

**CANADIAN HUMAN RIGHTS TRIBUNAL    TRIBUNAL CANADIEN DES  
DROITS DE LA PERSONNE**

**TERRY BUFFETT**

**Complainant**

- and -

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

- and -

**CANADIAN ARMED FORCES**

**Respondent**

**PRELIMINARY MOTION**  
**SEEKING THE DISMISSAL OF THE COMPLAINT**

MEMBER: Michel Doucet

2005 CHRT 16  
2005/03/21

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**I. INTRODUCTION**

[1] On February 10, 2005, the Respondent, the Canadian Armed Forces, brought a preliminary motion to have the complaint of Terry Buffett ("the Complainant") dismissed. It is the Respondent's position that the alleged discrimination does not constitute a denial of an employment benefit on one of the enumerated grounds under section 7 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6. It argues that since there is no employment relationship between the Respondent and the Complainant's spouse, the conduct does not fall within the course of employment. Furthermore, the Respondent adds that the provision of benefits to only its members under the Canadian Forces Health Services Plan is a distinction based solely on employment status which is not an enumerated ground under the *Canadian Human Rights Act*.

[2] The Respondent further indicated that the provision of insured health care benefits by the Canadian Armed Forces is not an employment practice or policy related to employment opportunities and it does not, therefore, fall within the jurisdiction of section 10 of the *Canadian Human Rights Act*.

[3] At the preliminary hearing, the Respondent also raised the issue of whether the Complainant had met the legal test for proving a *prima facie* case of discrimination.

## **II. THE FACTS**

[4] For the purpose of the preliminary motion, the parties have agreed to the following facts.

### **A. The Canadian Health Care System**

[5] By virtue of the *Constitution Act*, and as expressed in the *Canada Health Act*, Canada has a system of universal health care in which all provinces are responsible for the provision of essential health care to residents with financial contribution from the Federal Government.

[6] The only exception to this system is those groups of persons falling directly under the control of the Federal Government, including the Canadian Armed Forces, who are exempted from coverage by the Provincial Health Care Plan.

[7] The *Constitution Act* places responsibility upon the Federal Government for providing health care to members of the Canadian Armed Forces at public expense. The Respondent provides its members with comprehensive health care comparable to that guaranteed under the *Canada Health Act*. The health care services provided by the Respondent stand in the same position and have the same role as the Provincial Health Care Plan.

### **B. The Canadian Armed Forces Health Services**

[8] The Canadian Forces Health Care Plan operates under the direction of the Canadian Forces Health Services Group, which is responsible for the delivery of health services to members of the Canadian Armed Forces.

[9] The Respondent has developed a large infrastructure for the provision of services inside and outside Canada and operates on an annual budget in excess of 728 million dollars.

[10] The Respondent strives to provide its members with access to the same health care that the average Canadian would expect; however the Respondent also has added health care delivery requirements associated with the operational nature of the Canadian Armed Forces. The Respondent has a core of uniformed medical professionals and it also employs a number of civilian medical experts on a contractual basis to provide care to its members. It provides enhanced primary care services, including coverage for family doctor care, laboratories, mental health coverage, full pharmaceutical coverage, physiotherapy, social work and dental care.

[11] The Respondent also relies on various agreements with civilian health care agencies to assist in providing comprehensive health care to its members. Where it is necessary for a member to utilize the services of a civilian medical professional, the civilian agency submits an invoice to the Respondent for payment.

### **C. Canadian Forces Spectrum of Care Policy**

[12] The Canadian Forces Spectrum of Care Policy describes the health care benefits and services that are available and publicly funded for members of the Canadian Armed

Forces. The five principles which are considered in determining the scope of benefit coverage are:

- a) the benefit is necessary for the purposes of maintaining health and mental well being, preventing disease; diagnosing or treating injury, illness or disability;
- b) the benefit sustains or restores a serving member to be an operationally effective and deployable member of the Respondent;
- c) the benefit adheres to the scientific principle of evidence - based medicine;
- d) the benefit is not for purely experimental, research or cosmetic purposes; and
- e) the benefit is funded by a single province or federal agency.

[13] There is also a process within the Canadian Forces Health Services Group whereby requests for funding medical procedures, not covered by the Respondent's Health Care Plan, may be made by Canadian Armed Forces members and considered by the Respondent.

#### **D. Dependant Care**

[14] The Respondent does not have a program for publicly funded health care for families of its members and does not have the legislative mandate to provide medical coverage for non-members of the Canadian Armed Forces. Spouses and children of its members receive medical coverage through the Provincial Health Services Plan in the province in which they reside or through the Public Service Health Care Plan.

[15] There are a number of limited and exceptional circumstances in which the Respondent's medical personnel may provide medical treatment to family members of its personnel. These are limited to emergency situations in remote locations or where families accompany a member to positions outside of Canada.

#### **E. The Complainant**

[16] The Complainant holds the rank of Sergeant in the Regular Force of the Canadian Armed Forces. He is currently posted at CFB Gagetown, in the province of New Brunswick and receives health care through the Respondent's Health Services Plan. Rhonda Buffett, his wife, is not a member of the Canadian Armed Forces. She is a resident of the province of New Brunswick and at the relevant time was covered by the New Brunswick Medicare Plan.

[17] The Complainant and his wife have had difficulty conceiving. The Complainant's wife suffered four miscarriages early in their marriage. Following these difficulties the couple went through medical investigation to determine the cause of the problem. This medical investigation for the Complainant was covered by the Respondent's health plan. The investigation revealed that the Complainant was suffering from male factor infertility.

[18] The Complainant underwent further medical treatment for his condition. He received varicocele, surgery which was funded by the Respondent's health plan. Medication, the only other treatment for his condition, was not recommended in his circumstances.

[19] His physician recommended In Vitro Fertilization (IVF) and Intracytoplasmic Sperm Injection (ICSI) as his spouse's best chance at becoming pregnant. In IVF, physicians prescribe medication to the female to stimulate the production of multiple eggs, which are then retrieved from the ovaries and incubated. The sperm sample is then mixed with the woman's eggs in a Petri dish. If conception occurs a small number of the resulting embryos are placed in the female's uterus.

[20] ICSI may be used with immotile sperm during In Vitro Fertilization. In ICSI, a sperm sample is assessed under a microscope. A single sperm is selected from the sample and injected, with a needle, directly into an egg. The fertilized egg is placed in an incubator. The resulting embryo is implanted into the female's uterus.

[21] The Complainant requested funding from the Respondent for his wife to have IVF with ICSI.

[22] The Respondent's Spectrum of Care Policy provides the following treatments for infertility:

- a) investigation,
- b) medication,
- c) surgical treatment,
- d) artificial insemination, and
- e) in vitro fertilization. However funding will be provided in this case only
  - i) if the infertility is the result of double fallopian tube obstruction,
  - ii) for a maximum of three cycles, and

g members, not to civilian dependents, spouses or partners of serving members.

[23] The Complainant's request was denied because the beneficiary of the funding was not a member of the Canadian Armed Forces. In other words he was denied funding for IVF and ICSI because his wife is not a member of the Canadian Armed Forces and the IVF with ICSI can only be performed on a woman. If she had been a member of the Canadian Armed Forces, the agreed statement of facts indicates that her request would also have been denied because the treatment requested did not fall into the specific provision for funding, since she did not have double fallopian tube blockage.

[24] The Respondent's coverage for infertility is the same as the coverage offered by the Ontario Health Insurance Plan and the Public Service Health Care Plan. No other provincial health care plan covers the cost of IVF. There are currently no medical insurance plans in Canada which cover the costs of ICSI.

[25] Mrs. Buffet did request funding from the New Brunswick Medicare plan for IVF with ICSI but was denied. She also requested funding through the Public Service Health Care Plan and was also denied.

[26] On May 23, 2002, the Complainant filed his human rights complaint asserting that providing funding to only female members of the Canadian Armed Forces, who suffer from fallopian tube obstruction, is discriminatory on the basis of sex, disability, and family status contrary to section 7 of the *Canadian Human Rights Act*. On February 3, 2004, he amended his complaint to add that the Respondent had applied a discriminatory policy contrary to section 10 of the *Act*.

### **III. THE RESPONDENT'S ARGUMENTS**

[27] The Respondent referred to the complex set of Federal and Provincial legislation, which govern the provision of universal insured health services in Canada. It also made reference to the *National Defence Act*, R.S. 1985, c. N-5, which defines the Respondent's organization, administration and responsibilities. Pursuant to subsection 12(2) of this Act, the Minister responsible has the authority to make regulations for the administration and good government of the Canadian Armed Forces. Pursuant to this subsection the *Queen's Regulations and Orders for the Canadian Forces*, chap, 34, (the "Regulation") was adopted. This regulation sets out the requirements regarding provision of health services to members of the Canadian Armed Forces.

[28] Subsection 34.07(4) of the Regulation indicates that medical care shall be provided to all members of the Canadian Armed Forces at public expense. Furthermore, subsection 34.23 states that medical services may only be provided to dependents in very limited circumstances. Family members are normally requested to access insured health services through the provincial government where they reside. In the case of the Complainant's wife this would be the province of New Brunswick. The dependants are also eligible for third party insurance coverage through the Public Service Health Care Plan.

[29] The Respondent, after setting out the legislative framework, spoke of the well known principle that in a discrimination case it is up to the Complainant to establish a *prima facie* case. In the case of this complaint this means that the Complainant must prove, on a balance of probabilities, that the actions of the Respondent constitute an "employment practice which creates a distinction based on a prohibited ground." Once this *prima facie* case is established then the burden of proof shifts to the Respondent to show, on a balance of probabilities, a *bona fide* justification for its practices in relation to the Complainant.

[30] According to the Respondent the claim under section 7 of the *Canadian Human Rights Act* should be denied because the refusal to fund the medical procedure was not in the course of the Complainant's employment. In this case, the Complainant, as an employee of the Canadian Armed Forces, requested funding for a medical procedure to be performed on his wife. Therefore, according to the Respondent, there has been no benefit denied to the Complainant by his employer in respect of his employment relationship, but rather, there has been a refusal to extend funding for medical procedures to the Complainant's wife.

[31] The Respondent goes on to argue that pursuant to the legislative scheme described above, a non-member is not entitled to coverage under its medical plan and given that the benefit requested was for a non-member, this complaint is not related to a differentiation based on employment.

[32] It is also the Respondent's position that the claim under section 10 of the *Canadian Human Rights Act* should be denied because its Health Services Plan, and the related Spectrum of Care Policy, does not deprive the Complainant or any other employee of an employment opportunity. According to the Respondent, health care benefits and services are not an employment opportunity as defined by the *Act*. It adds that employment opportunities are ways by which an employee is hired, promoted and trained within an organization. The Respondent argues that the purpose of section 10 is to prevent employers from having discriminatory practices or policies which affect the way they hire, train or promote employees.

#### **IV. THE COMMISSION'S ARGUMENTS**

[33] According to the Commission, the Respondent's arguments do not take into account the seriousness and the complexity of the complaint. It fails to take into account that the complaint is that of Sgt. Buffett, a member of the Canadian Armed Forces, and not the complaint of his spouse. The Complainant alleges that he has been discriminated against on the basis of the Respondent's application of its Health Care Plan. For the Commission, the complaint raises a host of other questions going beyond the single issue of funding for a medical procedure.

[34] The Commission asserts that the Tribunal should not dismiss this complaint without a hearing and that the Respondent's request for dismissal does not meet the test set out in

previous decisions where the Tribunal has stated that it should exercise its jurisdiction to dismiss a complaint only in the "clearest of cases."

[35] Although the parties have come to an agreement on certain facts for the purpose of this preliminary hearing, the Commission maintains that they also agreed that they would be able to expand on these facts at a full hearing of the matter.

[36] The issues raised by the Complainant are, according to the Commission, live and complex issues. They cannot be narrowly boiled down to a question of whether or not the Complainant's spouse ought to be covered by the health benefit plan. The Commission consequently requests that the Respondent's application be dismissed.

## **V. THE ISSUES ON THE PRELIMINARY MOTION**

[37] In its preliminary motion, the Respondent asks that the complaint be dismissed on the basis :

- a) that its refusal to fund the medical procedure did not constitute a denial of an employment benefit on one of the enumerated ground of section 7 of the *Act*;
- b) that the Complainant cannot make out a *prima facie* case of discrimination;
- c) that the provision of insured health care benefits is not an employment practice or policy related to employment opportunities and does not, therefore, fall within the jurisdiction of section 10 of the *Act*.

## **VI. THE DECISION**

[38] Subsections 49(1) and 50(1) of the *Canadian Human Rights Act*, provides:

49(1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

50(1) After due notice to the Commission the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

[39] Taking into consideration the obligation set out in the *Act* that all parties should be given a full and ample opportunity to appear at the inquiry and present evidence and make representations, the Tribunal is of the opinion that it should exercise cautiously its jurisdiction to dismiss a complaint at a preliminary stage. As it was stated by my colleague Paul Groarke in *Cremasco v. Canada Post Corporation*, (2002/09/30 - Ruling No. 1), at paragraph 83: "It would undermine the remedial character of human rights legislation, which calls for a large and liberal interpretation, to curtail the right of complainants to a hearing."

[40] Accordingly, I agree with my colleague that the power of the Tribunal to dismiss a case at a preliminary stage should only be exercised in the "clearest of cases." Does it make any difference that the parties have agreed to some facts for the purpose of the motion? I do not believe so in regard to the parties' own admission that they could expand on these facts at the hearing of the complaint.

[41] At the hearing on the motion, the parties and the Tribunal had the following exchange:

**MR. PAGOWSKI:** I'd make just one further submission. This just arises out of something that my friend has said, it doesn't go to the substance.

**THE CHAIRPERSON:** No.

**MR. PAGOWSKI:** My friend and I have had correspondence -- I'm sure my friend would agree with me here -- we've had correspondence on the issue of the factual background that would have formed this particular motion, and we had agreed that -- that that context -- the factual basis may well be expanded at the time that we get to the Tribunal hearing. So only for the purposes of this -

**MS RICHARDS:** Yes.

**THE CHAIRPERSON:** Because I did understand that at the last conference call, when I have said I thought the parties had agreed on all the facts, and both of you did indicate that you could expand on the facts if there was a hearing.

**MS RICHARDS:** Absolutely, and I didn't intend to mislead you in regards to that.

**THE CHAIRPERSON:** No, I understand that.

[42] The matters raised by the Respondent in its motion are certainly very important. They raise significant issues of public interest which could have an impact well beyond the present complaint. In fairness to all the parties, the Tribunal feels that these matters should be dealt with at a full hearing of the matter during which all parties will have the opportunity to present their evidence and make legal representations. It would not be in the parties' best interest that these issues be dealt with expeditiously as a preliminary motion, certainly not when all the facts have not been submitted.

[43] The preliminary motion of the Respondent is dismissed and the matter will proceed to a full hearing on the merits. The parties will provide forthwith to the Tribunal their dates of availability for a hearing of one week in the month of May or June 2005. They will also exchange and file with the Tribunal a final list of their witnesses with a resumé of the evidence that these witnesses will be giving at the hearing. The parties will also conform themselves with the Tribunal's Rules of Procedure in regards to expert evidence, if any. The Tribunal is also available to deal with any matter arising from this decision or any other preliminary matters that the parties would want to raise prior to the hearing.

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"Signed by"  
Michel Doucet

OTTAWA, Ontario  
March 21, 2005

#### **PARTIES OF RECORD**

TRIBUNAL FILE:	T976/9604
STYLE OF CAUSE:	Terry Buffett v. Canadian Armed Forces
DATE AND PLACE OF PRELIMINARY HEARING:	February 10, 2005 Fredericton, New Brunswick

DECISION OF THE TRIBUNAL DATED:

March 21, 2005

APPEARANCES:

Terry Buffett

On his own behalf

Dan Pagowski

On behalf of the Canadian Human  
Rights  
Commission

Elizabeth Richards

Jessica Harris

On behalf of the Respondent