

**Canadian Human Rights Tribunal
des droits de la personne**

Tribunal canadien

JACQUELINE BROWN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ROYAL CANADIAN MOUNTED POLICE

Respondent

REASON FOR DECISION

MEMBER: Dr. Paul Groarke

2004

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I. INTRODUCTION

[1] The Complainant is a member of the Royal Canadian Mounted Police. On March 14, 2001 she filed a complaint with the Human Rights Commission alleging that the force had discriminated against her under section 7 of the *Canadian Human Rights Act* "on the basis of sex and family status, by treating me differently with respect to the terms and conditions of my employment". The allegation arose out of the Complainant's application for a promotion. The complaint was later amended to include an allegation under section 10.

[2] A hearing was held in Vancouver in August and September 2003. The Commission did not participate in the hearing, other than to provide a general sketch of the existing law. It will be apparent that I have consulted its "statement of key principles", along with the written submissions for the Complainant and Respondent, in preparing the following reasons.

II. FACTS

[3] Corporal Brown is a member of the RCMP. She is married to Corporal Colin Brown, another member of the force. She submits that she was passed over in favor of other candidates because of her sex and marital status. The Respondent does not dispute the fundamental allegation and merely argues that it was reasonable to consider her marital status in the promotional process. It states that sex was not a consideration.

A. The promotional process

[4] It may be helpful to review the promotional process in the RCMP before dealing with the specific facts of the present case. Staff Sergeant Mitchell, the special advisor to the Career Management Unit advised the Tribunal that the RCMP has used three different systems of promotion. The original system of promotions was based on a review of personnel files. An officer seeking a promotion would apply to a promotion board, which dealt with applications on an individual basis.

[5] This system was replaced with the "cycle" system, which was based on the publication of lists of available postings. These lists were sent to interested members, who would apply for a promotion by submitting a list of their preferred postings. The third system, predictably, was a synthesis of the two previous systems.

[6] Staff Sergeant Wills was the Staff Relations Representative. This was an elected full time position. He testified that members who criticized the first system would have called it an "old boys" network. By the mid-eighties, there were complaints that the system was unfair. It was generally agreed that the process should shift its focus from managerial supervision to "core competencies." The idea was to rid the system of any biases.

[7] The "cycle system" was implemented in 1994. The word "cycle" refers to a distinct process of promotional offers that takes place every two years. There were 4 cycles. There were problems however, maintaining the schedule set by the cycle system. The third cycle should have ended on March 31, 2000 and was well behind. Apparently there was a computer problem. Cycle 4 had already started and was also behind schedule. It was a frantic time.

[8] There were additional concerns. The promotional cycles that were held in the spring of 2000 were the last cycles before the implementation of a new promotions system. This was a pressing concern because the rules for the new system had not been established and the next round of promotions would not be completed for some time. The Career Management Unit was looking at "a void."

[9] It follows that there was a lot of pressure on Staffing and Personnel. Inspector Donovan testified that the Career Management Unit was over budget and had to obtain permission to go with the last lists. Transfers presented an additional problem. Each move cost the RCMP an average of 36 thousand dollars and there wasn't enough money to pay for all the moves. Staff Sgt. Mitchell's instructions were to go ahead with the promotions, but in a financially responsible manner.

[10] There were other pressures. The promotional process in the RCMP is handled on a divisional basis. The British Columbia Command is known as E Division. The Division was seriously understaffed and was trying to keep as many members working as possible at the time. There was also a problem recruiting members for promotions in the lower mainland. This was apparently a reflection of the cost of living in the area.

B. The Offering in March 2000

[11] The promotional offering for E Division in March 2000 was sent to 200 officers. There were approximately 60 corporal's positions. The members applying for a position were placed on a promotion list. This list ranked the candidates on the basis of a combine score calculated on the basis of the candidate's performance report, a test, and the candidate's seniority. There was a second round of promotions because a number of corporals were promoted to sergeant, leaving vacancies at the corporal's rank. The candidates were advised that a member who refused a posting that she had requested would be struck from the promotion's list.

[12] The Career Management Unit in E Division was run by Superintendent Schlecker. There were two inspectors under him. One of them was Inspector Donovan, who was in charge of the promotional process. Staff Sgt. Mitchell reported to Insp. Donovan and had immediate custody of the process. It was Staff Sgt. Mitchell's responsibility to vet the lists and make recommendations to his superiors. These recommendations were reviewed by Insp. Donovan and approved by Supt. Schlecker. The Superintendent had the final say in the matter.

[13] Staff Sgt. Mitchell testified that he started with the most highly ranked candidate, placed that candidate and moved down the list. Some positions required specific qualifications. Once a candidate met the qualifications however, that "there was no reason not to appoint them". After the list of promotions had been approved by his superiors, he would contact each member's supervisor, to see if there was any reason not to give her the selected posting.

C. Cpl. Brown's Application

[14] The Complainant had written the Corporal's exam in 1997. She scored in the top 10 percent but did not apply for a promotion. She had other matters to deal with and in 1999, her father became terminally ill. She requested a compassionate transfer to Saskatchewan, so that she could be close to her father. Although she was placed on a "humanitarian" list, she was denied the transfer.

[15] Corporal Brown's Career Management Officer was Sergeant Kimoto. He had been in Staffing and Personnel since 1993. He advised Cpl. Brown to participate in the promotional cycle for 2000, since it was probably the last. Cpl. Brown accordingly applied for a number of postings within driving range of Calgary, where her father was occasionally hospitalized. Although this has little bearing on the legalities of the situation, it explains a good deal of her response to subsequent events.

[16] Cpl. Brown was ranked 47 on the list of candidates and applied for 37 positions, in order of preference. Her first five preferences were Columbia Valley, Whistler, Gibson's Landing, Prince George, and a detective's position in Coquitlam. She wanted the position in the Columbia Valley because it was 4 hours from Calgary. She listed a general duty posting in Coquitlam as her 17th choice. I am inclined to think that the senior managers in Staffing and Personnel felt that she was ranked too highly, since that would go a long ways in explaining what followed.

[17] There is no doubt that Cpl. Brown made a mistake in applying for too many positions, some of which were of little interest to her. I think this showed a lack of confidence that inevitably became a factor in the decisions made by the Career Management Unit. There is some truth to the suggestion that she did not seem to know what she wanted. Sgt. Kimoto thought she was "wide" open for positions in the lower mainland.

[18] Cpl. Brown and her husband, Colin Brown, were nevertheless concerned that management would simply leave her in Coquitlam, if she included it in her preferences. They accordingly spoke to Sgt. Chris Deevy, officer in the Career Management Unit, who assured them that there wouldn't be any "leap-frogging." Colin Brown checked this with Staff Sgt. Mitchell and felt confident that a lower ranking officer would not be given a position ahead of his wife.

[19] Sgt. Deevy testified that Cpl. Brown phoned him on May 3, 2000 and asked him a question of the following nature: "If I'm the first qualified candidate for a position, would I receive that position?" He simply said yes. This became a pivotal event in what followed. The reality is that Cpl. Brown relied far too heavily on the advice of Sgt. Deevy and Constable Lou, another Staffing officer, who simply encouraged Cpl. Brown to put down as many positions as possible. It is notable that Sgt. Deevy would not provide the same advice today.

[20] Much of the evidence at the hearing focused on the ranking of candidates. Staff Sgt. Kimoto believed that the person who was ranked higher would normally be given the posting, as long as that person met the required qualifications. He nevertheless acknowledged that the Career Management Unit had discretion under 134(4)(d)(1) of the Career Manual to award a posting to another applicant. He stated that this section had been invoked from time to time, prior to the Brown case.

D. The First Round of Promotions

[21] Insp. Donovan and Staff Sgt. Mitchell described the first round of promotions. Staff Sgt. Mitchell provided Insp. Donovan with a list of the candidates, in the order they were ranked matching each candidate with the promotion that he was proposing. They went through the list together. When they got to Corporal Brown, who was 47th on the list, they worked through her choices, one by one. Although the Complainant was the highest-ranking candidate for at least five of her earlier preferences, Staff Sgt. Mitchell recommended that she be given a general duty posting in Coquitlam, her 17th choice. Insp. Donovan had no difficulty with the recommendation, which was later confirmed by Supt. Schlecker.

[22] Columbia Valley was the Complainant's second choice. Staff Sgt. Mitchell and Insp. Donovan both gave evidence that the posting was given to someone else because it was not possible to find a position for her husband. There was an issue of cost transfers. When a transfer of over 40 kilometers is made, it triggers the relocation process, which costs something in the range of 28 to 40 thousand dollars. The problem with moving someone with a spouse is that management would have to move them a second time, if no posting for the spouse became available. It was the second cost transfer that concerned the Management Unit.

[23] The Management Unit was concerned that they would not be able to find a position for Cpl. Brown's husband, if his wife was transferred to a small detachment. This was a general staffing problem in small detachments, where the rules apparently prevent the force from posting family members together. At the back of this reasoning, there was the fact that it was far more convenient to leave both of the Browns in the lower mainland.

[24] The requests for a posting in Columbia, Gibson's Landing, Whistler and Prince George were rejected for much the same reasons. There was no specific strategy to limit the cost transfers. It was simply done on a case-by-case basis. If it was possible to keep someone where they were, they would keep them there. The evidence was that the Management Unit was working within "dire" financial constraints at the time. They were under orders to keep costs to a minimum.

[25] Staff Sgt. Mitchell candidly acknowledged that Cpl. Brown had listed too many choices. If she would have only listed the Columbia Valley posting, he testified that she would have been awarded that position. This is because the Career Management Unit would have had no choice in the matter. She was entitled to a promotion. It was only because she had listed her other preferences that she was awarded another posting.

[26] On March 14, Staff Sgt. Mitchell sent an email to the Complainant advising her of the recommendation that she be promoted on site to Coquitlam. This would leave her husband where he was. Cpl. Brown was surprised, since she felt that she was entitled to a posting if she was the highest ranking candidate who had applied for it.

E. Intervening Events

[27] Cpl. Brown and her husband met with Staff Sgt. Mitchell the following day. He confirmed that she had been ranked number one for the Invermere posting. He also informed them that they were concerned about finding another posting for her husband. They then spoke to Supt. Schlecker. They wanted to resolve the matter before the official list went out and it was too late to change things.

[28] Supt. Schlecker gave them a number of reasons for the decision to leave Cpl. Brown in Coquitlam. One was cost. Another was their spousal situation. He stated that it was "prudent" to leave them in Coquitlam. Cpl. Brown's husband responded by requesting leave without pay. Supt. Schlecker was unwilling to consider it. The meeting lasted for about an hour. Supt. Schlecker agreed to discuss the matter with his staff but was firmly of the view that Coquitlam was "a good place to work".

[29] After the meeting with Cpl. Brown and her husband Supt. Schlecker met with Staff Sgt. Mitchell and Insp. Donovan. Sgt. Kimoto may have been present. Supt. Schlecker told them that Cpl. Brown and her husband were unhappy. They discussed the matter and decided that it wasn't feasible to change the decision. The most fundamental issue was the Complainant's husband. There were no other corporal's positions in the area and it didn't make sense to give her the Columbia Valley posting, since that only meant that they would have to relocate her husband at a later date. This would require another cost transfer.

[30] I do not believe that gender entered into the discussion. There was a discussion about giving the Complainant's husband leave without pay. The problem was that this would merely delay the problem of finding a position for her husband and present transfer costs at a later date. I feel obliged to add that this

kind of *ad hoc* solution to the problem, which circumvents the formal staffing process, would have been inappropriate.

[31] I think it is clear from the circumstances that there was another consideration that entered into the matter. The consensus was that the decision had already been made and there was no going back. It would have had an impact on too many other decisions. There was an email waiting for the Browns when they returned to Coquitlam, saying that the Complainant would be posted on site. Cpl. Brown and her husband were angry and disappointed. They felt that the process had betrayed them.

F. Staff Sgt. Wills

[32] The exact chronology of events is not completely clear to me. Cpl. Brown and her husband also discussed the matter with Staff Sgt. Wills, their Staff Representative. Staff Sgt. Wills told them that there were positions for the Complainant's husband sufficiently close to Whistler, Gibson's and Prince George to give her any of these posting. He testified that there were five Corporal's postings within a one hour drive from Invermere.

[33] Staff Sgt. Wills knew Sgt. Kallin, the Commander in charge of the Columbia Valley detachment. He accordingly phoned Sgt. Kallin to find out what the responsibilities would be. Sgt. Kallin said that he didn't want any more females. Staff Sgt. Wills said: "Ed, you can't talk like that." Sgt. Kallin said that he didn't care. He had already had two maternity leaves, which left him under-staffed, and he didn't want any more. He didn't want to work any more nights. The problem was that there was no mechanism in place at the time to replace a member on maternity leave. This left many detachments understaffed.

[34] Staff Sgt. Wills recounted the conversation with Sgt. Kallin to Cpl. Brown, who naturally came to the conclusion that this explained what had happened. As I understand it, this conversation was also relayed to Staff Sgt. Mitchell, who mentioned it to his superiors. The evidence is nonetheless clear that the Management Unit had no contact with anyone at Columbia Valley and I do not accept that Sgt. Kallin's views entered into the matter. Sgt. Kimoto testified that the receiving detachment commander has very little say in determining who would be promoted into a detachment.

[35] Staff Sgt. Wills met with Staff Sgt. Mitchell to discuss the situation. The two men went through Cpl. Brown's preferences one by one. Staff Sgt. Wills stated that Columbia Valley was available. Staff Sgt. Mitchell replied that there were issues because of her husband. There was only one Corporal's position. Staff Sgt.

Wills told Staff Sgt. Mitchell that he didn't think Cpl. Brown was welcome in Columbia Valley. This was a reference to Sgt. Kallin's comments.

[36] There was a discussion of the detective's position in Coquitlam. That posting was available, Staff Sgt. Wills said, and Cpl. Brown was qualified for the position. Why couldn't she have that? Staff Sgt. Mitchell said that she wasn't GI material. Staff Sgt. Wills demurred stating that she had experience in the investigation of serious offences of the person. Her performance evaluations were satisfactory. There was a similar discussion of the other postings.

[37] They discussed cost transfers. Staff Sgt. Wills pointed out that the person who got the Ridge Meadows position was a cost transfer. The person who got Coquitlam GIS was a cost transfer. This was also true of Columbia Valley. Staff Sgt. Wills accepted that there was a spousal issue with respect to Columbia Valley. But this was not properly explored, in his view, and could have been dealt with in a number of ways. One of the possibilities was to give the Complainant's husband leave.

[38] It was a wide-ranging discussion. The two men disagreed about whether it was difficult to accommodate Cpl. Brown's husband in Whistler. Staff Sgt. Wills felt that she could have been given one of the Prince George postings. It was a "huge" detachment. There would have been "something" like 15 Corporals in the detachment, plus the Corporals in the district headquarters. So why couldn't her husband have been accommodated there?

[39] Staff Sgt. Wills was unhappy with the answers he was getting. By his count, Cpl. Brown was passed over 7 times. The two men discussed her qualifications. Staff Sgt. Mitchell agreed that she was a hard-working, competent young officer. So Staff Sgt. Wills wanted to know why they weren't willing to accommodate her? Staff Sgt. Mitchell said something like: "She is all over the map. She hasn't got a clue what she's doing". Staff Sgt. Wills stated that he was taking the matter over Staff Sgt. Mitchell's head.

[40] Staff Sgt. Wills met with Supt. Schlecker about a week later. He wanted a rationale for what happened, "something that makes sense of it all." Supt. Schlecker simply kept saying that he had to make "the hard choices". When pressed, he relied on section 134(4)(d)(1) of the Career Management Manual. Staff Sgt. Wills testified that he has not seen another case where this section was relied upon.

G. The Second Round of Promotions

[41] Nothing came of the efforts made by Staff Sgt. Wills. Cpl. Brown refused to accept the Coquitlam GD position and withdrew her name from the promotional process. Management took the position that she was refusing a promotion. They then relented and allowed her to participate in the second round of promotions, which was needed to fill the vacancies created by any Corporals who had been promoted to Sergeant. This can be taken as some recognition by the Career Management Unit that the original process had gone awry.

[42] I do not feel that this round of promotions has much bearing on the case before me. Cpl. Brown feels that she should have been given a posting in drugs. Her previous career was in traffic, community policing and community development however. Constable Lou was familiar with her personnel file and had no recollection of anything that would indicate she had the necessary investigative experience for GIS or drugs. Sgt. Kimoto could not recall her having major investigative experience and did not feel that her experience in the area of drug offences was significant.

[43] The decision that Cpl. Brown did not have the qualifications for a drug posting is reasonable and is certainly sufficient to withstand scrutiny. I see nothing unfair in the manner that the competition was conducted and I suspect that the allegations that arose in this context reflect the continuing deterioration in the relations between the parties. The real problem in my view is that there were not enough vacancies to provide Cpl. Brown with a satisfactory posting.

H. Sick Leave

[44] At the end of the second round of promotions, Cpl. Brown was offered a Corporal's position in the Burnaby detachment. She was formally promoted on the day she arrived at the detachment and signed her A22A transfer report. This was on April 12th, 2001. The following day, she reported sick. The Respondent suggested that this was deliberate. If she had taken sick leave on April 6 rather than April 13, she would have received a Constable's salary.

[45] I would prefer to think that Cpl. Brown had come into the new position with mixed feelings and discovered that she could not face her responsibilities. On the stand, Cpl. Brown testified that she went to her doctor, Susan Buchan, and told her that she couldn't go back to work unless things changed. She was experiencing migraines and having dizzy spells. She was also concerned about her father. Dr. Bowman, the regional psychologist from the force, subsequently contacted her. He referred Cpl. Brown to Dr. Hannah, another psychologist. Dr. Hannah thought it was a good idea that she visit her father. So she spent the summer in Saskatchewan on sick leave.

[46] I do not propose to go into the medical evidence at any length, which is sufficient to establish that Cpl. Brown was in considerable distress. Corporal Brown had a lengthy history of migraines and some previous psychological problems. Some of her depression had to do with her father's illness. I nevertheless believe that Cpl. Brown's feelings with respect to her employment were very simple. She found herself unable to return to work without an acknowledgement from the force that she had been treated unfairly.

[47] On the stand, Cpl. Brown took the position that she made a mistake in seeing a psychologist appointed by the force. Her husband appeared to agree. I am not that sympathetic with them on this point. There is evidence on the other side that she was avoiding treatment. She stated that she refused to take the medication that had been prescribed because she was worried about side effects. That maybe so, but I think it is clear that Cpl. Brown was stalling. She had grieved the original promotion and was hoping for a decision in her favor before she returned to work. This came to naught when the grievance was denied.

[48] Insp. Donovan eventually contacted Cpl. Brown, in an effort to resolve the situation. He testified that it is important to get people back to work as soon as possible. There was at least some evidence of rumors and innuendo among the other members of the force. I accept his view that the real solution to these kinds of social issues is to get the member back in a healthy work environment. I accept that Insp. Donovan made real efforts to place Cpl. Brown and her husband in a posting that met their satisfaction. He obtained the authority, for example, to offer them two corporal's positions with the photo radar program in Kamloops before these postings were offered to the rest of the force. Cpl. Brown and her husband declined this posting because they did not believe the photo radar program would survive the next election.

[49] Insp. Donovan also offered Cpl. Brown a posting in Castlegar. She and her husband were prepared to take this posting, on the understanding that the Complainant's husband would take leave without pay until such time as a posting became available. This appeared to be the answer, until Cpl. Brown realized that she was required to "sign off" on her grievance. This was too much for her and the offer fell apart.

[50] Cpl. Brown felt that there was something sinister in the fact that she was required to forgo her grievance. I do not share her feelings. There was nothing improper in the RCMP trying to settle the matter on this basis. This does not affect the situation. Cpl. Brown wanted an open admission that she had been discriminated against and she was entitled to insist on it. Although one has to wonder whether Cpl. Brown made the right decision, she was entitled to reject the agreement on the basis that it did not include such an admission.

[51] Cpl. Brown's refusal to sign the agreement brought the negotiations with Insp. Donovan to a close. There is no doubt that the Inspector was upset and felt she was being unreasonable. But that was the end of it. Insp. Donovan advised her that she would be receiving an order to return to work. Dr. Buchan had reached the opinion that Cpl. Brown was fit for work but did not want to return until her dispute with the force had been resolved. I think there is a certain moral truth in this. It is evident that there was considerable obstinacy on both sides.

[52] When the negotiations with the Insp. Donovan collapsed, the dialogue between Cpl. Brown and her employer collapsed with it. I think it is fair to say that by this point, the Complainant's lack of trust in her employer had progressed to the point where she was suspicious of any efforts to resolve the situation. When Dr. Hannah advised her that she was fit for a desk job, she felt that Dr. Hannah had been pressured. I see no reason to question the good faith of any of the medical or psychological practitioners.

[53] In a last effort to resolve the matter, Colin Brown contacted Sgt. Haggymasy, an assistant to the commanding officer in human resources. The three of them had a meeting, in which the Complainant made it clear that she wanted to continue with her human rights complaint. They then discussed her qualifications. Sgt. Haggymasy discovered that Cpl. Brown had a business diploma and suggested a position at the Integrated Proceeds of Crime Unit. This was a "coveted" posting. Cpl. Brown was eventually awarded the position and has been complimented for her service there. Sgt. Haggymasy was also good enough to find a position for her husband.

III. LAW

[54] There are four points that might be made in discussing the legal issues in the case. The first point is merely that there is no obligation on the complainant to prove a specific intent to discriminate. This is trite law, which was established in *O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536.

[55] The second point relates to the allegation that Corporal Brown was discriminated against on the basis of "family status" under s.7 of the *Canadian Human Rights Act*. The Commission has provided me with *B. v. Ontario (Human Rights Comm.)* (2002), 44 C.H.R.R. D/1 (SCC), where Justices Iacobucci and Bastarache held that "family status" and "marital status" are not restricted to "the mere fact" that one is married or enjoys some other family attribute. These terms include the particular status that one enjoys by virtue of being married to specific individual.

[56] The third point is also uncontroversial. The Commission has cited *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 (FCA), at D/15, for the proposition that discrimination need not be the sole factor in the Respondent's treatment of the Complainant. This is important, if only because it simplifies the present case. If the Complainant's family status was one of the factors in the decision to deny her a specific promotion, that is sufficient to establish discrimination for the purposes of the *Act*.

[57] This takes me to the more fundamental legal issue in the case which relates to the complainant's obligation to establish a *prima facie* case of discrimination. In *Basi v. Canadian National Railway Co.* (1988), 9 C.H.R.R. D/5029, for example, this Tribunal held:

The burden, and order, of proof in discrimination cases involving refusal of employment appears clear and constant through all Canadian jurisdictions: a complainant must first establish a *prima facie* case of discrimination; once that is done, the burden shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour.

Thereafter, assuming the employer has provided an explanation, the complainant has the eventual burden of showing that the explanation provided was merely a "pretext" and that the true motivation behind the employer's actions was in fact discriminatory.

This analysis provides a pragmatic means of determining whether discrimination occurred in a particular situation. It should not be applied in a rigid or mechanical manner.

[58] The decision of an Ontario Board of Inquiry in *Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001, at D/1002, sets out a standard precis of what usually required to establish a *prima facie* case.

In an employment complaint, the Commission usually establishes a *prima facie* case by proving:

- a) that the complainant was qualified for the particular employment;
- b) that the complainant was not hired; and,

- c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

If these elements are proved, there is an evidentiary onus on the Respondent to provide an explanation ... for what occurred.

The point of cases like *Shakes* is that there is no need to prove anything more than the fact that someone no better qualified than the Complainant was hired or promoted.

[59] The situation is simpler where someone less qualified was hired. The usual rationale for the *prima facie* test does not seem of much assistance in this context. In *Basi*, for example, at paragraph 38481, the Tribunal held that:

...the complainant would have a herculean task were it necessary for him to prove, by direct evidence, that discrimination was the motivating factor. Discrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practiced.

This overlooks the fact that there is no obligation on a Complainant to establish that "discrimination" was a conscious factor in the decision to hire someone else. Although the animus of an alleged discriminator may be significant in certain aspects of the process, there is no need to prove a mental state in substantiating a complaint of discrimination.

[60] The older case law speaks of indirect or "adverse effect" discrimination. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 173, for example, the court asked:

What does discrimination mean? The question has arisen most commonly in a consideration of the *Human Rights Acts* and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition. In *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*,

[1985] 2 S.C.R. 536, at p. 551, discrimination (in the case of adverse effect discrimination) was described in these terms: "It arises where an employer . . . adopts a rule or standard . . . which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force". It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint.

The probative side of the human rights inquiry has always focused on the effect of an employer's actions. The same approach can be seen in *CNR v. Canada (Human Rights Commission)* (1987) 1 C.H.R.R. D/1014, at paragraph 30.

[61] The more recent case law has reinforced this approach. In *British Columbia v. BCGSEU*, [1999] 3 S.C.R. 3, usually referred to as the *Meiorin* decision, the Supreme Court held that there was no reason to distinguish between the concepts of direct and "adverse affect" discrimination. This was true under both the *Charter of Rights* and human rights legislation. At paragraph 47, the court wrote that: "... the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the effect of the impugned law, it has little legal importance". At paragraph 48, it continued:

...this Court long ago held that the fact that a discriminatory effect was unintended is not determinative of its general *Charter* analysis and certainly does not determine the available remedy. *Law*, supra, at para. 80, per Iacobucci J.; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 174-75, per McIntyre J.; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 62, per La Forest J. In cases such as *O'Malley*, supra, and *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, this Court endeavoured to entrench the same principle in its analysis of human rights legislation. (30)

This is a consistent theme in the case law. If the doctrine of discriminatory effect applies, evidence of improper motives is an adjunct of discrimination, rather than a defining feature.

[62] It seems to me that this should be the real focus of the process. The initial task of a Tribunal in examining the kind of case before me is to determine whether there is credible evidence that the actions of the Respondent had the requisite effect upon the Complainant. The reality is that discrimination is often a notional act, which exists at least legally in the consequences that flow from it. As I understand the case law, all the Complainant is obliged to do is establish that she suffered the necessary effect. The inference of discrimination already exists in the substantive law and nothing more is needed. The inference of discrimination already exists in the substantive law and nothing more is needed.

[63] There is nothing very difficult in such a proposition. This is much like saying that the Complainant is obliged to lead evidence that she was discriminated against. Nor does it affect the standard analysis, since the doctrine of discriminatory effect and the *prima facie* test introduce the same principle of strict liability into the human rights process. If there is a reasonable explanation for what appears on its face to be discriminatory conduct, it is for the Respondent to establish that explanation. There is no need, however, to see the evidence of such conduct as circumstantial evidence of some corrupt intent.

[64] There is a more general sense in which any person making a legal claim has an obligation to establish the elements of the case that it wishes to advance. It is for the Respondent to reply. This is often referred to as a *prima facie* case, but does not require any significant weighing of the evidence. I do not believe that this affects the primary burden in the case, which remains on the complainant throughout the process. If the Complainant does not establish at the end of the day that she has suffered some discriminatory effect, on a balance of probabilities, the complaint should be dismissed.

[65] This is fundamental law, which derives from the simple proposition that the prosecuting party must prove its case. The case law suggests that the situation is different when the Respondent raises a statutory defence. All I can say is that this is not the situation before me and requires further analysis. I cannot see that there is anything for a Tribunal to do in a case like the one before me other than to weigh the evidence on both sides and determine whether the Complainant has made out her case on a balance the probabilities. This is a compelling and reliable means of deciding the proper outcome in the case, which keeps extraneous considerations out of the process. The general jurisprudence recognizes that it is preferable to keep the tasks of evaluating evidence as simple as possible.

[66] The legal dynamics of the case before me are extremely simple. The testimony establishes that the Complainant was passed over in the promotion process because she was married to another member. The Complainant had no difficulty establishing a credible case in the matter before me. The probative issue is accordingly whether the Respondent was able to provide a reasonable explanation of what occurred and deprive the Complainant of the legal preponderance in the evidence. The failure of the Respondent to provide such an explanation merely leaves the case for the Complainant intact.

IV. ANALYSIS

[67] The purpose of the *Canadian Human Rights Act* is to rectify the problem of discrimination. The Complainant is obliged to establish that she was treated differently than the other candidates on the basis of her sex or marital status. She must also establish that this worked to her disadvantage. The case before me is remarkably simple. Corporal Brown was ranked 47th in the list of candidates and the Respondent has not challenged her ranking. The evidence on all sides was that the Career Management Unit had an obligation to place the higher candidates in the list before placing the candidates below them. The assignment of positions was strictly hierarchical.

[68] I am willing to accede that management was entitled to some discretion in awarding positions. There are global factors that come into play in the promotional process, which extend beyond the circumstances of individual candidates. This is borne out by section 134(4)(d)(1) of the Career Management Manual. The prerogatives of management only extend so far, however, and the qualifications of the candidates must take precedence over other considerations. In my view, this is the positive side of the law of human rights. It is not simply that employers are prohibited from discriminating against their employees in awarding promotions. It is that they are obliged to respect the merit principle.

[69] There were a number of factors that the Career Management Unit was entitled to consider in deciding whether to give Cpl. Brown a particular posting. One of these factors was that Corporal Brown was married to another member of the force. This had a number of implications for the force. It is also apparent that the exact qualifications and circumstances of other candidates needed to be considered. There was evidence for example that members in "limited duration" posts were entitled to a transfer. I think it was reasonable for the Career Management Unit to consider moving costs, the need to accommodate her spouse and the special circumstance of other candidates, in exercising its prerogatives.

[70] It follows that the Career Management Unit was entitled to award a posting to a lower ranked candidate, if it had valid reasons for doing so. This must not be taken too far however. It may have been reasonable to pass over Cpl. Brown's initial choices. The force of such an argument however dissipates as one works one's way through the list. At some point in the process, it can no longer be sustained.

[71] It is apparent that the strength of a candidate's case increases as one goes through her list of preferences. The second time one passes over a candidate, management should take note of that fact. The third time calls for serious reflection. The ranking system must be respected. The Career Management Unit simply failed to meet its legal obligations in this regard. The best illustration of this is probably the fourteenth choice of Cpl. Brown, which was awarded to a candidate who had ranked 96 in the scoring, almost 50 positions below her. This is unfathomable. The prerogative of management to deny Cpl. Brown one of the requested promotions was exhausted long before it reached her 17th choice.

[72] One of the problems with the argument that the Respondent has the right to appoint lower ranking candidates is that this logic cannot be reserved for other candidates. It also applies to Corporal Brown. If a lower ranked candidate was occasionally entitled to a promotion, over and above a candidate that ranked higher in the scoring, this only means that the Respondent had ample latitude to give Cpl. Brown one of her higher preferences.

[73] It is clear that Cpl. Brown's list of preferences demonstrated a certain indecisiveness. I have already suggested that her lack of confidence had a part to play in this. Her choices "were all over the place". It does not matter. The preferences were hers to make and it is not for anyone, least of all me, to question why she chose to list certain positions over others. There is no evidence before me to suggest that other candidates were given their seventeenth choice. The evidence is quite to the contrary. The case is anomalous.

[74] Staff Sgt. Mitchell candidly acknowledged that Cpl. Brown would have been awarded a higher preference if she had limited her choices. At the end of the day, it was the lower choices on her own list of preferences that defeated her. This was a travesty of the process. Corporal Brown did not list her additional preferences, so that her employer could pass her by, in awarding the postings that she wanted to candidates who were ranked below her.

[75] I am satisfied that the decision to give Cpl. Brown the posting in Coquitlam was driven more by costs and the needs of the force than the legitimate concerns of the promotional process. It was convenient to leave Cpl. Brown and her husband in the lower mainland, where management had difficulty retaining officers. This was contrary to the spirit of the promotions process, which was

supposed to be based on the preferences of individual members. The Respondent has not provided me with any other examples of a well qualified candidate who was awarded such a low ranking preference.

[76] I cannot say whether Supt. Schlecker and his staff deliberately treated Cpl. Brown unfairly. This is a common theme in cases of discrimination however. The face of discrimination has an invisible side, which does nothing to mitigate its effect. It is enough to say that the decision to promote Cpl. Brown on site was manifestly unfair. It is equally apparent that her marital status was the major factor in such a decision. This brings the *Canadian Human Rights Act* into play, and is more than sufficient to substantiate the complaint.

V. CONCLUSIONS

A. Section 10

[77] I do not believe that the present case raises significant policy issues. The evidence established that there was a personal rather than a systemic unfairness in the process. The decisions in the promotional process were made on a case-by-case basis. Any policy concerns are peripheral and merely provide the context in which the personal complaint was laid. The allegations under section 10 have not been substantiated.

B. Section 7

[78] This takes me to the complaint under section 7, which alleges that Cpl. Brown was unfairly treated in the promotional process because of her sex and family status. The former allegation was never substantiated. There was evidence that the RCMP is still experiencing some difficulties in integrating women, if only because members of the other gender have felt that they receive preferential treatment. This was very much in the background however.

[79] Staff Sgt. Mitchell acknowledged that there was some banter regarding Sgt. Kallin's comments, but that banter was at his expense. It would be overstating Sgt. Kallin's importance in the narrative to think his views mattered to Staff Sgt. Mitchell, who was under far too much pressure to concern himself with the individual preferences of detachment commanders. The idea that Supt. Schlecker and Insp. Donovan were attentive to Sgt. Kallin's views in dealing with a complex set of promotional requests does not bear up under analysis.

[80] I believe that the staff in the Career Management Unit were aware of their responsibility to make decisions regarding promotion without discriminating against female members. There may have been remnants of an historical bias against female members, particularly at the lower levels. But there is no convincing evidence before me that this affected the competition for promotions. I accept Staff Sgt. Mitchell's evidence that gender was "off the table" and was not considered in the promotional process.

[81] This leaves the allegation that Cpl. Brown was discriminated against on the basis of family status. I am satisfied that this aspect of the case has been substantiated. The witnesses openly acknowledged that marital status was the major factor in the decision and no real explanation was provided by the Respondent, other than to establish that there were significant expenses associated with moving a member to another posting. The Career Management Unit, was under strict orders not to spend money. This was a misplaced concern however and there is nothing in the evidence that would legally justify the decision to leave the Complainant in the lower mainland.

[82] I am not convinced that I have the entire story. Sgt. Deevy still has difficulty explaining what occurred. Staff Sgt. Wills testified that he had never heard a satisfactory account of what had happened. There is no doubt that Staff Sgt. Wills may have developed a certain mistrust of management as a result of his role as a member representative. Even after this is taken into account however, it is evident that the situation cries out for an explanation.

[83] They were probably a variety of factors, legitimate and illegitimate, that contributed to the decision making process. The reality however is that less qualified candidates were given promotions ahead of Cpl. Brown. The unfairness in the process was flagrant. There is no doubt that the Complainant has established a *prima facie* case. She has established a good deal more. The case before me is a case that requires an answer, which was never supplied by the Respondent.

[84] I might say in passing that the promotional process was poorly designed at the outset. This will come as no surprise to the officers in the Career Management Unit. Everyone was under enormous pressure and there were too many demands on the process. In the end, it was simply easier to leave the situation as it was and walk away. I accept the laconic remark of Staff Sgt. Wills who simply said that the amount of effort that would have been required to stop the process and rectify the mistake would have been "huge". The evidence of the other witnesses bears out this observation.

C. Remedy

(i) Apology

[85] The employer's efforts to accommodate the Complainant and redress the initial injustice were substantial. The problem is that it made these efforts without acknowledging that Corporal Brown had been unfairly treated. I believe that this has become the most prominent issue between the parties. When Colin Brown was asked why his wife wouldn't accept the Castlegar posting, he stated that it was "all about regaining her dignity." She needed some admission that she had been wronged.

[86] I am concerned that Cpl. Brown has become more interested in proving a moral point than in resolving the substantive issues before me. There was real stubbornness displayed on both sides of the case. This does not affect my view of the situation. It does not matter whether the discrimination was intended or a product of some conspiracy of circumstances. The fact is that Cpl. Brown was treated unfairly in the promotional process.

[87] Although this is exactly the kind of case that would seem to call for a corporate apology, the decision of the Federal Court in *Attorney General (Canada) v. Stevenson* 2003 FCT 341 (FCTD) prevents me from ordering an apology. This does not exhaust the issue, since it does not prevent the Respondent from making such a gesture. The parties are welcome to make submissions as to whether the conduct of the Respondent in this regard has any bearing on the compensation to which the Complainant may be entitled under section 53.

[88] I expressed some frustration during the hearing that the parties were unable to resolve the complaint among themselves. I am still of the view that it should have been possible to settle the matter, though it may be that the admission Cpl. Brown has been seeking is simply not available. If that is the case, my ruling will have to suffice. It constitutes finding in law that the Royal Canadian Mounted Police discriminated against Corporal Brown.

[89] It is my hope that the force will make what amends it can by negotiating a final resolution of the matter, in a spirit of reconciliation. I am also of the view that Corporal Brown needs to put the matter behind her. Corporal Brown and her husband are dedicated officers and there is no reason why they should not enjoy satisfying professional careers with the force.

(ii) Cost Transfer

[90] Corporal Brown is entitled to the cost transfer that she was denied in the promotional process. I am accordingly ordering that the RCMP provide her with another posting, preferably with the detachment in Saskatoon or Calgary. I gather

that either of these locations would be satisfactory. I am reluctant to enter any further into the specifics of the matter, which remains within the reasonable discretion of management.

[91] I was nevertheless asked to retain jurisdiction on this aspect of the case. If the parties are unable to agree on an appropriate posting within 4 months, I am accordingly prepared to revisit the issue, at the request of either side. As a matter of good faith, I would ask the Respondent to provide reasonable prospects for Corporal Brown's husband. The evidence establishes that there should be no difficulty in providing positions for both of them in a larger centre.

(iii) Compensation

[92] I think it is necessary to hear further submissions as to the appropriate *quantum* of damages and costs. I would prefer to deal with these matters at the same time. It may nevertheless be helpful to provide some commentary on this aspect of the case.

[93] There were a number of submissions. The Complainant relies on the fact that she was on sick leave for over a year. The Respondent replies that she left on medical leave the day after she returned to work and remained on salary until the day that she returned. There was accordingly no wage loss. It is a strange situation in many respects. The RCMP refused to openly acknowledge that it had discriminated against Cpl. Brown. But it was happy to pay her sick leave, which can be traced directly to the distress that she suffered as a result of the discrimination.

[94] The Complainant is entitled to compensation for pain and suffering. She had difficulty testifying and still feels an enormous sense of betrayal. Her emotional, psychological and physical well-being have been affected by the dispute. She has had a loss of confidence and suffered from depression. Her marriage and family has suffered. I would like to hear the parties views as to the significance of these factors in assessing damages.

[95] There are issues on the other side. I believe that the RCMP was within its rights in insisting that Cpl. Brown return to work. I do not think that it was reasonable for her to demand that the complaint be resolved before she returned to her duties. Any institutional process takes time, and an employee cannot expect to be paid indefinitely, when she essentially refuses to work.

[96] I accept Insp. Donovan's observation that the most important thing in rebuilding the relationship between an employer and an employee is to bring the employee back to work. Time runs against the resumption of a harmonious

working relationship. It is clear from the evidence of Corporal Brown that she has done well in her new position and this process has at least begun.

[97] The Complainant also submits that her prospects in the force have diminished as a result of raising her hand in protest. I am not prepared to assume that the force will act in bad faith however, and I accept the Respondent's submission that she has been given a desirable position.

[98] There is an additional suggestion that Corporal Brown was the victim of gossip in the workplace. That is inevitable and the evidence is that the RCMP discourages any public discussion of matters relating to an officer's personnel file. It is not responsible for the illicit gossip of other officers and staff.

(iv) Costs

[99] In a normal set of circumstances, I would have been inclined to award the Complainant her reasonable costs. The Respondent has asked me to reserve my decision on the question however, apparently on the basis that the Complainant rejected a reasonable offer of settlement before the hearing. I have some concern that the facts relevant to such an inquiry may be in dispute. There may also be issues of confidentiality or privilege that need to be addressed. I would accordingly ask the parties to determine whether evidence will be required before proceeding further.

[100] There may be other issues that require attention. Cpl. Brown has asked me, for example, to order that the RCMP to place a copy of my decision on her personnel file. I believe that it is better to deal with such a request after I have heard from the parties on the outstanding issues with

respect to remedy. I would accordingly invite the parties to advise the Tribunal how they wish to proceed. I will retain the jurisdiction to deal with any matters arising out of this decision.

signed by

Dr. Paul Groarke

OTTAWA, Ontario
February 4, 2004

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

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APPEARANCES:	
Chris Finding	For the Complainant
Ronald Snider	For the Canadian Human Rights Commission
Keitha Richardson	For the Respondent