Decision Rendered on July 5, 1982
T.D. 7/82

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, C.-33 as amended

And in the Matter of a Hearing Before a Human
Rights Tribunal Appointed Under Section 39 of
the Canadian Human Rights Act

BETWEEN:
James Anderson,
Complainant
and
Atlantic Pilotage Authority
Respondent

HEARD BEFORE: Susan Mackasey Ashley
Tribunal

Appearances:
Yvon Tarte Counsel for the Complainant
and the Canadian Human
Rights Commission

Murray Ritch Counsel for the Atlantic
Roseanne MacGillivray Pilotage Authority

French version to follow
>This
case relates to a complaint brought by Mr. James L. Anderson, alleging that he was discriminated against by his employer, the Atlantic Pilotage
Authority, on the basis of physical handicap, contrary to sections 7 and 10
of the Canadian Human Rights Act. The complaint form (Exhibit C-4) dated July
7, 1980, sets out the complaint as follows:

Dismissed due to a record of a heart attack six years ago, and recorded as a limitation by the company doctor. Personal doctor says I am capable
of carrying on my work.

Facts

The chronology of events is as follows. In December 1973, Mr. Anderson suffered a heart attack. He was twenty-eight (28) years old. He had been
working in the marine field since he was fourteen (14), and after a period of
recovery from the heart attack, he went back to school to upgrade his sailing

tickets. He had obtained his Fishing Master's Ticket in 1969, and received
his 350-ton Master's Home Trade Ticket in 1975, his Master's Minor Waters
Ticket in 1975, and his Radar Simulator Ticket at about the same time.

At the time of his heart attack, he was mate on a fishing dragger. Between
1973 and the time of his employment with the Atlantic Pilotage Authority, Mr.
Anderson was employed by the following: Atlantic Towing, Saint John, (as
chief mate), Eastern Canada Towing, Halifax (as mate), National Sea Products,
Lunenburg (as deck hand), A.B. McLean, Sault Ste. Marie (as captain) McNamara
Marine, Whitby, Ontario (as captain) and H. B. Nickersons, Riverport, N.S.
(as deckhand and mate).

In 1980 Mr. Anderson became aware that the Atlantic Pilotage Authority in
Halifax was looking for captains to act as relief launchmasters. The duties
of the launchmaster are set out in Exhibit C-6, part of which states that
he/she

Navigates a pilot boat to transport pilots to and from vessels within the District;
by - plotting and guiding the boat over courses with the aid of compass and radar.
by - handling the boat's wheel and engine controls when placing boat alongside vessels to embark or disembark pilots.
by - following the normal practice of seamen in avoiding traffic and protecting the boat and her passengers during the trips.
by - deciding the boat's limitations when operating in foul weather and heavy seas.

Other duties include organizing the dispatch and scheduling of pilot boats,
instructing ships of landing procedures, supervising the maintenance and
upkeep of the boat, maintaining records and lists of stores and other
necessities, and providing transportation to other departmental agencies.

Captain Claude Ball is Director of Operations for the Atlantic Pilotage
Authority. In his testimony he gave a detailed description of the duties of
a launchmaster:

A launchmaster's function is to take conduct or command of the pilot boat. And his primary function would be to transport pilots to and from vessels within the compulsory pilotage area of Halifax, for example. He

would also be responsible for certain maintenance of the boat. He would be also supervising one deckhand. Besides its primary function, the pilot boat also has a search and rescue role. That is to say, we are manned twenty-four hour days in this port as in other ports and should a craft get in trouble, we would be dispatched to render assistance at any given time. Also besides transporting pilots to and from vessels there are times in bad weather when we, under the Act, lead vessels,

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that is a legal definition, for boarding a pilot on board a vessel other than at the regular boarding station. When this happens, the pilot is on board the launch, and with the launchmaster in command of the launch, the vessel is led to another location other than the boarding station so that the pilot can board properly and safely. The pilot boat is ahead of the ship and giving it whatever direction it may see fit so that the ship will follow behind in a safe passage. (Transcript page 215-6)

The launchmaster is in charge of the boat and the only person authorized to operate the boat.

The training given to launchmasters involves working two (2) twenty-four (24) hour shifts. In the words of Captain Ball:

He is given, following coming into the office and determining he has the proper certification, that is is to say a minimum of 350 ton, he is put on with a senior launchmaster for two twenty-four hour periods. During that period, the senior launchmaster would be explaining to him the rules of the business we are in. He will be showing him how he handles the boat, both going alongside the ships, different lingos they are using, the proper use of the approach on radar in thick weather. And during that period, he will be asking the trainee to take over the boat and he will be observing him putting pilots on board, putting launches alongside the wharf and so on. During this period, if the senior launchmaster has given the man a satisfactory rating, then he is either put on with himself during the next time as relief launchmaster or the senior launchmaster will say I recommend a further one more shift or two more shifts because during our shifts the traffic was light and the weather was good sort of thing. So, we would like to put him through in bad weather. Then this is done.

But following that, if the rating is still favourable from the senior launchmaster, he is put into a relieving category. That is to say, when one of our regular launchmasters is sick or off on annual leave, whatever, then he would be brought in as launchmaster, relieving position.

Mr. Melvin Lloyd, Personnel Manager for the Pilotage Authority, stated the minimum requirements for launchmaster as being a 350 ton ticket, radar and radio proficiency, submitting to a medical, and general suitability for the job (Transcript page 156). It appears that a medical examination is not required for relief launchmasters, but only when they have been brought on full strength.

It should be noted that the Authority in Halifax Harbour operates only one (1) fully-crewed pilot boat, usually with another back-up boat. The crew consists of a launchmaster and deck hand. The boat used in Halifax Harbour is referred to as APA number 20.

It appears that Mr. Anderson underwent the required training for the position of relief launchmaster and was told they would call him when they needed him. The employer then phoned and offered him a permanent job. He was told that he would have to submit to a medical by the Authority's doctor. He commenced work with the Authority on March 31, 1980 (according to Exhibit R-3), and was examined by Dr. Charles A. Gordon acting as doctor for the Atlantic Pilotage Authority, on May 26, 1980.

The medical form completed by Dr. Gordon was entered as Exhibit C-2. The 'health questionnaire' part of the form, completed by the physician, indicated details of Mr. Anderson's family and personal medical history. At the bottom of the form

Dr Gordon made comments explaining the positive responses to the questionnaire, i.e. that Mr. Anderson's mother had died at about age 52 of heart trouble; that Mr. Anderson smoked a pack of cigarettes a day; that he had pneumonia 6 years ago with no complications; that he had a myocardial infarction at age 28 with a good recovery, and other things that are not relevant for the purpose of this complaint. At the end of the form, Mr. Gordon indicated that Mr. Anderson is mentally and physically fit for the duties of the position of launchmaster "with limitations", and that he seems capable of pursuing an alternative kind of work. His comments are:

EKG attached. Well documented former inferior myocardial infarction. The incidence of further infarction is great and may suddenly render him unable to carry out his duties as Launchmaster.

On July 7, 1980, Mr. Anderson was released from the Atlantic Pilotage Authority, and was officially taken off strength on July 9, 1980. Captain Ball informed Mr. Anderson that the medical report would have to be changed before he would be given permanent employment by the Pilotage Authority and gave him the opportunity to have his personal doctor contact Dr. Gordon. The complaint form under the Canadian Human Rights Act was dated July 7, 1980.

In a memorandum entered as Exhibit C-7, Mr. Lloyd notified Captain Ball of the negative medical report and indicated in a hand written note that "Dr. Gordon states the man is perfectly fit right now but would suffer another attack under stress conditions." I will examine the medical evidence in more detail later.

The employer presented evidence as to an incident which occurred at Herring Cove, at the mouth of Halifax Harbour, on July 4, 1980. While Mr. Anderson was piloting the launch boat out of the cove to transport the pilot to an incoming ship, APA 20 grounded, causing $20,000 damage to the launch boat, and causing injuries to the deckhand resulting in his being off work for approximately six months. The employer is suggesting that Mr. Anderson’s alleged incompetence was a cause for his dismissal. A memorandum from Captain Ball to Mr. Lloyd dated July 11, entered as Exhibit C-8, states:

In view of Dr. Gordon’s medical report placing limitations on Mr. Anderson’s medical fitness for the position of Launchmaster with the Authority, I had Mr. Anderson in on the morning of 7 July, 1980 and informed him that in view of his failure to pass the medical examination the Authority could no longer employ him in the position of Launchmaster.

I also mentioned the seriousness of the grounding of A.P.A. #20 in Herring Cove while he was on duty on Friday 4 July, 1980.

You are to strike Mr. Anderson off strength effective AM 9 July, 1980. If it is found that there was discrimination, the employer also suggests that they were justified in their conduct because of the existence of the bona fide occupational requirement of passing the medical examination established under section 14 of the Act.

Discrimination

The first issue to be decided is whether the complainant has proved a prima facie case of discrimination under sections 7 and 10 of the Canadian Human Rights Act. The onus is on the complainant to prove discrimination, and only when this has been done do we deal with the question of whether the respondent was justified in their conduct by virtue of a section 14 bona fide occupational requirement. Once a prima facie case of discrimination has been proved, the onus then shifts to the respondent to show that the policy or practice which resulted in the discrimination was justifiable within the meaning of the Act and the case law.

It is now clear that an intention on the part of the employer to discriminate is not necessary in order to prove discrimination under the Act. (Re Attorney General for Alberta & Gares et al (1976), 67 D.L.R. 635 (Alta. S.C.), Foster v. B.C. Forest Products Ltd. (1980) 2 W.W.R. 289 (B.C.S.C. among others). The relevant fact is not whether the employer intended to discriminate, but whether the employer's conduct, even if unintentional, resulted in discriminatory treatment of the complainant, one of the objects of the Act being to ensure that all employees under its jurisdiction be treated equally despite the existence of certain factors, among them, physical handicap. It is clear that Mr. Anderson's prior heart attack comes within the definition of "physical handicap" contained in section 20 of the Act, as a "physical disability, infirmity, malformation

or disfigurement that is caused by bodily injury, birth defect or illness..."
The employer in this case has attempted to argue that Mr. Anderson's failure to pass the medical examination was only part of the reason for his dismissal, the other relating to the grounding incident at Herring Cove

on
July 4, 1980. There was a considerable amount of evidence presented on this
matter, and the question arises as to whether it is necessary that the discriminatory factor need be the only one present in the mind of the employer in order to prove discrimination, or whether it is sufficient that
it be even one of the operating factors.

Ian Hunter, in his article "Human Rights Legislation in Canada: Its Origin,
Development and Interpretation" (1976), 15 U.W.O. Law Rev. 21 addresses this
point at page 32:

What happens if race or colour is a factor, but perhaps only one among several factors, which led to the discrimination complained of? On this point, Canadian boards of enquiry have consistently held that it is sufficient if the prohibited ground of discrimination was present to the
mind of the respondent, however minor a part it played in the eventual

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decision.
He cites as authority for this proposition Segrave v. Zellers Ltd (Ontario
Board of Inquiry 1975), Naugler v. N.B. Liquor Commission (N.B. Board of
Inquiry 1975), Jones and Wilkinson v. Huber (Ontario Board of Inquiry 1976),
and R. v. Bushnell Communications Ltd [1974] 4 O.R. (2d) 288 (C.A.).

More recently, a June 1981 Board of Inquiry decision under the Ontario Human
Rights Code discussed this proposition. In

Mrs. Perlina Reid v. Russellstell Ltd. (1981), 2 C.H.R.R. D/400, the Board
stated, at paragraph 3588:

...The issue is - was Mrs. Reid dismissed from her employment because of
a prohibited ground, contrary to s. 4(1)(6) of the Code? Moreover, the jurisprudence is clear that the complainant is successful in establishing a violation of the Code if one of the reasons for dismissal
was a prohibited ground. The prohibited basis for dismissal must be a promimate cause but may be present with other proximate causes.

The Board Chairman, Peter A. Cumming, cites R. v. Bushnell Communications
Ltd. as authority for the above, and in an explanatory footnote (page D/400
- D/401) states:

In summary then, Bushnell holds that where one prohibited ground is present, even amongst other non-prohibitive grounds, a violation has occurred. This has been approved in other labour relations decisions and has been applied by analogy in decisions of Boards of Enquiry under the Ontario Human Rights Code.

In Peter Mitchell v. Nobilium Products Ltd. (1982), 3 C.H.R.R. D/641 an Ontario Board of Inquiry ruled that discrimination because of race, colour, nationality, ancestry or place of origin was one of the factors causing Mitchell's dismissal. The Board Chairman was satisfied that the primary reason for the complainant's dismissal was unsatisfactory work performance, but that the fact that Mr. Mitchell, a black Trinidadian, was treated differently from other employees in similar circumstances, was a contributing factor (at paragraph 5776).

In this case, counsel for the Atlantic Pilotage Authority admits there were two factors leading to Mr. Anderson's dismissal. (At page 436 of the transcript Mr. Ritch states that "Captain Anderson was released on the basis of his medical disability and on the basis of the grounding that he completed.")

The strength of the authorities cited leads me to the inescapable conclusion that discrimination being one of the factors will result in violation of the Act.

This being the case, it is clear that Mr. Anderson's physical handicap was a reason for the Authority's decision to fire Mr. Anderson, even though another

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reason may have been a contributing factor. In support of this conclusion, I refer to the memo from Captain Ball to Mr. Lloyd (Exhibit C-8) already cited, the memo from Captain Latter to Captain Ball dated September 2, 1980 (Exhibit C-9) saying that "...Mr. Anderson was struck off strength from the Authority a.m., July 9, 1980, due to his failure to meet the medical requirements, which were a prerequisite for employment and he was so informed at the time of hiring...", and the Record of Employment filled in by Mr. Lloyd and dated July 11, 1980 (Exhibit C-5) stating that Mr. Anderson was "rejected during probation; did not pass authority's medical requirements". (This latter

statement was apparently added to the form by Mr. Lloyd at the request of Mr.
Anderson on July 14, so that he could receive unemployment insurance.)

Therefore, I find that discrimination under sections 7 and 10 of the Act has
been proved.

Application of BFOR Guidelines
Under the Canadian Human Rights Act, the Commission has the authority to
issue regulations pertaining to certain matters under the Act. The Commission
issued guidelines respecting bona fide occupational requirements in relation
to physical handicap dated December 14, 1981, which if applicable would provide guidance.

However, these guidelines are not helpful to us in this case, where the discrimination occurred in July 1980, over a year before the guidelines were
issued. The guidelines were not published until January 13, 1982 and cannot
be considered to be retroactive to July 1980. Section 9(1) of the Statutory
Instruments Act, S.C. 1970-71-72, C. 38 states

No regulation shall come into force on a day earlier than the day on which it is registered unless
a) it expressly states that it comes into force earlier than that day and is registered within seven days after it is made, or
b) it is a regulation of a class that, pursuant to paragraph (b) of section 27, is exempted from the application of subsection (1) of section 5,
in which case it shall come into force, except as otherwise authorized or provided by or under the Act pursuant to which it is made, on the day
on which it is made or on such later day as may be stated in the regulation.

Neither (a) nor (b) are applicable here. "Regulation" as defined in the Statutory Instruments Act in section 2(1)(b) as

... a statutory instrument
(i) made in the exercise of a legislative power conferred by or under an Act of Parliament...
and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament.

The legislative power to make regulations or guidelines is found in section
22 of the Canadian Human Rights Act. These guidelines were issued on

December
14, 1981, passed on for registration and publication as required by sections
5, 6 and 11 of the Statutory Instruments Act, and they were so published on
January 13, 1982. They can not, therefore, be considered applicable to a
complaint arising in July 1980, so that case law as to the meaning of bona
fide occupational requirement must be considered.

Bona fide occupational requirement

Discrimination having been found, it remains to be seen whether the employer's policy which resulted in the discrimination was justified as a bona fide occupational requirement.

Section 14 of the Act provides a method for employers to show that certain requirements, even though on their face discriminatory, may be such an essential feature of the particular job as to be inseparable from the job.
Section 14 states in part as follows:

> It is not a discriminatory practice if
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by any employer to be based on a 'bona fide' occupational requirement;...

The policy which resulted in discrimination against Mr. Anderson in this case was a requirement that all permanently employed launchmasters pass a medical examination. The exact determination as to what constitutes "passing" this test has never been stated or enunciated by Dr. Charles Gordon, who performs the examinations, or the employer. In his testimony, Dr. Gordon indicated that he knew the functions of launchmasters in a general way. However, in testimony, he stated that he had examined only 2 launchmasters (Transcript page 313), but that he examined perhaps 6 pilots per year. It should be noted that regulations under the Pilotage Act set out very specific and rigorous medical standards for pilots. They do not mention any specific standards for launchmasters, In the words of Dr. Gordon at page 334:

> I was just looking at the safety of Captain Anderson and any crew or passengers in the boat and the safety of the other boats that would be encountered.

Dr. Gordon stated that he did not consider Captain Anderson fit for the job
of launchmaster, because of his previous heart attack and the nature of the
job: (at page 300)

... I didn't think he was physically fit to undertake the position as launchmaster which would be the managing of a fairly heavy vessel and work long hours, up to twenty-four hours at a time, and often under considerable stress, out in high seas and the fog, coming alongside a vessel and

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for safety standards, numerous things could have happened to him. He has
often responsibilities of other lives besides his own on his hands. It's
not safe for him and it's unsafe for any passengers or deck crew, if something suddenly incapacitated him and it was a strong possibility that this would happen.
(and at page 301) ...He certainly wasn't considered fit for a job like this which at times can be quite stressful, where if he has a serious cardio-vascular disorder and the probability of a second heart attack could render him useless and probably die, is quite increased over a person who has not had a heart attack. So he didn't meet the fitness standards that I thought medically should be present in a man taking this position...

Dr. Gordon felt that, along with other risk factors such as smoking, overweight, and tension, the risk of a further myocardial infarction would be
greatly increased, and would render Captain Anderson a safety hazard if he
were to occupy the stressful position of launchmaster. In his opinion, persons who had already suffered one heart attack have a significantly increased mortality rate.

In writing to the Human Rights Commission on October 8, 1980 to clarify his
opinions as to Captain Anderson's fitness, Dr. Gordon stated that:

... He had suffered from an acute myocardial infarction, which was remote in nature and there was no evidence of cardiac decompensation and
he had no history of ischemic heart disease.

The term "with limitations" was made because he was not considered medically fit to withstand long periods on duty without relief. In his contemplated duties, I understand that he may be a launchmaster on duty up to 24 hours without a break, often in severe weather and with a crew and passengers aboard. With his medical disability, I felt he suffered from a disease that was likely to render him unable to safely and efficiently carry out his duties especially if he had to work long hours

and under adverse conditions.
Mr. Anderson was also examined by Dr. R. D. Gregor on June 3, 1981, for the purposes of the Tribunal. It should be noted that the purpose of Dr. Gregor's examination was to determine Mr. Anderson's heart function, quite apart from the question of his fitness to carry out a particular job. His report (Exhibit R-2) states that "...there is no doubt that this man had had a myocardial infarction; however, he is quite asymtomatic at this time." Dr. Gregor had Mr. Anderson submit to an electro-cardiogram and an exercise test. The electrocardiogram showed the previous inferior wall injury, and the latter test indicated that he had good to excellent exercise capacity. In other words, he would be capable of performing reasonably heavy physical activity (Transcript page 341), and in fact performed above the norm in the bicycle test.

Dr. Gregor summarized his findings as follows:
In summary, this is a young man who had a myocardial infarction at age 28. Since that time, aside from ventricular ectopic beats, he has been totally asymptomatic. He has a normal exercise study. His risk at this time is probably little, if any, greater than other 36-year-old

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individuals. He does have the risk factors of smoking and hypertension. The risk associated with ectopic activity is very difficult to determine although there is probably a slightly increased risk associated with these. However, there is no evidence that treating ventricular ectopic beats changes that risk.

...Therefore, in assessing his risk, it may be slightly greater than others at his age but, with seven years without an ischemic event, his risk has certainly decreased towards the norm."

Dr. Gordon stated in his testimony that he did not disagree with Dr. Gregor's findings. (Transcript page 319). Dr. Gregor did differ somewhat from Dr. Gordon in his opinion as to the risk of further infarction by a person such as Mr. Anderson. Dr. Gregor stated that the risk of having another infarction is greatest in the first six months to a year after the initial incident. But if there are no further ischemic events, the risk decreases fairly rapidly towards the norm. (Transcript page 342-3) . In response to a question by Mr. Tarte, Dr. Gregor stated that he had no doubt about Mr. Anderson's

physical
capability to do the duties of launchmaster (at page 347).

Existence of a BFOR
The Supreme Court of Canada in Ontario Human Rights Commission v. Borough of
Etobicoke (1982) 40 N.R. 159 has set out a definition of bona fide occupation
requirement (BFOR). At page 166 of the report, paragraph 8, McIntyre, J. for
the Court states that:

...To be a bona fide occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be imposed
honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

Prior to this Supreme Court of Canada case, several Boards or Tribunals had
expounded similar tests. Cosgrove v. The Corporation for the City of North
Bay (1976), 21 O.R. (2d) 607 (Ont. C.A.) states that "...although it is essential that

a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason based on the practical reality of the work a day world and of life.

In Bhinder v. CN Railways (1981) 2 C.H.R.R. D/546, the Tribunal decided that
the respondent had engaged in a discriminatory practice by requiring that the
complainant comply with its policy that all persons in the Toronto yard wear
hard hats, thereby violating Mr. Bhinder’s right to follow the teachings of

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his religion, which forbade the wearing of any head covering but a turban.
The Tribunal went on to say that even though there might have been a slight
increase in the risk of harm if the occupational requirement were not met, to
the greatest extent possible, the decision whether or not to bear that risk
should be left with the individual, in keeping with the general objects

of
human rights legislation.

This principle affirmed in Hall was also applied in Ward v. CN Express, (1982) 3 C.H.R.R. D/689 which stated that

the bona fide occupational requirement must be an honest, genuine requirement, one that is real and substantial. It is not the employer's belief as to the job requirement that must be bona fide, but the job requirement itself."

The employer's position is that launchmaster is a high risk occupation which
requires a certain minimum in terms of physical fitness. There was evidence
presented as to some of the problems involved in getting the pilot on or off
the launch boat. There was evidence as to the relative congestion in Halifax
Harbour as compared with other ports, and it appears that Halifax is much
busier than other ports in Atlantic Canada. The weather is certainly a factor
in carrying out the duties of the job; the weather in Halifax being what it
is, this must be a fairly constant concern. I have no doubt that this can be
a fairly strenuous and demanding job.

However, there are factors which lead to the conclusion that it is not a
particularly hazardous occupation. Prospective employees, besides having
certain navigational 'tickets', receive only very minimal on-the-job
training. There is no specific instruction as to the correct method of on and
off-loading pilots other than what guidance is given by the senior
launchmaster. If the trainee happens to be undergoing his or her training
shifts in clear weather, it is possible, but not mandatory, that they may be
asked to do another shift in bad weather.

It also appears from the evidence that relieving launchmasters are not
required to submit to a medical examination, even though they do the same
work as the full-time employees. If Mr. Anderson had stayed with the
Authority in a relieving capacity, he would not have lost his job. This
does not seem consistent with the conclusion that Mr. Anderson was not
fit to perform the job. If the
Authority found him suitable to be a relief launchmaster on the basis of his
experience and skill, it seems incongruous that he is not 'fit' to be a
full-time employee.

Dr. Gordon's main basis for judging that Mr. Anderson's heart attack rendered him unfit for the job was the possibility that a further heart attack would occur on the job, perhaps causing injury to Mr. Anderson himself, the other crewmember or the boat. Dr. Gregor disputed that the risk of a further attack was much greater for Mr. Anderson than for other 36 year old males. In view of the fact that Mr. Anderson had had no heart problems since the 1973 attack, Dr. Gregor felt that his prognosis was good.

It is not clear to me whether Dr. Gordon's perception of medical fitness for a position as launchmaster would exclude any person who had ever suffered a heart attack. It would seem that this is quite a broad exclusionary category, based on a margin of risk that is very small. Even if a risk exists (and this is disputed by Dr. Gregor), the Bhinder case would have us allow Mr. Anderson, a handicapped employee, be the one to make the decision as to whether he is prepared to accept the risk. If the risk of serious injury to himself or to the public were substantial, the strict medical standard applied might be justifiable.

However, in this case, not only does there appear to be only a fairly minor risk of Mr. Anderson having a further heart attack, but there is only an even slighter danger that this attack would occur on the job in such circumstances as would endanger Mr. Anderson, or his crewmember. (As this is not a situation where the general public is involved, I will not deal with this possibility.) In fact, it would appear to be much more likely, using the July 4 incident as an example, that injury would occur as a result of incompetence or lack of training, and no steps have been taken or are apparently being contemplated to address this situation.

The intent behind including discrimination against the physically handicapped as prohibited behaviour under the Human Rights Act is to bring handicapped employees into the workplace, to as great an extent as possible, as fully functioning employees. There may be jobs that certain handicapped people cannot do, although the law intends that employers not make generalized decisions as to what an employee with a certain handicap can or cannot

do,
without ensuring not only that the function in question is necessary to the
job, but that the particular handicapped employee or applicant cannot do the
particular job or function.

It is my conclusion in this particular case that the medical examination
which requires that launchmasters not have suffered from
heart attack has the effect of excluding from the job people who are
otherwise qualified. Furthermore, the justification for the requirement, i.e,
that the risk of further heart attack would render the complainant a risk to
himself, other people, or the boat, is so slim as to be unreasonable in this
circumstance. In the words used in the Hall case, the requirement is not
"related in an objective sense to the performance of the employment
concerned, in that it is reasonably necessary to assure the efficient and
economical performance of the job without endangering the employee, his
fellow employees and the general public". On the contrary, there is a very

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Damages

On the question of damages, it should be pointed out that the employer, the
Atlantic Pilotage Authority, acted in good faith thoughout the incident, and
did not intend to discriminate against Mr. Anderson. Therefore, there is no
question of damages being awarded under section 41 (3)(a), relating to wilful
or reckless discrimination.

Section 41(2)(c) allows a Tribunal to make an award to compensate for lost
wages and expenses resulting from the discrimation. In Foreman v. VIA Rail
(1980) 1 C.H.R.R. D/223, the Review Tribunal states, at paragraph 2043 that
"Although the language used is permissive, it is our opinion that the award
of compensation should be regarded as normal in every case where such losses
have been incurred. In this case, however, the complainant has suffered no
financial loss as a result of the discrimination, and no claim is made under
this section.

Mr. Anderson has asked that the Tribunal make an award of $5000 under section
41 (3)(b) of the Act, which states that:

...if the Tribunal finds that
(b) the victim of the discriminatory practice has suffered in respect of
feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

Again in Foreman, the Review Tribunal addresses the issue of damages in respect of feelings and self-respect. At paragraph 2050:

We are also of the opinion that the compensation referred to in section 41 (3) should, like that under s. 41(2) be available as a matter of course where the circumstances to which it refers exist, unless it can be shown that there are good reasons for denying such relief...the marginal note refers to it as "special compensation". This does not indicate to us, however, that it is an extraordinary remedy calling for unusual circumstances to justify its award.

As to the issue of quantum of compensation, the Review Tribunal states at
paragraph 2057:

It might be thought that the award referred to in Section 41(3) should be treated differently than the award of compensation for purely pecuniary losses. It is our view, however, that at least so far as the claim for compensation for suffering in respect of feelings or self-respect under paragraph (b) is concerned, we should be seeking an appropriate monetary equivalent (subject to the five thousand dollar limit) for the suffering involved on the part of the Complainants, not just an nominal sum. ...The difficulty of the task (of assigning a monetary equivalent to a non-pecuniary loss) does not justify a resort

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to tokenism.
And at paragraph 2060:
The appropriate level of compensation for each Complainant will depend on the evidence tendered as to that Complainant’s situation and the inferences that can be reasonably drawn therefrom.

In Rawn Phelan v. Solicitor General of Canada (1981) 2 C.H.R.R. D/433 the
Complainant was awarded $2,500. The Tribunal cited the above principles from
Foreman and found on the evidence that the complainant suffered in respect of
his feelings and self respect. He
was forced to seek unemployment insurance after having been employed for 8-9
years. To mitigate his losses he was forced to separate from his wife

and
young family. Testimony also indicated that he was angry and embarrassed.

In Peter Mitchell v. Nobilium Products Ltd. (Ontario Board of Inquiry) (1982)
3 C.H.R.R. D/641 the complainant was dismissed for incompetence and because
of his race. The Tribunal found that discrimination existed, and awarded
$3,012.00 compensation for lost wages, but made no award under s. 41(3)
because "there was no evidence whatsoever as to the injured feelings
experienced by the complainant. In the absence of any such evidence, (there
is)..no basis for an award under this section." (para. 5785)

In Michael Ward v. CN Express (Tribunal Decision February 1982), there was
evidence of frustration, anger, and hurt feelings as a result of the
discrimination. The fact that this was the complainant's first experience at
being labelled "handicapped" and the loss of self-respect resulting therefrom
was a factor in the Tribunal awarding $2000 under s. 41(3).

In Bhinder v. CN Rail, the Tribunal did not address the issue of damages at
any length. Compensation for lost wages was awarded, but a s. 41(3) award was
dismissed with the comment "... considering all the circumstances in this
case, we do not think there should be an award of general damages."

It is obvious that a Tribunal has a fairly wide discretion in awarding
compensation under s. 41(3). However, a review of some of the cases does seem
to require that there be evidence on which to justify an award. The evidence
in this case is scant. In direct examination by Mr. Tarte, at page 48 of the
transcript, Mr. Anderson indicates how he felt when he was dismissed from his
job because of his handicap:

(Mr. Anderson) A. Well, if somebody tells me I can't work because I had a heart attack seven years ago, I want to know why. If that is the case then as far as anything goes I might as well have died when I had the heart attack seven years ago, what was the idea of me getting better. I thought I got better so I could go back to work.

(Mr. Tarte) Q. How did you feel when you were told the Pilotage Authority you didn't meet the medical standards and

couldn’t work?
A. I don’t know, contrary I guess.
Q. Pardon me?
A. I was contrary over it, I imagine.
Q. What do you mean, contrary?
A. I was savage over it. I didn’t know how anybody could have the right for to tell me especially what that doctor put in that report. He more likely said there in that report that any minute I could drop dead. I couldn’t see what grounds he had to say that.

This exchange represents the only evidence relating to hurt feelings or self-respect. Counsel for the complainant and the Commission has asked that the Tribunal interpret Foreman as meaning that, unless there is some reason not to do so, an award for the full amount of $5000 should be made, in all cases. He felt that the maximum award of $5000 was so low that is should be awarded in all cases where there is any evidence of the type of damage referred to in s. 41(3)(b).

While I agree with Mr. Tarte’s contention that it is difficult to determine the basis on which these awards are made, and to determine why one complainant will get no award and another will get $2500, I do not agree that an award of $5000 should be made as a matter of course, and I didn’t think that the Review Tribunal in Foreman contemplated this when they stated that an award should not be mere tokeism. Certainly there must be differing degrees of damage suffered, which the Tribunal must distinguish. Tribunals are given little guidance on how an award should be quantified, and it follows that each decision represents the subjective viewpoint of the particular Tribunal. The Act states that a Tribunal may order compensation to be paid, not that it must do so. The Act also leaves it to the Tribunal to decide whether, after hearing all the evidence, an award is justified.

In response to Mr. Ritch’s argument that the evidence offered by Mr. Anderson was too slight and vague to justify an award, Mr. Tarte made an impassioned reply that decisions as to quantum of damage should not be made on the basis of the complainant’s ability to express himself as to his feelings. At page 449... "that would be wrong because the best orators would get the most money and that’s just not the case. You have to look, you have to determine what is expressed by what was said and how the person reacted and what actions were taken."

While I agree with the opinion expressed by Mr. Tarte, I do not feel that a full award is justified in this case. There is no evidence that Mr. Anderson's anger and feeling of hurt pride lasted for any length of time, nor that he suffered any undue inconvenience in relation to job or his family

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because of the employer's action. And given the employer's evidence at the hearing regarding the July 4 incident, it seems likely that Mr. Anderson would have lost his job in any case. It is possible that the medical reason was just a convenient excuse.

In these circumstances and considering the evidence presented, I find the amount of $500 a suitable one under section 41(3)(b).

Decision and Order:

1. The Atlantic Pilotage Authority has discriminated against James Anderson in that it dismissed him from his job because of his physical handicap. This discrimination was not justified by a "bona fide occupational requirement" under section 14 of the Canadian Human Rights Act.

2. The Atlantic Pilotage Authority shall pay to James Anderson the sum of $500.00 for suffering in respect of hurt feelings and self-respect, under section 41(3)(b) of the Act.

Dated at Halifax, Nova Scotia, this 23rd day of June, 1982.

Susan Mackasey Ashley
Tribunal