payment of relocation expenses, early retirement incentives and maintenance of rates of pay.

iv) Analysis

It appears from a review of the decision of the original Tribunal that the Tribunal assumed for the purposes of its analysis that the ESIMA was an agreement within the meaning of section 10(b) of the CHRA. This assumption on the part of the original Tribunal is understandable as this argument does not appear to have been advanced in CN's submissions before the original Tribunal.

While the parties have raised an interesting question as to the proper meaning of the words ‘ any other matter relating to employment or prospective employment' as they have been used in sub-section 10(b) of the CHRA, it is not necessary for the purposes of our analysis to look beyond the types of agreements specifically enumerated in the statute.

The ESIMA creates a comprehensive scheme which provides salary protection for eligible employees whose positions have been abolished as a consequence of a technological, operational or organizational change. In the Review Tribunal's view, the Appellant's submission that the ESIMA should be viewed as an agreement providing for different forms of escalating benefits (and therefore outside of the scope of sub-section 10(b) of the CHRA) is too simplistic, and ignores important aspects of the Employment Security program. In addition to salary protection, the ESIMA also provides for the retraining of employees so affected for other positions within the company, and as well, sets out a protocol to be followed with respect to the re-assignment or transfer of affected employees to new positions.

Further, under the ESIMA, CN employees who have Employment Security will continue to have access to other positions in the company, including positions outside the jurisdiction of the employee's union from the date of lay-off until the date of retirement. In contrast, under the provisions of Article 16 of the BMWE/CN collective agreement, employees who have been laid off by CN and who are not eligible for Employment Security only maintain their right to be recalled to positions within the jurisdiction of their union for one year from the date of lay-off, after which they can be dropped from the applicable seniority list by agreement of the company and the union. In other words, Employment Security provides greater access to employment opportunities within CN than would otherwise exist.

For these reasons we are of the view that the ESIMA is ‘ an agreement' within the plain meaning of sub-section 10(b) of the CHRA, affecting as it does, amongst other things, the training and transfer of employees as well as access to employment opportunities.

Accordingly, despite the very able submissions of counsel for CN on this issue, this aspect of CN's appeal cannot succeed.

b) Issue 2: Does the definition of Cumulated Compensated Service tend to adversely discriminate against employees on the basis of disability?

i) Decision of the Original Tribunal

The original Tribunal ruled that employment benefits (other than those prescribed by law) do not have to be provided, and that an employer may, after a reasonable period, dismiss an employee who is unable to work at all or who cannot be accommodated. Where employment benefits are granted, they cannot discriminate against the disabled, nor should they differentiate between classes of persons who are disabled.

The original Tribunal found that the requirement to work one day in a calender year was adversely discriminatory, as it discriminated against those who could not work at all in excess of a calender year. With respect to the 100 day ceiling imposed by sub-section (iii) of Definition G, the original Tribunal concluded that this limit was discriminatory because it treated those with a short term disability differently than those with a long term disability.

Based upon the evidence of Alan Sunter, the statistician called as a witness by the Canadian Human Rights Commission, the original Tribunal found that an identifiable class of individuals could tend to be adversely affected in the same way as was Mr. Cramm, namely those individuals who suffered from long term illness in excess of 100 days or who could not work at least one day in any year.

ii) Position of the Appellant

The Appellant submits that the definition of CCS found in the ESIMA does not deprive an employee or group of employees of an employment opportunity on a prohibited ground of discrimination. According to the Appellant, sub-section (iii) of definition G cannot be considered in isolation, and must be viewed in the context of the definition as a whole, in order to fully understand the nature of the ‘ benefit' conferred under sub-section (iii).

As was noted by the original Tribunal, there is no obligation on an employer under the CHRA to pay employees who are not performing work. The Appellant submits that it was the intention of the parties to the agreement to tie the accumulation of CCS to the performance of work. This is reflected in sub-section (i) of Definition G, albeit in a relaxed form, as the employer only requires that the employee work for the majority of a month in order to earn CCS credit for the month.

According to the Appellant, sub-section (iii) of Definition G entitles employees absent from work for certain enumerated reasons to accumulate CCS on certain terms. This creates an exception to the general rule found in sub-section (i), which exception operates in favour of the employees mentioned in sub-section (iii). In other words, employees absent from work for the reasons listed in sub-section (iii) will be in a better position with respect to the accumulation of CCS than employees absent from work for other reasons.

The Appellant contends that the original Tribunal erred in fact and in law in equating the notion of absence from work with the concept of disability. Not every employee absent from work by reason of illness of injury will be ‘ disabled' within the meaning of the CHRA. In this regard the Appellant refers to cases such as Ouimette v. Lily Cups Ltd (1990), 12 C.H.R.R. D/19, Naval v.

Globe Foundry Ltd. (1993), 21 C.H.R.R. D/136 and Elkas v. Blush Stop Inc. (1994), 25 C.H.R.R. D/158. Rather, factors such as the nature of the illness and the degree of impairment must be considered. According to the Appellant, the original Tribunal took the concept of absence even further and established three categories of disabled employees - those absent 100 days or less, those away from work for more than 100 days with one day worked in the calender year, and those absent with no work at all in the calender year, again without consideration of the nature or permanence of the impairment, if any.

According to the Appellant, the original Tribunal also erred in law and in fact in concluding that sub-section (iii) was discriminatory because it treated one category of disabled employees differently than another. To establish adverse effect discrimination, one must demonstrate a distinction, based upon a prohibited ground, which imposes a burden on such individuals that is not imposed on others. As was noted by the Trial Division of the Federal Court in Dumont-Ferlatte v. Canada (Employment and Immigration Commission), [1997] F.C.J. No. 1734, where adverse effect discrimination is alleged, the comparison must be made as to the nature of the effect among the various groups to whom the rule applies. In this case, the Appellant contends that the original Tribunal compared the situation of employees to whom the rule applied, and those to whom it did not. Had a proper comparison been made, the Appellant contends that the original Tribunal would have concluded that disabled employees received exactly the same benefits as non-disabled employees away for the same period of time, and that the Canadian Human Rights Commission had led no evidence to demonstrate that the neutral rule imposed a particular burden on disabled employees because of their disability.

While the Appellant acknowledges that more disabled employees will likely encounter periods of absence for which they do not accumulate CCS than will members of the other groups referred to in sub-section (iii) of Definition G, the focus should not be on numbers, but the nature of the effect in order to establish adverse effect discrimination (Thibaudeau v. Minister of National Revenue, [1994] 2 F.C. 189, rev'd on other grounds [1995] 2 S.C.R. 627).

iii) Position of the Commission

The Canadian Human Rights Commission submits that the evidence before the original Tribunal established that Barry Cramm was actually deprived of the employment opportunity of Employment Security, and further, that the ESIMA tended to deprive a class of individuals, namely the disabled, of employment opportunities.

According to the Commission, the accumulation of CCS under Definition G was subject to the 100 day cap, and was further subject to the additional limitation of the requirement of having to work one day in the calender year. While Mr. Cramm was credited with CCS for all of 1980, the year of his injury, (the injury having occurred less than 100 working days from the year end), because of the effect of sub-section (iii) on the otherwise available accumulation of CCS, Mr. Cramm was not credited with any CCS for 1981-1983, as he was unable to work even one day in each of these years. This had an adverse effect on Mr. Cramm in that, as a consequence, he had insufficient CCS to qualify him for Employment Security following the closure of the Newfoundland railway.

The Commission relies upon the evidence of Mr. Sunter which, it submits, establishes that sub-section (iii) of Definition G tends to have an adverse effect on disabled employees as a group. Mr. Sunter analysed the days lost by a group of individuals who were in receipt of Worker's Compensation benefits, who were otherwise working a five day week, and who were not on ease-back programs or performing work in the workplace.

The Commission contends that it is not necessary to know the nature of the individuals' injuries, other than that they suffered from bona fide work-related injury and were in receipt of Worker's Compensation benefits under the Temporary Earnings Loss program. According to the Commission, this represents a class of employees having bona fide injuries which rendered them unable to work. It was open to the original Tribunal to find that individuals absent for more than 100 days or for a year or more due to work-related injuries were ' disabled' within the meaning of the CHRA.

The Commission submits that the original Tribunal properly found, based upon Mr. Sunter's evidence, that disabled employees, as a class, tended to be affected in the same way as Mr. Cramm, if away from work for more than 100 days in any given year, or if unable to render compensated service during the calender year. The focus of Mr. Sunter's evidence, according to the Commission, was to show the nature of the deprivation suffered by a class of individuals, not to establish how many employees were so affected. According to the Commission, Mr. Sunter's evidence shows the quantification of the adverse effect that the application of the 100 day limitation had on persons having more than 101 days of absence due to disability, that is, the inability of having each day's absence counted towards CCS.

With respect to the identification of the appropriate comparator groups, the Commission states that, following the decision of the Supreme Court of Canada in Battlefords and District Co-operative Ltd. v. Gibbs [1996], 3 S.C.R. 566, it was open to the original Tribunal to find that the relevant group was persons absent from the workplace due to illness or injury, and to compare those employees absent from work because of illness of injury for more than 100 days in a calender year to those absent from work for the same reason for less than 100 days. Discrimination against a subset of the relevant group may be considered discrimination against the relevant group generally for the purposes of human rights legislation. Further, following Gibbs, there should not be a difference of treatment between classes of people who are disabled, or between those with short term disabilities and those with long term disabilities.

The Commission contends that there may be more than one appropriate comparator group in any given situation, and that a finding of discrimination could also be made if one were to compare the those on ' time off duty account bona fide illness, injury' with the other persons subject to sub-section (iii) of Definition G - ie: those on maternity leave, jury duty, at committee meetings, etc. Such a comparison reveals that there would not likely be a loss or denial of CCS where the absence is a result of the other reasons referred to in sub-section (iii) of Definition G.

The Commission submits that Mr. Cramm's case is distinguishable from the Dumont-Ferlatte case in that here, the comparison of the two groups subject to sub-section (iii) of Definition G shows an adverse effect suffered by the group absent due to illness or injury as opposed to the other groups mentioned, whereas in Dumont-Ferlatte, the comparison between the groups subject

to the impugned agreement did not show any adverse effect suffered by pregnant women. The Commission points out that CN has conceded that workers are more likely to be away from work on account of illness or injury than for any of the other reasons referred to in sub-section (iii) of Definition G. Individuals away from work while on jury duty, committee meetings, maternity leave etc. will not tend to be deprived of accumulating CCS as they are highly unlikely to be absent for more than 100 days in a calender year, or to be unable to render one day's service in a given calender year, whereas the effect of sub-section (iii) of Definition G will be greater for employees away because of illness or injury.

The Commission acknowledges that it is open to CN and the BMWE to restrict the accumulation of CCS by employees absent from work, but states that they cannot do so on a prohibited ground of discrimination.

iv) Analysis

Although the CHRA prohibits discrimination on the various grounds enumerated in section 3 of the Act, the concept of ‘ discrimination' itself is not defined anywhere in the Act. The term has, however, been defined in the jurisprudence:

... 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. Distinctions based on personal characteristics attributed to the individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based upon an individual's merits and capacities will rarely be so classified. (Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at 174-5)

The parties are in agreement that if discrimination exists here, it would be indirect or adverse effect in nature. 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 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 workforce... 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. (Ontario Human Rights Commission and O'Malley v. Simpson-Sears Limited, [1985] 2 S.C.R. 536, at 551)

In cases of adverse effect discrimination, the burden of proof is on the Canadian Human Rights Commission and the Complainant to establish a prima facie case of discrimination. Once that is done, the burden shifts to the Respondents to establish that they have taken reasonable steps to accommodate the affected employees. Each of these must be established on a balance of probabilities. (Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, at 208,

and O'Malley, supra., at 558-9)

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

The task before us then is to consider the employment rule in issue - here Definition G of the ESIMA, and to determine whether the rule imposes burdens or obligations on, or otherwise adversely affects members of an identifiable group (ie: disabled employees) in comparison to others. It is by definition a comparative process.

Of considerable importance will be the identification of the appropriate comparator group. In this regard, a review of the cases referred to by the Appellant and the Commission reveal that there appear to be conflicting views on this question. Cases cited by the Commission, such as Ontario Human Rights Commission v. 501781 Ontario Ltd. Operating as Fleetwood Ambulance Service (Ont. Bd. of Inq., November 10, 1995), suggest that in cases of this nature, comparison should be made between the Complainant and employees in the bargaining unit as a whole:

> To consider only other employees on unpaid leave, would be to artificially limit the scope of the comparison, and to ignore the proximate cause of the differential treatment, which I have found to be the compensable injuries (and hence the complainant's handicap under the Code. If the cause of the differential treatment is the injuries, which in turn caused the absence, then the appropriate comparison must be between the complainant and the broad group of employees in the bargaining unit who have not suffered a compensable injury resulting in a lengthy involuntary absence. (at p. 23)

On the other hand, the decision of the Trial Division of the Federal Court in Dumont-Ferlatte, supra., is clear that consideration must be given to the groups of employees covered by the provisions in question, and a determination made as to whether one group is treated differently from other groups of employees who take leaves of the same nature. (at p. 21)

In attempting to resolve this issue, it is helpful to return to first principles. As noted above, in describing adverse effect discrimination, the Supreme Court of Canada has said that:

> 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. (O'Malley, supra., at p.551, emphasis added)

In other words, in order to determine whether the employment rule issue has a differential impact on a protected group, it is the impact of the rule on the other groups to whom it applies that must be considered. As a result, we are of the view that the reasoning of the Federal Court in Dumont-Ferlatte is more appropriate in the circumstances of this case.

In our view, the reasoning in Dumont-Ferlatte is also more consistent with the essential nature of the employment contract. To reiterate: the employer's obligation to pay is conditional upon work being performed. There is no general obligation on employers to compensate employees

who are not providing services. If one were to accept the reasoning in the Fleetwood Ambulance Service decision referred to above, it would follow that employees away from work because of illness or injury would be entitled to be fully indemnified by their employers for the period that they were away, however long that might be, in order to ensure that they were treated no differently than the other members of the bargaining unit. This would clearly be an untenable result.

The Commission also relies on the decision in Gibbs, supra., as support for its argument that it was open to the original Tribunal to compare the situation of employees away from work as a result of illness or injury for less than 100 days with those away for over 100 days or who were unable to work a day in a calender year. The Commission further argues that the decision in Gibbs makes it clear that an employer cannot discriminate between classes of people who are disabled.

In Gibbs, the complainant became unable to work as a result of a mental disorder and applied for benefits under her employer's disability insurance policy. The policy provided that in cases of mental illness, the income replacement benefit would terminate after two years, even if the employee remained unable to work, unless the employee was in a mental institution. After two years, Ms. Gibbs remained ill and unable to work, but was not hospitalized. Had Ms. Gibbs been physically disabled she would have continued to be eligible for income replacement benefits even though she was not hospitalized. Ms. Gibbs filed a complaint alleging discrimination on the basis of disability, which complaint was ultimately upheld by the Supreme Court of Canada.

The Supreme Court found discrimination on the basis of a comparison between those individuals who were unable to work as a result of a physical disability and those who were unable to work as a result of a mental disability. The Court noted the historical disadvantages faced by the mentally ill, and then went on to consider the purpose of the income replacement plan, which it found to be to insure employees against income loss resulting from being disabled and unable to work. The Court observed that discrimination against a subset of a protected group may be considered discrimination against the group generally for the purposes of human rights legislation. The Court then compared the income replacement benefits available to the mentally ill under the terms of the policy with those benefits received by the physically disabled and concluded that in limiting the benefits available to the mentally disabled under the plan, the insurance plan violated the provisions of the applicable Human Rights Code .

In our view, the decision of the Supreme Court in Gibbs confirms the approach taken by the Federal Court in Dumont-Ferlatte in terms of the identification of the appropriate comparator group, comparing the treatment accorded to the mentally disabled with the treatment given to others claiming benefits under the plan.

With respect, we do not accept the Commission's argument that, following Gibbs, it was open to the original Tribunal to compare the situation of employees away from work as a result of illness or injury for less than 100 days with those away for over 100 days or who were unable to work a day in a calendar year. In our view, on this issue, Gibbs is distinguishable from the present case on its facts: in Gibbs the distinction made in the insurance plan in issue was based

upon the nature of the disability, as opposed the situation here, where it is the length of the absence from the workplace, whatever the reason, that determines the result.

In our view, in this case it is appropriate to compare the treatment of employees away from work by reason of illness or injury with the treatment afforded to other employees away from work for the other reasons referred to in subsection (iii) of Definition G, including those away on authorized maternity leave, jury duty, at committee meetings, etc. It is clear on the evidence, and indeed the Commission conceded, that an employee away from work for 150 working days because he or she was serving as a juror on a lengthy trial would suffer the same consequences, that is, the loss of 50 days CCS, as would an employee away from work for the same period by reason of illness or injury. Similarly, two employees who were unable to render one day's service in a calender year would each suffer the same consequences - the loss of CCS for the entire year, notwithstanding that one absence was as a result of illness or injury, and the other was as a result of one of the other circumstances set out in subsection (iii) of Definition G. In other words, the disabled employee does not suffer a qualitatively different impact as a result of their disability than does the employee away for the same period of time for some other reason.

The Commission argues that the evidence establishes that employees away from work for any of the other reasons set out in subsection (iii) of Definition G will not be deprived of accumulating CCS as such individuals are highly unlikely to be absent for more than 100 days in a calender year, whereas disabled employees are more likely to suffer the adverse effect of not having all of the period of their absences count as CCS.

The evidence does suggest, and indeed the Appellant conceded, that it is employees away from work as a result of injury or illness who will most often be unable to have a period of absence count as CCS. In the Review Tribunal's view, the fact that more disabled individuals may suffer such a loss than do members of the other groups referred to in subsection (iii) of Definition G does not mean that the loss is qualitatively different than the loss suffered by others away for the same period of time. On the issue of qualitative as opposed to quantitative effect, the Federal Court of Appeal observed in Thibaudeau:

> But surely it cannot be said that legislation that adversely affects both men and women is discriminatory on the grounds of sex solely because the women (or men) in question are more numerous... Indeed, in my view it is not because more women than men are adversely affected, but rather because some women, no matter how small the group, are more adversely affected than the equivalent group of men, that a provision can be said to discriminate on the grounds of sex. (supra., at p. 204)

While Thibaudeau was decided under the provisions of the Charter, the parties are in agreement that this proposition is equally applicable to cases under human rights legislation.

As a result, we are of the view that the definition of CCS contained in the ESIMA does not tend to differentiate adversely against employees on the basis of disability, and that the original Tribunal erred in law when it concluded otherwise.

Mr. Cramm is a most unfortunate individual who was grievously injured while in the service of

his employer, and who appears to have slipped through the cracks of the various organizations with responsibilities for injured CN employees. Nevertheless, despite our considerable sympathy for the predicament in which Mr. Cramm now finds himself, we cannot rely on sympathy to grant relief where jurisdiction does not otherwise exist. Having concluded that the definition of CCS contained in the ESIMA does not tend to differentiate adversely against employees on the basis of disability, it follows that the Canadian Human Rights Commission has failed to establish a prima facie case of discrimination. We have no alternative but to allow the appeal and to dismiss Mr. Cramm's complaint.

c) Remaining Grounds of Appeal

In light of our conclusion that the agreement in issue does not adversely affect Mr. Cramm and other disabled CN employees on the basis of disability, the issue of accommodation does not arise. Similarly, it is unnecessary to deal with the remaining grounds of appeal which relate to union liability and remedy.

V. ORDER

For the foregoing reasons the Appeal is allowed and the Complaint is dismissed.

Dated this day of , 1998.

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Anne L. Mactavish

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Hendrika M. Adams

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Allen M. Ruben