T.D. 7/96
Decision rendered on May 16, 1996

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JOHN MILLS

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

VIA RAIL CANADA INC.

Respondent

TRIBUNAL DECISION

TRIBUNAL:

Keith C. Norton, Q.C., Chairperson
Joanne Cowan-McGuigan, Member
Kent Morris, Member

APPEARANCES:

Rosemary Morgan
Counsel for the Canadian Human Rights Commission

Tom Barron, CAW/Canada
Representing the Complainant, John Mills

Brian Johnston
Counsel for VIA Rail Canada Inc.

DATES AND
LOCATION OF HEARING:

May 15-18, 1995
September 5-7, 26-29, 1995
November 15-17, 1995
HALIFAX, NOVA SCOTIA

1. THE COMPLAINT

The Complainant, John S. Mills, filed a complaint on October 2, 1992 against the Respondent, VIA Rail, which alleges that:

"... I am being discriminated against in employment because the Respondent has refused to continue to employ me because of my disability (back injury) contrary to section 7 of the Canadian Human Rights Act."

2. THE FACTS

A) EMPLOYMENT HISTORY OF JOHN S. MILLS 1970-1991

The Complainant, John Mills, following a period with the Canadian Navy, began employment with Canadian National Railways on May 27, 1970 when he was twenty-two years of age. Subsequently, in 1978, he was transferred to VIA Rail Canada Inc.

Initially he worked out of the Halifax Terminal but was transferred to the Moncton Terminal and moved his residence to Louisbourg, N.S. from where he commuted to work by train from Sydney, N.S. to Moncton, N.B.

In 1971, he began training as a chef and for a period of ten to twelve years worked on the spareboard - sometimes as a chef but also as a cook, an S.A. (Service Attendant), or an S.S.A. (Senior Service Attendant) as required.

In the early 1980's, he had acquired sufficient seniority to work a regular job as bartender on board the train which he did for about two years before starting to work regularly as a chef out of the Moncton Terminal.

In January, 1990, after almost twenty years of service with the railway, his position as chef was eliminated as a result of VIA Rail cutbacks in service out of Moncton.

Mr. Mills was placed on Employment Security at full pay pursuant to the agreement entered into between the bargaining agent and VIA Rail in 1989 in anticipation of the 1990 cutbacks. This agreement provided for a continuation of salary and benefits to employees regardless of whether or not actual employment was available. It also stipulated that the employee must be available to work when called.

Although there was some confusion in the evidence as to dates, sometime in early 1990 he was called regarding a position as chef working out of Prince Rupert for VIA Rail in Western Canada. He decided to accept the position and move west, only to be advised shortly thereafter that the offer was withdrawn because he was too tall to work on the type of rail car being used.

It is worthy of note at this point that although the Complainant had some history of back problems up to this point in his career, it had never been identified as a serious problem nor apparently noted in any work performance review. This will be dealt with in more detail later.

In early 1990, the Complainant was transferred to the Halifax Terminal to perform spareboard duties as available. He maintains that, contrary to the provisions of the collective agreement, the Respondent required him to work frequently as an S.A. - making beds, lifting luggage, detraining passengers - and only rarely calling him to work as a chef.

Now, it is noteworthy that Mr. Mills' residence in Louisbourg is 350 kms from Halifax, his terminal of employment and that he had to travel to Halifax by automobile.

In March 1991, Mr. Mills applied for a re-location transfer to the Halifax region. He understood he was entitled to re-location assistance under the collective agreement. He sought this in hope of eliminating the 10 hour round trip to take employment on the Halifax spareboard. A dispute arose about the issue of re-location - including the sale of his home - and the matter remains unresolved.

Consequently, Mr. Mills continued to commute to work in Halifax by automobile - a drive he maintains was stressful making it necessary for him to take medication to combat back pain.

On March 19, 1990, while working as an S.A., not as chef, he suffered an injury to his back which resulted in his being off work intermittently until October 17, 1990.

From October 17, 1990, he continued to work the spareboard until he suffered a further injury to his back on August 21, 1991.

B) HISTORY OF BACK PROBLEMS

The Complainant has a history of some recurring back problems dating back, at least, to July 1982, of which he has testified and much of which is documented in company records. (Exhibit HR-1, Tab 50).

From 1982 until 1990, when his position as chef in Moncton was eliminated, the evidence indicates that there were seven or eight episodes, as recorded in Exhibit HR-1, Tab 50, when some medical attention was required for his back. These usually resulted in less than two weeks off work for rest or therapy.

In addition, the Complainant testified that there were two incidents when his back was injured as a result of what could only be described as accidents - not necessarily related to any chronic condition - when some time off was required for recuperation. One involved his falling between two incompletely or improperly coupled rail cars in the yard at Halifax during 1986 and the other occurred when a chair in the dining car collapsed while he was seated upon it.

It appears from the evidence that the most severe of these episodes occurred in April 1987, when, the Complainant testified, he injured his back while helping a passenger detrain. This resulted in his being off work for several weeks for physiotherapy. It is noteworthy that this did not occur in the performance of his duties as chef.

Although there is no documentary evidence to support it, Mr. Mills testified that as early as 1982, Dr. Boudreau, the attending physician, issued restrictions on heavy lifting and stretching. He further testified that the employer was advised of this at the time.

There was no suggestion in the evidence, despite the fact that Mr. Mills had a recurring back problem, that he could not perform his duties as chef during this period. Indeed, a review of the evidence and the medical reports indicate that the episodes of back pain were

generally not associated with the performance of specific chef duties. After his transfer to the Halifax spareboard in early 1990, Mr. Mills no longer worked exclusively or primarily as a chef. His duties often involved working as an S.A., assisting passengers to board and detrain, lifting luggage, making beds, pulling beds down and working as a waiter. Only rarely was he called to work as a chef.

It was working as an S.A. on March 19, 1990, while detraining passengers and handling luggage - perhaps contrary to the earlier restrictions placed upon him by Dr. Boudreau - that he injured himself again. This injury resulted in his being off work intermittently until October of 1990. During this period he received extensive physiotherapy.

In addition to his family physician, Dr. J. Wawrzyszyn, he was examined by Dr. Ian Holmes, an orthopaedic surgeon, at the request of Dr. E.G. Nurse, VIA's doctor, as well as finally, by Dr. Nurse on October 17, 1990.

Dr. Wawrzyszyn once again reiterated the restrictions on heavy lifting, stretching and pulling. (Ex. HR-1, Tab 28)
Dr. Holmes stated, following his examination of Mr. Mills, in a letter dated August 20, 1990 (Ex. HR-1, Tab 27):

"His physical examination did not reveal anything very much but he has a problem reaching over to pull down beds in his employment as a Via porter." (Emphasis added)

Finally, Dr. Nurse stated in his letter dated October 18, 1990, after noting Dr. Wawrzyszyn's restrictions on lifting, stretching and pulling:

"I would tend to agree that any patient who is recovering from a back injury should exhibit caution and avoid heavy lifting, stretching and pulling when he returns to the workforce. It is to be understood, however, that this is a temporary condition and that he should be able to carry out

full normal activities after he has been on the job for a few weeks.

Physical examination on October 17 revealed a 43-year-old man in no acute distress. There was nothing very much to find on physical examination. He has a normal gait. His range of motion is completely within normal limits. There is no decrease in his strength and there is no sensory impairment." (Ex. HR-1, Tab 29)

When the Complainant was cleared to return to work in October 1990, he was unable to hold his position on the spareboard because of lack of seniority and was therefore returned to Employment Security where he remained until March 1991. At that time he was returned to the spareboard in Halifax where he performed the same variety of tasks - porter, waiter, sometimes chef - as before. This, despite the restrictions of which the Respondent was unquestionably aware at this point.

On August 21, 1991, Mr. Mills injured his back at work. This time he was, in fact, working as a chef and the episode was triggered by

his bending over to light a gas oven, something he must have done many times before without incident. In October, 1991, following two months of physiotherapy, Mr. Mills was informed by Dr. Wawrzyszyn that he was cleared to return to work with the previous restrictions regarding lifting heavy weights and stretching. Dr. Nurse, physician for VIA Rail, refused Mr. Mills' note from Dr. Wawrzyszyn stating that he could return to work and referred him again to Dr. Ian Holmes. The Respondent refused to allow him to return to work following receipt of Dr. Holmes' opinion. The position was outlined in a letter from Dr. Nurse to Mr. J. Dionne, Manager, Claims, VIA Rail, dated November 5, 1991. Dr. Nurse said in part about Mr. Mills:

"...On page two item # 3, he (Dr. Holmes) states quite clearly that his capacity for returning to his present employment has got to be very limited. I think we should accept his recommendation and declare Mr. Mills unfit for his present job. He can, therefore, either be offered a disability pension or some other form of employment. He is presently off work as I have refused to allow him to return to work until we have settled this issue." (Exhibit HR-1, Tab 37)

Dr. Holmes, in the same letter, states in the last paragraph: "Please note that ... physical impairment is not the same as the level of disability. If he is incapable of returning to his present employment, that represents 100% disability for that job even though the actual physical impairment can be somewhat less."

On November 26, 1991, VIA Rail offered the Complainant a disability pension. He declined the offer, citing as his reason a strong desire to continue working. It was suggested that the pension would have been about $800 per month.

In May and June of 1992, VIA provided five weeks of training in Moncton, which enabled Mr. Mills to qualify as a Telephone Sales Agent (TSA). All travel and accommodation expenses, as well as all costs associated with providing the actual training, were borne by VIA Rail Canada Inc. VIA offered Mr. Mills, pursuant to the collective agreement, available vacancies in the Telephone Sales Office in Moncton, New Brunswick after the completion of his training. Because Mr. Mills would have been responsible for all expenses incurred for accommodations and travelling to and from the workplace, he deemed the offer not to be viable economically and he declined three separate offers for one-day employment. It should be noted that he could no longer commute to Moncton by train, as he had previously, because that run had been discontinued.

VIA also offered to transfer Mr. Mills from Agreement No. 2 to Agreement No. 1, the effect of which would have allowed Mr. Mills to work in the Telephone Sales Office in Moncton.

The offer of a job was made, as is contained in a letter dated December 1, 1992 from Preston Beaumont of VIA to Mr. Gary Murray, Union Regional Vice-President. The offer was:

"1. Offer Mr. Mills employment at the T.S.O. in Moncton effective immediately and for the period of time the Work Group is active, or until they present a proposal which is agreeable to both parties, whichever comes first.

2. Mr. Mills would be redcircled in a 12.6 position under the provision of Article 15.1 (B) of Collective Agreement # 1, without bumping rights.

3. Mr. Mills would not accumulate Agreement # 1 seniority, unless the Work Group develops an acceptable process through which Mr. Mills obtains an Agreement # 1 position. If this happens, Mr. Mills' seniority date in Agreement # 1 would be established as the first day he worked in the T.S.O."
(Exhibit R-2)

Since the offer was not without restrictions and because agreement was not reached on such matters as relocation expenses and transfer of seniority, the offer was not accepted. There was also some doubt raised as to whether this offer was acceptable to the union at the time.

In the summer of 1992, Mr. Mills had applied for the position of baggage attendant with VIA Rail Canada Inc. He was referred to Dr. Brown, an orthopaedic surgeon engaged by VIA, who expressed the opinion that Mr. Mills would not be an appropriate choice for that position. Dr. Brown in a letter to Gillis Langley, dated July 20, 1992 stated:

"Since the chances of recurrent severe back pain, that could come on while at work as a result of losing his balance on a rapidly moving train, struggling with luggage are high if the employer cannot take him under those circumstances then for his job he would have to be considered one hundred percent disabled."(Exhibit HR-1 Tab 43)

Dr. Brown also stated in a letter to MEDISYS dated July 7, 1992:

"The question really is returning to work and I think that he should be given the opportunity to return to work in the dining car, he wants to do it. In fact I think this man is better working even if it means repeated time off work because of acute episodes..." (Ex. HR-1 Tab 41)

VIA requested Dr. Marcel Pigeon, Medical Director for MEDISYS, to offer an opinion on Mr. Mills' capacity to work. Based on a review of medical files, rather than any physical examination or test, Dr. Pigeon concluded that:

"Considering this situation, I judge Mr. Mills unfit for the job of chef aboard the train as well as baggage handler. He may also be considered unfit for the job of telephone

attendant...."
(Exhibit HR-1 Tab 45)

Dr. Pigeon was alone among the doctors who testified, in his position that Mr. Mills was unfit to work as a chef. In reacting to this position, Dr. Wawrzyszyn said:

"I disagree... He was fit, in my opinion, for work on the train as a chef." (Transcript Vol. 5, p. 760)

Dr. Orrell, qualified as an expert orthopaedic surgeon, testified that he felt Mr. Mills had an impairment, but was functional and not disabled from the workforce. He said:

"Q. ...you indicate that it is your opinion that: "--in October, 1991, he was capable without harming himself or others of returning to the work place as a chef." A. Yes."
(Transcript Vol. 3, p. 558)

"I do not feel that he requires a specific modification at the work place except to avoid heavy lifting so as not to further increase his spasm..."
(Transcript Vol. 3, p. 559)

Dr. Orrell also, when replying to the question "Do you confirm that Mr. Mills was totally disabled in October of 1991?" stated: "I think just the opposite. I think he was not disabled and he was fit to return to work."
(Transcript Vol. 3, p. 646)

On August 12, 1992 a grievance was filed by the Union on behalf of Mr. Mills alleging that VIA Rail was denying him access to work under Agreement No. 2.

On October 2, 1992, the complaint under the Canadian Human Rights Act initiating this proceeding was filed.

C) EVENTS SUBSEQUENT TO 1992

The grievance was heard at Montreal on May 11, 1993 and the award of Arbitrator Michel Picher was made July 16, 1993. It read:

"The Arbitrator directs that Mr. Mills be reinstated into his employment, without compensation and without loss of seniority, with his assignments to be restricted to the position of chef. His reinstatement is conditional upon his undertaking, for a period of not less than two years, the duties and responsibilities of a chef in On-Board Services, on a trial basis. If, for any quarterly period during the course of the two years, Mr. Mills should fail to register attendance comparable to the average of other employees in his classification in VIA Atlantic, the Corporation shall be entitled to consider his reinstatement into that trial service as at an end. Should that occur the parties will be

in a position to consider and exercise such rights and obligations as may then apply to Mr. Mills under the terms of the collective agreement. The Arbitrator retains jurisdiction."(Exhibit HR-2, Tab 61)

Mr. Mills returned to work as chef in July, 1993. He was absent from work on several occasions during the following year and one quarter. These absences were a result of a cut finger, a burned hand, a cut leg and most importantly and finally, a stress-related illness which he attributed to his problem with his employer. He was dismissed on October 7, 1994 for failing to meet the attendance requirements set out in the arbitration award.

It is noteworthy, that during the period from July 1993 to October 1994 when he worked only as a chef, he was able to perform his duties without back related absences raising some interesting questions regarding the opinions expressed earlier that he was 100% disabled.

3. ANALYSIS

A) RELEVANT STATUTORY PROVISIONS

In his formal complaint presented to the Tribunal, Mr. Mills says, "I allege that I am being discriminated against in employment because the Respondent has refused to continue to employ me because of my disability (back injury) contrary to section 7 of the Canadian Human Rights Act". The Respondent is VIA Rail.

Section 7 of the Canadian Human Rights Act (CHRA) 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. 1976-77, c. 33, s. 7."

The purpose of the CHRA is set forth in Section 2 which reads 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. 1976-77, c. 33, s. 2; 1980-81-82-83, c. 143, ss. 1, 28."

Sections 15 (a) of the CHRA provides as follows:

"15. It is not a discriminatory practice if

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

B) PRIMA FACIE CASE

In the Supreme Court of Canada decision of Ontario Human Rights Commission v. Etobicoke (1982) 1 S.C.R. 202 at page 208, Mr. Justice McIntyre on behalf of the Court wrote:

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

In Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited (1985) 2 S.C.R. 536 at page 558, Mr. Justice McIntyre once again dealt with the concept of a prima facie case and stated as follows:

"To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy - it will vary with particular cases - and it may not apply to one party on all issues in the case: it may shift from one to the other. But as a practical expedient it has been found necessary, in order to insure a clear result in any judicial proceeding, to have available as a 'tie-breaker' the concept of the onus of proof. I agree then with the Board of Inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove.

Therefore, under the Etobicoke rule as to burden of proof, the showing of a prima facie case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is 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, it is clear that when the Respondent refused to return Mr. Mills to work in October, 1991, it did so because he was perceived as being unfit to perform his job as a result of a disability, namely, a back ailment. It did so, despite conflicting medical evidence.

The evidence as set out above was that his family physician, Dr. Wawrzyszyn, had cleared him for return to work while Dr. Nurse, the company doctor, refused. His refusal was based on a report from Dr. Holmes to whom he referred Mr. Mills. This was done without any attempt to resolve the conflicting opinions through actual testing in the workplace, or indeed, in any other way.

These same two doctors had examined Mr. Mills in 1990, and each reported finding nothing seriously wrong with him. Then without any explanation of cause, they made these more radical findings a year later. These views, which are contradicted by other medical opinions, undoubtedly influenced the subsequent position of Dr. Pigeon when he reviewed the file.

The following year, in July 1992, another physician to whom he was sent by the company, Dr. Brown, found him unfit for the position of baggage handler but recommended that he be returned to work in the dining car - presumably in the position of chef for which he was trained.

Subsequently, Dr. Pigeon, based not on an examination of Mr. Mills but on a review of his file or medical record, found him to be unfit to perform the job of chef, or baggage handler or even telephone attendant. The Respondent thus continued to refuse to return him to work.

The Tribunal finds that the Complainant has clearly established a prima facie case of discrimination based upon the perception that he was disabled.

C) FINDINGS

The Tribunal is unanimously of the view that this case is determined on the facts as opposed to any complex application of the law.

The Tribunal, having reviewed and weighed all of the evidence, finds that the decision that Mr. Mills was disabled to the point he could not perform his duties as a chef or indeed any other duties on board a train was not based upon any proper assessment of his performance in the workplace. The Respondent relied heavily upon the opinion of Dr. Pigeon who conducted a "paper review" and who at no time examined Mr. Mills. With respect, this was not the best evidence with which to make the kind of career determining assessment that the Respondent was making with regard to Mr. Mills.

The Tribunal finds much more persuasive the evidence of Dr. Orrell, an orthopaedic surgeon engaged by the Commission to provide an assessment of Mr. Mills. Dr. Orrell testified as one whose practice deals extensively with patients with back ailments, many of whom work in heavy industry. As quoted earlier in this decision, he quite emphatically expressed the opinion that in October 1991, Mr. Mills was

capable of returning to work as a chef.

Although Dr. Orrell's assessment was not based upon an examination in 1991, his opinion was supported by Dr. Wawrzyszyn who was treating Mr. Mills in 1991 and did so over a period of several years and was very familiar with his condition.

In Attorney General of Canada v. Thwaites et al (F.C.T.D.), March 25, 1994, unreported at page 15, Mr. Justice Gibson quotes from the Tribunal decision in that case:

"Whenever an employer relies on health and safety considerations to justify its exclusion of the employee, it must show that the risk is based on the most authoritative and up to date medical, scientific and statistical information available and not on hasty assumptions, speculative apprehensions or unfounded generalizations (Heincke et al v. Emrick Plastics et al (1992) 55 O.A.C. 33 at 37-38 (Div. Ct.); Etobicoke supra at p. 212; Rodger v. C.N. (1985) 6 CHRR D/2899 at p. 2907)."

The Tribunal finds that VIA Rail failed to obtain the most authoritative and up-to-date medical evidence or scientific evidence with respect to Mr. Mills and at best relied upon conflicting medical evidence.

The Tribunal finds that the preponderance of evidence indicates that Mr. Mills was able to return to work as a chef in October, 1991 and this is further strengthened by the evidence that when he did return to work as a chef in July, 1993 pursuant to the award of the arbitrator, he worked for over a year without a back-related absence.

As outlined earlier in this decision, in mid-1992 VIA Rail trained Mr. Mills in Moncton as a Telephone Sales Agent. VIA argued that this was an effort to accommodate Mr. Mills' back ailment and that he rejected it.

The evidence regarding the difficulty for Mr. Mills in getting to Moncton, the absence of any offer of relocation assistance, the short-term nature of any concrete offers of work and the uncertainty surrounding whether there was ever any agreement consummated between VIA and the Union regarding this employment opportunity, certainly diminish its significance. The Tribunal finds that this cannot be regarded as a serious effort to accommodate Mr. Mills.

Thus, the Tribunal finds that VIA Rail did discriminate against Mr. Mills because of a back ailment which was not such as to prevent him from performing his duties as a chef and has failed to present any adequate defence.

D) ARBITRATION PROCEEDINGS

VIA Rail submitted that this entire matter was settled and Mr. Mills' claim effectively abandoned by virtue of the arbitration proceedings which took place on July 16, 1993 before Arbitrator Picher. VIA Rail argues that the Arbitrator basically effected mediation between VIA Rail, Mr. Mills and his Union which resulted in a settlement of the entire matter in the same manner as settlement of such matters sometimes occurs through the Canadian Human Rights Commission. VIA Rail submits that this Tribunal should abide by that

settlement and the decision flowing from it, and further that Mr. Mills did not live up to the "condition" in the settlement and,

therefore, VIA Rail is justified in denying Mr. Mills. This Tribunal does not agree with VIA Rail's submissions in this respect.

In Erickson v. Canadian Pacific Express and Transport Limited (1986) 8 C.H.R.R. D/3942 (C.H.R.T.) the Human Rights Tribunal dealt with a preliminary objection taken by Counsel on the grounds that the matter before the Tribunal was "res judicata" because the Complainant had already brought the same issue and sought the same remedies before an arbitrator appointed under the Canada Labour Code who dismissed the Claimant's claim. The arbitrator's award had the same force and effect as a judgment of the Federal Court of Canada under the provisions of the Canada Labour Code upon being filed with the Court.

The Arbitrator's award was filed with the Federal Court of Canada. The question for the Tribunal was whether the award of the Arbitrator dealt with the same issues of fact and law as was before the Human Rights Tribunal so as to render the matter before the Human Rights Tribunal "res judicata". The Tribunal dealt with the matter at pages D/3943 to D/3947 and held that "res judicata" did not apply because the issue before the Arbitrator was not whether the Complainant had been discriminated against because of his disability, but rather whether his termination from his employment was consistent with the provisions of the collective agreement.

The Tribunal in Erickson referenced at page D/3946 the Supreme Court of Canada decision in Insurance Corporation of British Columbia v. Heerspink (1982) 2 S.C.R. 145 and at page D/3947 referenced the Supreme Court of Canada decision in Winnipeg School Division No. 1 v. Craton (1985) 6 C.H.R.R. D/3014 wherein it was held that Human Rights legislation is not to be treated as ordinary law of general application, but is to be treated as public and fundamental law of general application. The Supreme Court of Canada has said that saving Constitutional Laws, Human Rights Legislation is intended to supersede all other laws when a conflict arises, unless an exception is created.

Thus the CHRA is quasi-constitutional.

Mr. Mills' case is similar in this respect to that of Erickson. This Tribunal is not bound by anything which took place at or emerged from the arbitration proceedings before Arbitrator Picher on July 16, 1993 or subsequent thereto.

This Tribunal has also reviewed the decision in Ontario Human Rights Commission et al v. Gaines Pet Foods Corporation et al (1993) 16 O.R. (3d) 290 (Ont. Div. Ct.). The decision in Gaines runs

contrary to the submissions made by VIA Rail with respect to the arbitration process regarding Mr. Mills.

Finally, the evidence suggests that at the time of the arbitration process on July 16, 1993, Mr. Mills did not bargain away any of his rights under the CHRA. No evidence whatsoever has been presented to this Tribunal to indicate that any of the parties believed that the arbitration process which took place on July 16, 1993, either negated or ended Mr. Mills' complaint or rights under the CHRA. Certainly, no evidence was presented before this Tribunal to demonstrate that Mr. Mills either did or intended to give up his complaint or any of his rights under the CHRA.

For the reasons expressed, the Tribunal finds that the complaint filed by Mr. Mills has been substantiated. Mr. Mills' complaint being successful, we now turn to the question of remedy.

4. REMEDY

A) RETURN TO WORK

The remedy sought on behalf of Mr. Mills by Commission Counsel and Mr. Mills' Union representative is substantially the same. Commission Counsel submits that Mr. Mills should be reinstated to the position of chef only, with no requirement for heavy lifting. The Union representative requests that Mr. Mills be reinstated unconditionally. Both submit that the reinstatement should be made effective as of October, 1991.

Counsel for VIA Rail submits that Mr. Mills was not dismissed until October of 1994 and that this dismissal is the subject of a second complaint over which this Tribunal has no jurisdiction. Therefore, Counsel for VIA Rail submits that reinstatement to employment is not an issue in this case.

The evidence clearly demonstrates that VIA Rail considered Mr. Mills to be unfit and not able to return to work as of October 1991.

An assessment of the facts leads to the conclusion that as of October 1991, VIA Rail did not intend to permit Mr. Mills to return to work.

In the normal course of events, Mr. Mills would have worked and earned income and other benefits. In effect, Mr. Mills appears to have been

constructively dismissed as of October 1991. If Mr. Mills was not constructively dismissed in 1991, then even though he remained an employee of VIA Rail, he was denied work when he ought not to have been so denied. It is not necessary for the Tribunal to decide between these two characterizations of Mr. Mills' employment circumstances since the net result will be the same.

The Tribunal orders that Mr. Mills be reinstated as of October 1991 to his position as a chef in the employ of VIA Rail and that he be permitted to work as a chef only.

The description of the duties of chef offered into evidence, including the definition set forth in the Collective Agreement, which does not require any heavy lifting, is the description and definition accepted by the Tribunal and the Tribunal orders that VIA Rail not require Mr. Mills to engage in any heavy lifting or lifting on a continuous basis.

B) COMPENSATION FOR LOST WORK

Commission Counsel argues that Mr. Mills should be entitled to the income and all the benefits he would or should have received if he had not been denied work. Commission Counsel argues that the Tribunal should award all forseeable loss, including relocation allowance and the market value of Mr. Mills' house in 1991. Mr. Mills' Union representative agrees.

VIA Rail Counsel refers to the award of Arbitrator Picher and further submits that Mr. Mills received Workers Compensation payments, indemnity payments and income as a Telephone Sales Agent. As to the issue of Mr. Mills' house, VIA Rail Counsel says that this is a claim that misconstrues the damages which are normally

awarded in a human rights matter and he submits that:

(i) VIA Rail cannot be responsible for the failure of Mr. Mills to sell his house;

(ii) Mr. Mills knew why VIA Rail wouldn't permit him to return to work;

(iii) Mr. Mills did not accommodate in the matter in that if he was to return to work either as a chef or in another

position, he would need to relocate and he ought not to have turned down the offer of $36,000.00 for his home;

(iv) there is a dispute as to the value of the house;

(v) the real failure to sell resulted from the potential buyer backing off; and

(vi) that the matter is under grievance.

With respect, the evidence discloses that the issue of Mr. Mills' house has been part of and dependent upon the issue of his employment.

The Tribunal orders that VIA Rail provide Mr. Mills with all lost wages and benefits from October 1991 to the actual date he is re-employed including pension benefits, seniority, relocation allowance or other loss in respect of the sale of his house, that he should have received had he not been denied work, less any income he received from other sources during that period.

C) COSTS AND EXPENSES

Commission Counsel and Mr. Mills' Union representative asked that an award be made for Mr. Mills' costs and expenses, such as travel, associated with pursuing and participating in this complaint. The Tribunal finds their request to be reasonable in the circumstances of this case and orders VIA Rail to pay such costs and expenses.

D) HURT FEELINGS

Mr. Mills is married and has a family. The evidence indicated that this matter had a major impact upon his life and the whole family both economically and emotionally. There certainly was uncontroverted evidence of very substantial stress during the period.

The Tribunal orders that, pursuant to section 53(3)(b) of the CHRA, VIA Rail pay Mr. Mills the sum of $2,O00.00 in respect of hurt feelings and loss of self-respect.

E) INTEREST

Commission Counsel cited Uzoaba v. Correctional Service of Canada, Tribunal Decision 7/94, April 28, 1994 (unreported); and A.G. of Canada v. Uzoaba and Canadian Human Rights Commission, F.C.T.D., April 21, 1995 (unreported) and asked for interest on any awards made. In Uzoaba, the Tribunal at page 95 stated "It is also well established

in the jurisprudence that interest is payable on damages for loss of income as well as on monetary awards for hurt feelings." In Uzoaba, the Tribunal ordered interest to be paid in accordance with the provisions of the Courts of Justice Act of Ontario, presumably because the venue was in Ontario and the parties from that Province. This Tribunal adopts this approach and orders that VIA Rail pay interest in accordance with the similar legislation in effect in Nova

Scotia or if no such legislation exists, at the relevant prevailing Bank of Canada Rate.

Interest shall be paid on the lost wages from the dates the wages would have been due and owing to Mr. Mills had he continued to work for VIA Rail during this period, up to the date of payment.

Interest shall be paid on the costs and expenses incurred by Mr. Mills in this matter commencing as of the date of this order and at the same rate as above.

With respect to the award for hurt feelings, interest calculated at the same rate as above shall be paid commencing on the date of this order.

CONCLUSION

The Tribunal retains jurisdiction in this complaint and directs the parties to commence forthwith to determine the actual monetary amounts awarded under Remedy, Items 4 A), B), C), and E) above.

If the parties have failed to reach agreement on these amounts within 60 days from the date this decision is rendered, they shall so notify the Tribunal Registry and dates will be set forthwith to reconvene the Tribunal in Halifax, Nova Scotia, to assess and otherwise deal with any outstanding matters.

Dated at Toronto, this 10th day of May, 1996.

Keith C. Norton

Joanne Cowan-McGuigan

Kent Morris