T.D. 1/95
Decision rendered on January 12, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JEFF WOROBETZ

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

DECISION

TRIBUNAL: RAYMOND W. KIRZINGER - Chairperson

APPEARANCES: Patricia Spencer, Counsel for the Complainant
Odette Lalumiere, Counsel for the Commission
Zygmunt Machelak, Counsel for the Respondent

DATES AND
PLACE OF HEARING: January 17, 18, 19, 20 and 21, 1994
April 12, 13, 14 and 15, 1994
Edmonton, Alberta

The Complainant, Jeff Worobetz, was employed with Canada Post Corporation for a brief period of time during the months of November and December 1988. The issues surrounding that employment form the subject matter of Mr. Worobetz's complaint which is stated thus:

> Canada Post Corporation has discriminated against me by refusing to continue to employ me because of my disability (cerebral palsy) in contravention of Section 7 of the Canadian Human Rights Act
>
> I was hired as a casual employee on November 14, 1988 and trained for one week as a mail sorter in the priority post parcel section. I then worked from November 20, 1988 to December 7, 1988. On December 22, 1988, Mr. Dave Cruickshank of the Canada Post Corporation advised me that they thought I couldn't handle the work load. Then on December 24, 1988, he informed me that I would no longer be called for work by Canada Post Corporation. This came as a complete surprise to me because on December 8, 1988 in my presence, Mr. Dave Cruickshank told the morning shift supervisor that if any person was sick or missing to call me to work.
>
> At no time was I ever informed as to what amount of productivity I was expected to maintain. There are also a number of other positions in the mail sorting operation that I am fully capable of performing but was not given the opportunity to do so.

The relief sought by Mr. Worobetz for the alleged contravention of Section 7 consists of compensation for hurt feelings, lost wages, interest, and his legal costs, together with a claim for reinstatement.

Mr. Worobetz appears to be a tenacious and determined individual evidenced by his excellence in swimming (to the extent that he won a silver medal at the 1988 Para-Olympics in Seoul, Korea). As part of the training for the competition, he stuck to a rigorous diet and exercise routine (eg. rising at 3:00 AM for food and then swimming and eating at frequent, specific times during the day), a routine that appeared to have continued up to the time of the hearing.

With respect to Mr. Worobetz's disability, he suffers from some physical disabilities in that he walks in a gaited fashion, is only able to walk for a certain distance, and his speech is somewhat slurred. Although his Complaint indicates that he suffers from cerebral palsy, it appears that he in fact has a mental disability resulting from a motor vehicle accident on October 2, 1979. However, the fact that he has a mental disability was unknown to him (and from the evidence it appears unknown to Canada Post Corporation before and after the employment period as well) until the expert in the area of

neuropsychology disclosed in detail the nature and extent of Mr. Worobetz's mental disability at the hearing. A number of times when responding to questions in cross-examination, Mr. Worobetz stated,

quite vehemently, that he was not aware that he had any mental disability. The neuropsychologist's evidence was also that Mr. Worobetz was not aware of his mental disability.

Dr. John F. Keegan was qualified, by consent of all the parties, as an expert in the area of neuropsychology and vocational assessment. Dr. Keegan indicated that he always uses conservative norms in testing brain damage so that if he does make an error, the error occurs in determining that someone does not have brain damage when he or she in fact has brain damage (as opposed to the opposite type of error where he might diagnose a brain injury when it did not exist).

Dr. Keegan's overall assessment was "that Mr. Worobetz has significant cognitive impairments arising from brain injury". His report also indicates that the Complainant has problems with any task requiring speed of information processing and/or new learning. He also exhibits problems with verbal, visual and spacial memory tasks. He has problems with expressive language ability and has evident motoric difficulties. He reads at only a Grade Five level and spells at a Grade Four level, making him illiterate in many respects. As well, in Dr. Keegan's opinion, the Complainant does not appreciate or deal effectively with his limitations and he is inclined to deny them and make excuses for them.

Dr. Keegan also characterized Mr. Worobetz as an honest individual and that any denial by him of a mental disability would be related to a psychological condition (ie. denial) rather than dishonesty. After witnessing Mr. Worobetz at the hearing, I have no difficulty accepting this statement as entirely accurate.

Dr. Keegan was also of the opinion that Mr. Worobetz's mental disability had not changed substantially since 1981 or 1982 (which was approximately two to three years post-injury) and as is typical of brain injuries, it is not expected that his performance will likely improve in any substantive way in the future, although he could develop compensatory skills and techniques to assist performance.

In order to appreciate the background to this complaint, it is therefore important to realize that at the time in question Mr.

Worobetz was an individual with a reasonably significant mental disability which was unknown to him.

Turning to the facts as they relate to the job opportunity, Mr. Worobetz's evidence was that he initially applied for a position at Canada Post Corporation because his father and a friend believed that the Respondent, being a Crown corporation, had implemented an affirmative action program with regard to certain minorities, including the disabled. Mr. Worobetz applied for the job because he considered himself to be physically disabled. It should be noted that there was no evidence that any affirmative action program was in place at Canada Post Corporation at the time in question - in fact, the only other evidence on this point came from Canada Post Corporation

employees who testified that they had no knowledge of any such program.

The Complainant's initial interview was with Mr. Rhem, at Canada Post Corporation's office. According to the Complainant, the interview was short and dealt primarily with his sports achievement and the experience disclosed in the resume he submitted, outlining some short-term electronic repair jobs he held in the past. There was no testing done by Mr. Rhem - the only discussion in this regard was the fact that Mr. Worobetz was physically disabled which impaired his walking. At the close of the interview, Mr. Rhem indicated to the Complainant that he would get back to him as soon as there was a job that was suitable for him.

Mr. Worobetz did not receive a call from Canada Post Corporation for some time so he contacted the office and was eventually called back by Canada Post for an interview for a temporary job repairing and hanging super mailboxes. Mr. Worobetz indicated to the Canada Post representative who telephoned him that he had concerns about doing the job as he was disabled and he had an impending trip to the Para-Olympics to represent Canada. The Canada Post representative indicated that he would not be able to get time off to go to the Para-Olympics and as a result, the job opportunity was not pursued by Mr. Worobetz.

Eventually, after he returned from the Para-Olympics, Mr. Worobetz was contacted for an interview with Mr. Joly, who held the position of Superintendent of Priority Courier from October 1988 to April 1989. Mr. Joly described Priority Courier as the "cadillac of

services" offered by Canada Post Corporation. In November 1988 with the Christmas season approaching and the resultant heavier volume of mail, it was his intention to develop a list of on-call casual employees to fill in for absent regular workers and provide extra help for increased volumes of mail.

As a generalized view, it appears as though Canada Post Corporation had a very quick and superficial screening process for on-call casual workers. No testing was conducted as only applicants for permanent positions were given tests (such as the National Dexterity Test). As long as the applicant for the on-call casual position appeared suitable after a quick, cursory assessment by the interviewer, he or she was given on-the-job training and assessment. In Mr. Worobetz's case, it appears that he had been recommended for the further interview by Mr. Rhem because of his athletic ability and electronic experience.

Mr. Joly conducted a brief interview. The Complainant and he differ on whether or not any specifics were mentioned about the on-call casual job in Priority Courier and the expectations associated with the position. Mr. Worobetz testified that he received next to no explanation about the job requirements, that Mr. Joly simply said he "needed people" and did not indicate whether or not the job was

permanent or on-call. In particular, Mr. Worobetz related that he was not told the job was physically difficult or that accuracy and productivity were very important parts of the job.

Mr. Joly's evidence directly contradicted Mr. Worobetz on this point. According to him, he told Mr. Worobetz that he was interviewing for an on-call position and that Priority Courier was the "cadillac of services". He had also indicated that at this particular time of year, the volume of mall at Priority Courier was high and that there were high expectations of Priority Courier employees. Mr. Joly indicated that he was not aware of any disability of Mr. Worobetz during the interview, except that his speech was somewhat slower. After he described the job to Mr. Worobetz, he asked him if he thought he could do the job and Mr. Worobetz said he thought he could and did not raise any concerns about his ability to perform the job.

The question arises as to whose version of the facts to accept. In my view, it would not be fair and reasonable and in accordance with the purpose and objects of the Canadian Human Rights Act to discount

the evidence of the Complainant because he or she has been diagnosed as having a mental disability and memory problems. Such an approach would require acceptance of the Respondent's evidence in all cases where there are two versions of the facts. In my opinion, this is contrary to the purpose and objects of the Canadian Human Rights Act. Accordingly, I propose to consider what is reasonable and logical based on both versions of the facts.

I believe, and find as a matter of fact, that Mr. Joly did provide the Complainant with a very brief and cursory overview of the job description which, from Canada Post Corporation's perspective, constituted a very brief and preliminary explanation of the job requirements. As well, as long as there was no glaring and obvious problem, the Complainant would be given an opportunity to work and that is where the real explanation of the job would occur and testing as to his ability to perform the expected job requirements. I also believe that from Mr. Worobetz's perspective, he had no particular understanding of what the job involved as a result of the interview, but that he was so anxious for the job that he probably was not too concerned and was simply excited about pursuing the opportunity. Specifically, I do not believe that Mr. Worobetz was told about Canada Post Corporation's standards (in the sense of percentage accuracy rate expected and pieces of mail per minute). In general terms, all details associated with the job, such as expectations, duties, requirements, etc. were left to the actual on-the-job situation.

Following the interview on November 8, 1988, a representative of the Respondent phoned Mr. Worobetz and asked him to report to Mr. Cruickshank for the night shift on November 14, 1988 and he worked a total of fourteen eight-hour shifts between then and December 7, 1988 - all on the midnight shift.

Again, there is a discrepancy between the Complainant's and the

Respondent's version of the facts regarding the on-the-job training that took place, about the extent to which Mr. Worobetz was informed about mis-sorts that he had allegedly made, and Canada Post Corporation's expectations regarding accuracy rate and speed. Mr. Worobetz's evidence in cross-examination was that he had been informed of mistakes that he apparently made on two or three occasions but no mention was made of the expectations that Canada Post Corporation had, etc. until subsequently when he was informed that he would not be recalled. As well, he did not realize that such mistakes were

unacceptable and could result in him not being called in to work any further. Mr. Cruickshank, on the other hand, was the supervisor of the midnight shift of Priority Courier and outlined a number of circumstances when mis-sorts were pointed out to the Complainant and efforts made to correct the situation and when a description of Priority Couriers expectations were pointed out to the Complainant.

In my opinion, Mr. Cruickshank was a very good witness. He had been employed as a supervisor with the Respondent for eleven years and supervised the Priority Courier section for five years on the midnight shift. The evidence he provided was fairly detailed and consistent. As well, he had personal experience as a foster parent to two "severely handicapped children" (as described by him) one of whom he had adopted. He struck me as having a reasonable degree of understanding of, sensitivity to, and compassion towards individuals with disabilities. Mr. Joly, on the other hand, struck me as more of a dynamic, fast-paced manager who did not want to spend a lot of time with what he might regard as more "trivial matters" such as interviews unless there appeared to be a problem - which, I believe, is reflected in the way he conducted the interview with Mr. Worobetz. In contrast, Mr. Cruickshank appeared to be more thorough and conscientious in his on-the-job assessment of the Complainant.

Both parties were somewhat consistent with their version of the physical space provided at Priority Courier at the time in question. Apparently the sortation room was somewhat cluttered with a number of varieties of large sortation bags, bins, etc. with approximately three to four people working in the area on the midnight shift. It appears as though the work area was somewhat crowded and cluttered but yet organized with all the bins, etc. marked for the various sortations that were conducted. As well, there was a map and other items posted to assist with sortation.

Mr. Cruickshank indicated that he told Mr. Worobetz that they had to strive for 100% accuracy with sorts. Apparently, once Mr. Worobetz was on shift, there were a number of significant mis-sorts - for example, whole bags of mail going to the wrong mail station within the City of Edmonton. As well, there were complaints from the Complainant's fellow workers (two to three times per shift, he indicated) that Mr. Worobetz was causing mis-sorts and, at one point, he was asked to "get rid of" Mr. Worobetz by another employee. Both Mr. Cruickshank and a Union representative, Ursulla Webber, who was called as a witness by the Commission, indicated that Priority Courier

workers took pride in the low number of mis-sorts in their unit and the escalation in the number of mis-sorts with Mr. Worobetz working on shift was of considerable concern to the workers.

A co-worker was assigned to work closely with Mr. Worobetz on the job and after one week (ie. five shifts), Mr. Cruickshank had a discussion with Mr. Joly about what he perceived to be the difficulty with mis-sorts caused by the Complainant. At the hearing, Mr. Cruickshank explained that, in his view, the Complainant appeared to have a "retention problem". As a result of this meeting, it was decided to give Mr. Worobetz a chance for an additional one week period. It appears that in most circumstances, individuals are given on-the-job training and testing for approximately one week.

It also appears as though there was some union tension caused as a result of Priority Courier hiring Mr. Worobetz as an on-call casual employee which eventually resulted in a grievance being filed. Being an on-call casual employee, Mr. Worobetz was out of scope of the Union contract and it was the Union's position that a Union person should have filled the job in question. I should point out, however, that there was no evidence that the Union tension underlied any complaints made by fellow employees about Mr. Worobetz's performance or that fellow employees might have been sabotaging Mr. Worobetz's efforts by causing mis-sorts while he was on the job. In fact, the only evidence on this point (which, however, was very minimal) was that the complaints of fellow workers were not at all related to the conflict with the Union.

After the additional one-week period, Canada Post Corporation eventually decided that it would not continue with Mr. Worobetz. Mr. Cruickshank indicated that the mis-sorts continued and it did not appear that his work was improving. As is the case with all Canada Post's on-call casuals in such a situation, Mr. Worobetz was simply not called to work any further. Mr. Worobetz indicated that, after he had not been called for a period of six days (on December 13th), he contacted Mr. Cruickshank about the situation and was simply told that another on-call person was being trained and consequently he had not been called to work. Mr. Worobetz persisted and contacted Canada Post again on December 22nd when he attended at the station during a shift. At that time, Mr. Cruickshank took him aside to the loading dock and explained to him that, in his view, Mr. Worobetz could not handle the work load and that he would not be called any further. Mr. Worobetz was very upset and offended by this comment. He indicated that it was the first time he was informed of specific expectations and productivity requirements. He simply felt that he had not been given a "fair chance to prove himself".

It is Mr. Worobetz's evidence that he was very distraught after being told that he would not be recalled by Canada Post. As an example, he had been debating about whether or not to have a vasectomy at the time and as a result of the effect this decision had on his self esteem, he decided that he did not want to have any children and

he had a vasectomy.

Mr. Worobetz testified that he was aware that he was a casual employee but he had the expectation and hope that eventually he would be granted permanent employment status. Mr. Worobetz acknowledged on cross examination that he understood that he had made mis-sorts but he did not appreciate that mis-sorts were unacceptable. Essentially, he did not realize that Canada Post Corporation had an expected near 100% accuracy rate with sortations.

It appears, as well, that Mr. Worobetz applied for a job with Alberta Forestry and that he was offered a job with Alberta Forestry on or about December 1, 1988. Mr. Worobetz did in fact commence employment with Alberta Forestry on December 15, 1988 and worked there until April 25, 1989. Apparently, he quit the job with Alberta Forestry because he was having difficulty with the air quality.

It was disclosed in evidence that Mr. Worobetz was receiving Assured Income for the Severely Handicapped ("AISH") benefits from the Province of Alberta, which at the time of hearing amounted to $605.00 per month. Richard Thurman, an AISH intake supervisor, gave evidence that in order to qualify to AISH benefits, the applicant has to certify, as well as his or her medical doctor, that he or she is not capable of being "competitively employable". The Complainant's personal physician, Dr. Weeks, was called to give evidence about the AISH application form she had completed. She basically acknowledged that she had not done detailed testing and was not an expert in the area of mental impairment. She also indicated that she had never told the Complainant that he had a mental disability. In the AISH assessment form, she stated that he was permanently disabled, mentally impaired and not competitively employable, but she acknowledged that this assessment was not based on examination and testing she had done but primarily on a diagnosis and discharge statement from the hospital when Mr. Worobetz was released following his car accident in 1979 and on an Edmonton Board of Health report.

When commenting on the AISH program and the requirement that recipients be certified as not competitively employable, Dr. Keegan indicated that, in his opinion, the applicant's medical forms are normally completed by his or her general practitioner who does not possess the necessary expertise to make such an assessment. I agree with Dr. Keegan's assessment and find that just because Mr. Worobetz applied for and received AISH benefits, and that the application form requires certification that the applicant is not competitively employable, this is not tantamount to a determination that he is in fact not capable of being competitively employed. Certainly, the evidence of the expert, Dr. Keegan, on that point outweigh any indications from the AISH application form. However, as indicated, Dr. Keegan also indicated that he tends to use a conservative approach in assessing mental impairment. That is, he tends to err on the side of not diagnosing mental impairment to make sure that someone is not mistakenly categorized as such.

While Dr. Keegan was definitive in his assessment that Mr. Worobetz had brain damage which affected his cognitive processing, he was not as definitive about whether or not Mr. Worobetz was competitively employable, about whether or not Mr. Worobetz had the capability of performing the Priority Courier job in question, and about what other job Mr. Worobetz might be capable of performing. In short, his vocational assessment opinion was somewhat limited.

Firstly, he did not consider any physical ability requirements of occupations and Mr. Worobetz's physical ability, as that was not within the area of his expertise. Secondly, some of his vocational assessments were quite general and somewhat diminished by other more specific evidence. Thirdly, adopting the conservative approach, he was reluctant to give definitive opinions which might restrict the Complainant's career options, and ability to be employed (my observation is that Dr. Keegan would not make a statement that the Complainant was not competitively employable unless it was clear and beyond the shadow of a doubt).

In Dr. Keegan's report, he outlined two general occupation areas where Mr. Worobetz showed an aptitude and interest - that is, for clerical and related occupations, specifically the area of reception, information, mail and message distribution occupations. As well, his testing showed an aptitude for artistic, literary, performing arts and related occupations, which Dr. Keegan indicated was probably in error as it did not make any sense from his perspective -in that, it

necessarily involved creative, spontaneous type of work, whereas Mr. Worobetz was more interested in routine and repetitive work (such as in the clerical and related occupations category).

Although the clerical and related occupations category indicated "mail distribution" as one of the categories, a Canada Manpower personnel employee was called by the Respondent to provide, in part, specific information on the clerical and related occupations category. From the evidence of this individual, Edward McGreer, a Human Resources Development Officer with Canada Employment Centre, it is evident that the clerical and related occupations group is very broad and encompasses a wide variety of job classifications. The specific category referred to in Dr. Keegan's report as "mail distribution" is directed to, for example, an office mail and message delivery person, and does not refer to a mail clerk or sorter requiring high speed sortation skills. Such latter occupations fit within a different category under the clerical and related occupations major category. For example, reception, information, mail and message distribution occupations were categorized with the major categorization number 4179. Mr. McGreer indicated that mail and postal clerks appear under the major categorization number 4173 and, for example, mail clerk is then sub-categorized specifically as occupation group 4173-126 and the mail sorter is occupation group 4173-130. The point of the foregoing is that although it appeared from Dr. Keegan's report that his testing indicated an aptitude on the part of Mr. Worobetz for mail

distribution, this was not "mail distribution" in the sense of a Canada Post Corporation mail clerk or mail sorter, which is otherwise categorized. As indicated, this was more in the sense of a mail delivery person within an office setting, etc.

Since Dr. Keegan was not definitive in his assessment of the Complainant's abilities as it relates to the Priority Courier job in question, it is incumbent upon this Tribunal to consider the opinion evidence given by Dr. Keegan in conjunction with the observations made by Mr. Worobetz's coworkers and supervisor and make some assessment on a balance of probabilities. I have taken into account Dr. Keegan's "conservative assessment approach", along with his actual assessment of Mr. Worobetz (ie. "significant cognitive impairments", difficulty with "speed of information processing" and problems with verbal, visual and spacial memory tasks). I have also considered the observations of the Complainant's supervisor, Mr. Cruickshank, as well as the observations of his co-worker, Ursulla Webber (who testified

that she worked with Mr. Worobetz for two or three shifts and noted that he was making a number of sortation mistakes). I find, on a balance of probabilities, that Mr. Worobetz did not have the ability to perform the duties of the job with Priority Courier and that he could not be expected to do so at any time in the future. It appears unlikely that Mr. Worobetz could have done the required job even after any amount of accommodation (even to the point of undue hardship) to assist him with properly performing the task. In short, in my opinion, his cognitive difficulties simply would not allow him to perform the job at hand.

Therefore, I find that the Complainant had a significant mental disability, that such mental disability precluded him from properly performing the job in question at Priority Courier and that such disability would preclude from him performing the task at any time in the future even with a significant amount of training and accommodation, etc. As well, Mr. Worobetz was genuinely not aware that he had a mental disability until he heard Dr. Keegan's report at the hearing. Finally, Canada Post Corporation was also not aware of the mental disability at the time Mr. Worobetz was interviewed, at the time he worked for the Corporation and at the time the decision was made not to call him any further.

With this factual background and findings made, I turn to a consideration of the law and its application to such facts.

Mr. Worobetz's complaint is based on Section 7 of the Canadian Human Rights Act which provides as follows:

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.

From the outlined facts, it appears to me that the reason the Respondent refused to continue to employ Mr. Worobetz was because he was not able to sort mail quickly and accurately. Stated in terms of a rule that Canada Post imposed upon its employees as a condition of

continued employment, such rule would be that: "employees must be able to sort mail quickly and accurately".

In my assessment, there are three basic issues that must be considered with regard to this rule or with regard to the fact that Mr. Worobetz's employment was not continued because of his inability to sort mail quickly and accurately. The three issues are stated as follows:

(a) whether or not there is a prima facie case of discrimination under Section 7 established;

(b) if such a prima facie case is established, whether the discrimination can be categorized as direct discrimination or as adverse effect discrimination; and

(c) once categorized as direct discrimination or as adverse effect discrimination, whether the Respondent has established a defense either of a bona fide occupational requirement or of accommodation, as the case may be.

Before specifically analyzing each of these issues, I must say that I found, in this case, the distinction between whether or not there was a discriminatory practice, and whether any discrimination was direct or adverse effect, somewhat artificial. As indicated by Anne M. Molloy in Disability and Duty to Accommodate, found at page 37 of Canadian Labour Law Journal, Volume 1, No. 1, Spring/Summer 1992 in respect to the two types of discrimination:

> With respect to disability-based discrimination, the line between the two kinds of discrimination is much more blurred. If an employer advertises a position for an office receptionist and stipulates that no blind persons will be accepted, this is clearly direct discrimination. But this is a case that almost never arises. In practice, what happens is that the requirements for the position will contain no obviously discriminatory exclusion but will require the successful applicant to use existing office computer equipment that is not adapted for use by a blind person. Is this direct discrimination because no blind person could ever meet the requirement? Or is it adverse impact discrimination because it is a neutral requirement for all job applicants that adversely affects

persons with visual disabilities?

I agree with that comment in this disability-based discrimination case. For example, I previously characterized the rule imposed by Canada Post Corporation to be "that employees must be able to sort mail quickly and accurately", but as was argued by the Respondent's counsel at the hearing, the rule could also be stated along the lines of: "persons with mental disabilities need not apply for a position with Priority Courier".

Similarly, I find the characterization as to whether or not Canada Post Corporation's refusal to continue to employ Mr. Worobetz was based on a prohibited ground of discrimination equally "blurred". In this case, the complainant could not perform the basic and essential duties required of the job - that is, quick and accurate sortation of mail. The reason he could not perform these duties is because he suffered from a mental disability. When one cannot perform the basic and essential requirements of a job, does this mean that the employment is not continued on a "prohibited ground of discrimination" just because a mental disability underlies the inability to perform the basic and essential tasks?

The consolation I find in going through the analysis and making these (what I consider to be) somewhat artificial distinctions is that I find a consistent result in each case. No matter how one characterizes the Respondent's refusal to continue to employ Mr. Worobetz, that is whether or not that is a discriminatory practice at all and if it is discrimination, whether it is direct and adverse effect discrimination, the result, in my view, is similar.

The onus is upon the Complainant to establish a prima facie case of discrimination (see, for example, Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202 at page 208 and O'Malley v. Simpson-Sears Limited, [1985] 2 S.C.R. 536 at page 558). As specifically stated by McIntyre, J. in the O'Malley case at page 558:

> 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.

Part of the difficulty I have in determining that the Complainant has categorically established a prima facie case of discrimination is, in part, in view of provisions of Section 2 of the Canadian Human Rights Act which provides that " . . . every individual should have an equal opportunity with other individuals . . . " (emphasis added). Does this mean an employer has to continue with the employee where the employee is simply unable to perform the basic and essential requirements of the job just because a disability underlies the inability? For example, consider the situation of another on-call casual employee who does not meet Canada Post Corporation's requirements with respect to speed and accuracy in mail sortation.

Such employee may lack some of the mental faculties (such as memory and speedy processing) but not to the extent of being categorized as suffering from a "mental disability". Or, such employee may simply, in general terms, lack the natural ability to properly perform the task. In such a situation, the on-call casual employee need not be called back by Canada Post Corporation and the employee is likely without recourse. However, if in cases such as this, where the reason the person lacks the ability to perform the job is because his or her condition is such that it is categorized as a "mental disability", then refusing to call the on-call casual employee is categorized as discrimination (at least on a prima facie basis). This is not treating mentally handicapped individuals the same as other individuals who also lack the aptitude and ability to perform the basic and essential requirements of the job. Although the Canadian Human Rights Act is to be interpreted in a broad and liberal manner, the object and intent of the Act also, as previously indicated, provide for equal, not superior, opportunities for disabled persons.

This point was considered in the context of the Ontario Human Rights Code in Chamberlain v. 599273 Ontario Ltd. (1989), 11 C.H.R.R., D/110 at D/116:

> ... the Code does not ignore the fact that certain handicaps can negatively impact on an individual's ability to perform certain types of work. If a person is unable to adequately perform a particular job because of a handicap, the Code does not entitle that person to employment in the job. What the Code does do is ensure that persons with a handicap are not discriminated against with respect to jobs they are capable of performing.

With the basic objective or purpose of the Act as described in the Chamberlain case in mind, I find it to be somewhat compelling to suggest that Section 7 of the Act does not apply when the employment is discontinued for inability to perform the basic and essential tasks required and the disability (which underlies such inability) is first discovered by both parties long after the refusal to continue to employ - that is the refusal is not based on a prohibited ground of discrimination and no prima facie case has been established. It is my view that if the presence of an underlying disability was known to the employer prior to the discontinuance of employment, it may be incumbent upon a Tribunal to consider the circumstances surrounding the refusal beyond a simple consideration of whether or not the employee could perform the basic and essential requirements of the job. Amongst other issues to consider, it may have to consider the issue of accommodation.

However, when the disability underlying inadequate job performance is unknown until after the termination and such lack of knowledge is not due to such things as willful blindness or neglect on the part of the employer (which I believe to be the case here), the dismissal is not at all based upon a discriminatory ground and no prima facie case exists. To find otherwise would lead to impractical and unreasonable consequences for employers who are legitimately not aware of an employee's existing disability and may also lead to additional and unrealistic rights for such employees.

I have indicated that, in my view, the determination as to whether or not the dismissal was based upon a prohibited ground of discrimination is unclear therefore, I believe it necessary to consider the outcome of this Complaint in the event that a prima facie case had in fact been established.

If a prima facie case of discrimination is established, it is then necessary to characterize the discrimination as being either direct discrimination or adverse affect discrimination. The most commonly referred to definition of the two types of discrimination was stated by McIntyre, J. in the O'Malley case (supra) at Page 551:

> Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "no Catholics or no women or no blacks employed here". There is, of course, no

> disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristics of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

As I have suggested, I find drawing the distinction between the two types of discrimination in this case somewhat artificial and "blurred" as suggested in the Disability and the Duty to Accommodate article referred to previously. In my view, the rule or standard set by Canada Post Corporation - that is, that employees must be able to sort the mail quickly and accurately on its face, appears to fit within the definition of adverse effect discrimination, since the rule or standard is on its face neutral but it has a discriminatory effect upon mentally handicapped employees.

However, one could characterize the rule as being: "Canada Post Corporation does not employ mentally handicapped individuals in its Priority Courier department", which would then be categorized as direct discrimination. If this was a case of direct discrimination on the basis stated, it would be my decision that the Respondent has met the onus then placed upon it to prove, on a balance of probabilities, that the rule was based upon a bona fide occupational requirement pursuant to Section 15(a) of the Act. As set out in the Etobicoke case (supra), in order to qualify as a bona fide occupational requirement, a rule (briefly stated) must, on a subjective basis, be imposed by the employer in good faith and, on an objective basis, it must be reasonably necessary for the efficient and economical performance of the job. In this case, I have no difficulty accepting that the standard and rule imposed by Canada Post Corporation was done so honestly and in good faith, etc. As well, I am satisfied that compliance with the objective standard required has been established by the Respondent. Based on the evidence presented at the hearing, and the simple logistics involved with the Canada Post operation as described therein (in that its objective, particularly in the Priority

Courier section, is to dispatch the mail as quickly and accurately as possible) the rule is reasonably necessary for the efficient and economical performance of the job.

Having, however, determined that this case more aptly falls into the category of adverse effect discrimination, I must consider whether or not the Respondent has discharged its duty, or the onus placed upon it, to demonstrate that it accommodated the Complainant's disability up to the point of undue hardship. The leading case in the area of adverse effect discrimination and the duty to accommodate is Alberta Human Rights Commission v. Central Alberta Dairy Pool, [1990] 2 S.C.R. 489 (S.C.C.). The Central Alberta Dairy Pool case involved discrimination on the basis of religion in that the Complainant/employee was determined to be lawfully entitled to pursue the practices of his religion and to be free from coming to work on a particular day, which was contrary to his religious beliefs. Writing for the majority of the Court, Wilson, J. stated at pp. 520-521:

> The onus is upon the Respondent employer to show that it made efforts to accommodate the religious beliefs of the complainant up to the point of undue hardship.
>
> I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. ... This list is not intended to be exhaustive and

> the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

Sopinka, J. writing for the Supreme Court of Canada in Renaud v. Central Okanagan School District No. 23, [1992] 2 S.C.R.. 970, at page 984, provided a brief and more detailed explanation of the term "undue hardship" in the following manner:

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this 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. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case.

The factors I have considered in assessing whether or not the Respondent has accommodated the Complainant to the point of undue hardship in this case include: the on-the-job testing and training of Mr. Worobetz conducted by the Respondent; the employment status of the Complainant - the duration of it and type of status he had; the evidence presented regarding the speed and accuracy requirements of the mail processing plant of Canada Post Corporation; the nature and extent of Mr. Worobetz's disability as outlined primarily in Dr. Keegan's report; the morale of fellow employees in the Priority Courier unit; the disruption and problems with Collective Agreement in re-assigning Mr. Worobetz; and the finding of this Tribunal regarding Mr. Worobetz's ability to perform the basic and essential requirements of the Priority Courier job at the time in question or at any reasonable time in the future.

I initially found Canada Post Corporation's lack of any significant initial screening for on-call casual employees somewhat disturbing. However, after further consideration, it is my view that although it appears more preferable to conduct some reasonable degree of testing for a job where reading and sortation skills are required, it would not be reasonable and practical to require an employer to test employees who are hired on an on-call casual basis. In addition to assisting the employer with volumes of work, it is only reasonable to see the nature of an on-call casual employment relationship as one which provides the employer with an opportunity to assess, without prejudice to it, the ability of an employee to perform the required tasks of a job. I also have to say, as an aside, that even if in my

view that proper testing of prospective on-call casual employees ought to have been conducted, the failure to do so, in this case, would not

amount to a contravention of Section 7 of the Canadian Human Rights Act. Presuming that a proper test or screening would have been conducted by Canada Post Corporation, based on the evidence before this Tribunal, Mr. Worobetz would never have been placed on the on-call casual list because he lacked the mental aptitude to sort mail quickly and accurately. He has suffered no prejudice from the lack of pre-testing for the Priority Courier job except to the extent that he was put in a job situation where, in my view, he did not have the proper aptitude to successfully perform the required tasks, which led to a discomforting experience on his part. More correctly, the issue of testing and a possible contravention of Section 7 of the Canadian Human Rights Act in this case is related to the testing on the job conducted by the Respondent and, based on such on-the-job testing, it's decision not to call Mr. Worobetz to work any further.

I believe the testing and training issues are related in this matter and, in the case at hand, Canada Post Corporation provided Mr. Worobetz with reasonable testing and training to the point of undue hardship. The normal practice is to provide testing/training for a one-week period. In this case, they extended the period to two weeks. There had to be some indication that Mr. Worobetz's performance would likely improve within a reasonable period of time and with reasonable effort. If there had been some such indication, it may have been incumbent upon the Respondent to provide him with additional time. However, I believe the on-the-job assessment made by Canada Post Corporation at the time is confirmed by Dr. Keegan's assessment of Mr. Worobetz. Although Dr. Keegan would not state his opinion on whether or not Mr. Worobetz could perform the duties of the job in question, I believe that the observations he makes about Mr. Worobetz's cognitive difficulties and the specific aptitudes indicated for mall and postal clerks support the evaluation made by Canada Post. As well, as indicated, I have also found, based on the evidence and expert opinion presented at the hearing, that Mr. Worobetz could not perform such duties and would not likely be able to do so to any reasonable degree in the future. With these facts in mind, an extension of the testing/training period was pointless.

There are cases outlining the responsibility of a respondent to conduct individual testing (such as Friesen v. Regina (City) Commissioners of Police, (1991), 13 C.H.R.R., D/11 [Saskatchewan Human Rights Commission]). In the circumstances of this case, where Mr. Worobetz worked with another employee in a relatively small group of employees (ie. no more than four) with one supervisor, my assessment is he received a fair and individual test.

Furthermore, in this case, given the job status held by Mr. Worobetz with Canada Post Corporation (being that of an on-call casual employee who was just commencing his employment) I am satisfied that it would cause an undue hardship to require the employer to attempt relocation of Mr. Worobetz to another department once it was

determined that he could not properly perform the task within the Priority Courier section. The evidence before the Tribunal suggests that there were speed and accuracy requirements in almost every section of the sortation plant. Although a large corporation like Canada Post may potentially have positions somewhere in the country where a person with Mr. Worobetz's disability could properly perform the basic and essential tasks or requirements of the job, I consider this to be well beyond the point of undue hardship given that Mr. Worobetz was a very short-term, on-call casual employee and, also, given the fact that the evidence disclosed there was a Collective Agreement in effect which governed where employees were to be placed, etc. Anything other than another on-call casual position would require disruption to the Collective Agreement in effect between Canada Post Corporation and its employees which in and of itself is not sufficient to constitute an undue hardship. However, given all the circumstances, this simply adds to the Respondent's hardship in retaining an on-call casual employee by relocating him - to the point where the hardship is undue.

I should also point out that on the issue of relocation of an employee, the duty to accommodate, as dealt with in Central Alberta Dairy Pool, has been interpreted to mean that the employer must " . . . accommodate the employee relative to his or her current position" (see Re: Royal Alexandra Hospital and Alberta Hospital Employees Union, Local 41 (1992), 29 L.A.C. (4th) 58 at page 76). I am not certain that I would agree with this observation in all situations, however, I certainly do agree with it in the context of this case given the status and duration of Mr. Worobetz's employment. To require relocation would be an undue hardship.

Furthermore, there was evidence regarding the negative effect of the morale of fellow employees with Mr. Worobetz's continued employment with the Corporation. As with some of the other factors already mentioned, this alone would not necessarily be viewed as a sufficient basis to determine that continuing Mr. Worobetz's employment would be an undue hardship. Also there is a recognized concern with giving too much weight to this factor. In Renaud, supra,

Sopinka, J. commented on this consideration on page 988 in the following manner:

> It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration.

Because of the indicated Union tension at the time, I consider this factor with some degree of caution. However, Priority Courier employees' pride associated with a low number of mis-sorts is a valid and reasonable consideration. Taken with the other factors, including the Tribunal's findings with regard to the likelihood of Mr. Worobetz

being able to perform the task at any reasonable time in the future with any reasonable degree of accommodation and effort, it would again appear to create undue hardship on the part of the employer if it had to continue the employment and negatively effect the morale of employees in the Priority Courier section.

In short, Mr. Worobetz simply did not appear suited for the position in question. It is unfortunate that a determination as to his suitability could not have been made before he began working in the Priority Courier section. Mr. Worobetz was a very determined individual, unaware of any mental disability. The frustration he experienced when the job did not work out for him and when Canada Post Corporation informed him that he was, in their view, not able to properly perform the job, is understandable given his lack of awareness about any mental disability. ln is also my view that a great deal of his frustration regarding this Complaint was caused by such lack of awareness. However unfortunate this situation may be from Mr. Worobetz's perspective, I believe, that on the facts before this Tribunal and in the circumstances of this case, Canada Post Corporation made every reasonable effort to accommodate Mr. Worobetz, to the point of undue hardship and as such, the Respondent has discharged the onus upon it in this regard.

Consequently, I find that the complaint has not been substantiated on any possible basis and is dismissed.

DATED November 21st, 1994.

RAYMOND W. KIRZINGER, Chairman