T.D. 6/92
Decision rendered on June 15, 1992

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

BRENT V. SPURRELL
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: Hugh L. Fraser - Chairman

APPEARANCES:

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| René Duval | Counsel for the Canadian Human Rights Commission |
| Stephen B. Acker | Counsel for the Canadian Human Rights Commission |
| David Bertschi | Counsel for the Complainant |
| Alain Préfontaine | Counsel for the Respondent |
| Brian Evernden | Counsel for the Respondent |

Lt. Col. R.A. MacDonald Counsel for the Respondent

DATES AND LOCATION OF HEARING: November 27, 28, 29, 30, 1989
January 4, 5, 1990
September 20, 1990
September 11, 12, 1991
Ottawa, Ontario

## I. THE COMPLAINT

The Complainant Brent V. Spurrell has filed two complaints under Section 7(a) and 10 of the Canadian Human Rights Act. The first Complaint alleges as follows:

"I have reasonable grounds to believe that the Department of National Defence has discriminated against me by refusing to employ me because of a disability in violation of Section 7(a) and 10 of the Canadian Human Rights Act. In the spring of 1985, I applied for the Officer Candidate Training Program (OCTP). In September 1985, I was disqualified from the Air Navigator classification of the OCTP because of visual impairment. I suffer from myopia and moderate colour loss. This, however has not prevented me from satisfying the Federal Department of Transport requirements to obtain a private pilot's licence and a commercial helicopter's licence. I maintain that DND's minimum visual requirements for the Air Navigator classification are unnecessarily high and I have suffered as a result of DND's policy in this regard."

The second complaint which was also filed on October 22, 1985 states as follows:

"I have reasonable grounds to believe that the Department of National Defence has discriminated against me by refusing to employ me because of my age, in violation of Sections 7(a) and 10 of the Canadian Human Rights Act. In the spring of 1985, I applied for the Officer Candidate Training Program (OCTP) specifying Air Traffic Controller as my choice of trade or classification. In August, I learned that I had not been recommended by DND headquarters for the air selection board in Toronto. The recruiting officer informed me after having consulted an official at DND

headquarters that the "bottom line" reason for this was my age. I maintain that DND has a practice of disqualifying individuals from the Air Traffic Control Classification of the Officer Candidate Training Program on the basis of age.

The words "Air Traffic Control Classification of the" were added to the complaint by the complainant on January 22, 1986."

Prior to hearing evidence with regard to the two complaints, a request was made to the Tribunal to deal with a motion concerning its jurisdiction to hear the Section 7 complaint relating to the allegation of discrimination on the basis of a disability.

On October 31, 1986 the investigator appointed by the Canadian Human Rights Commission filed her summary investigation report with the Commission. The investigator found that the



Respondent's standard for visual acuity for the relevant occupation required an eyesight which should not be affected by myopia greater than 2.00 diopters spherical equivalent in either eye. The investigator also found as a fact that the complainant's eye sight fell short of this standard, his myopia being -2.75 diopters in both eyes. The report filed by the investigator also noted that in February 1986 the Respondent had offered the Complainant the opportunity to have his file reactivated but the Complainant had declined the offer. The investigator further noted that this offer was predicated on subsequent medical advice received by the Respondent that the Complainant did in fact meet the required visual acuity standard.

On September 24, 1987, the Chief Commissioner of the Canadian Human Rights Commission wrote to the Respondent advising that the complaint made under Section 10 (otherwise known as the "policy complaint") was dismissed pursuant to Subparagraph 36(3)(b)(i) of the Canadian Human Rights Act because the standard for visual acuity was found to be a bona fide occupational requirement. However, the complaint made pursuant to Section 7 of the Canadian Human Rights Act (otherwise known as "the personal complaint") was referred to a Tribunal. The position

taken by the Respondent is that the Section 7 complaint should not have been referred to a Tribunal.

Counsel for the Commission suggested that the Tribunal reserve its decision on the disability complaint specifically with regard to the objection raised by Counsel for the Respondent that the Tribunal did not have jurisdiction. The request from the Commission counsel was that such decision be reserved for three months or any period of time that the Tribunal believed would be a proper period of time for the Complainant to seek other counsel with regard to whether or not to proceed with the Section 7 disability complaint. The Tribunal would then proceed with the hearing of evidence with regard to the age complaints but would defer hearing any evidence concerning the Section 7 disability complaint until February 27, 1990 by which time the Complainant would have notified the Tribunal of his intention regarding the matter of the Section 7 complaint on the allegations of discrimination based on disability.

An Order was granted to this effect. The Complainant subsequently advised the Tribunal that he wished to proceed with the Section 7 disability complaint. In the meantime the Tribunal heard the evidence relating to the age complaint.

On September 20, 1990 the hearing reconvened for the purpose of receiving submissions relating to the motion of the Respondent to quash the personal complaint of Brent V. Spurrell



based on visual disability. The question put to the Tribunal with regard to the motion was whether the Tribunal had jurisdiction to hear the Section 7 complaint. The subsequent finding of the Tribunal was that it had the jurisdiction to hear the complaint made under Section 7 of the Act and would proceed to hear evidence regarding the complaint as soon as the parties were in a position to present such evidence.

On September 11th and 12th, 1991 the Tribunal heard evidence regarding the Section 7 complaint alleging discrimination on the basis of a disability. The first part of this decision relates to the age complaint.

II. THE FACTS

The Complainant was born on February 14, 1957. He had his grade twelve Ontario Secondary School Diploma as well as several grade thirteen credits.

From 1971 to 1974 he was enrolled in Air Cadets. It was during that period that he began to dream of becoming a pilot in the Canadian Armed Forces. From May 1974 to August 1979 he served in the Canadian Armed Forces Reserve Service with the Lanark and Renfrew Scottish Regiment in Pembroke, Ontario. He was eventually promoted to the rank of Master Corporal. Between 1978 and 1979 he decided to submit an application to the Canadian Armed Forces to become a pilot. However, he realized that with his visual impairment that required wearing glasses, he would not qualify for entry into the Canadian Armed Forces as a pilot. He then proceeded to obtain a commercial pilot's licence, which he achieved in 1980. In February 1981, when the Complainant had completed his commercial pilots training, he sought employment in the aviation field unsuccessfully. He carried his dream of becoming a pilot for several years but began to realize that his efforts would not meet with success.

The Complainant was encouraged by a friend who was an Air Traffic Control Assistant to pursue that field. The Complainant expressed a concern to his friend that he might be too old but was advised that that was not the case. The Complainant made several telephone calls to determine that the age limit was much older than his age at the time and then began a period of approximately sixteen months of physical and mental training in preparation for a visit to the Recruiting Centre to make an application to be enrolled in the Air Traffic Controller Program.

The Complainant inquired at the Recruiting Centre as to whether or not he was too old to apply for a position for an Air Traffic Controller. He was advised by the Warrant Officer at the Recruiting Centre that he was not too old and that there was no problem regarding his age. The Complainant submitted the



necessary application forms, completed the variety of documents required, and successfully completed the initial aptitude test. He then underwent the Class 2 medical examinations. He was then processed to the Class 1 medical examination which involves a

thorough medical examination performed by an Armed Forces Physician.

The Complainant Spurrell passed the final medical examination and was then advised that he would attend a Board where more Canadian Forces officers would interview him. This interview lasted approximately one hour. The interview was completed in August 1988 and Mr. Spurrell was advised that the next Officer Candidate Training Program course was slated for September 1985 in Chilliwack, British Columbia. The Complainant began to become quite anxious and after waiting for approximately two weeks, he decided to attend the Recruiting Centre to obtain more information. He was initially advised that his file could not be found. After waiting approximately one half-hour, he was advised by Lieutenant Ritcey, one of the recruiting officers on duty at the time, that he had been unsuccessful in his attempt to gain an Air Traffic Controller's position.

The Complainant asked Lieutenant Ritcey for specific reasons why he had been rejected. He recalled that the Lieutenant was somewhat vague and evasive and that Lieutenant Ritcey then made a telephone call to an acquaintance of his at National Defence Headquarters with whom he spoke for approximately ten minutes. At the end of that conversation the Complainant states that he was advised by Lieutenant Ritcey that "the bottom line for your rejection is mainly because of your age". The Complainant recalls being shocked and depressed after being given this reason for the rejection in view of the fact that he had inquired at a much earlier date and had been advised that his age would not be a problem. Lieutenant Ritcey then suggested to the Complainant that he consider applying for the Air Navigator Trade. The Complainant expressed surprise that he was considered too old for the Air Traffic Controller position but not too old to be a member of a flight crew as an Air Navigator. The Complainant's preference was to be an air crew member in any event, and he agreed that the paper work for the Air Navigator classification should be completed as soon as possible.

On September 9, 1985, the Complainant was advised by telephone that he had a briefing for the air crew selection at the Recruiting Centre at 1:30 p.m. on September 13th and that a Board would commence on September 14th. The Complainant made the necessary arrangements with his employers to be available for that requirement. He had been working as a driving instructor at

the time. The Complainant arrived for the briefing at 1:30 p.m. on September 13th. He was advised by a Lieutenant Dickson that



he would not be going to Toronto, that there was a problem with his medical, and his file would shortly be closed. He was asked to proceed to the National Defence Medical Centre to discuss the problem that had been discovered concerning his eyes.

The Complainant returned to the driving school, advised his employers that he would not need the time off after all, and was subsequently fired. Mr. Spurrell was advised that his request for a two week absence on such short notice caused a great deal of stress in the Driving School office over the rescheduling that was made necessary, and his employer felt that it would be better for all concerned if he did not return to his job.

The Complainant went through a period of depression following the apparent loss of the opportunity to enter the Armed Forces as an Air Navigator and the loss of his job as a driving instructor. He stopped his physical training over the next few months and put on weight. In an attempt to get back on his feet, he sent out several resumes and applied for a number of positions including that as a bus driver with Ottawa-Carleton Regional Transit Authority. On February 5, 1986 he received a firm offer from the Ottawa-Carleton Regional Transit Authority (OC Transpo) to begin training as a bus operator. This was due to start in late February 1986.

On February 7, 1986 the Complainant received a telephone call from someone in the military offering him another opportunity to go to Toronto for the air crew selection board. The date that was given to him would have been one of the first two weeks of his training period with his new employer, OC Transpo. The air crew selection board would have been taking place in approximately three weeks time and the Complainant recalls that at the time he was overweight as he had stopped training, and he did not believe that he could be ready within a three week period and also did not want to jeopardize his new employment. He discussed the implications of not reporting for the air crew selection board in Toronto with the Human Rights Commission investigator responsible for his file. The Complainant decided to advise Major Nadeau of the Canadian Armed

Forces that he was not interested any longer in a career with the Canadian Armed Forces.

III. THE ISSUES

From the foregoing facts the following issues have been raised by the parties:

1. Was age a factor in the decision made by the Canadian Armed Forces not to select the Complainant for a position in the Air Traffic Controller Program?



2. If the Complainant was discriminated against on the basis of his age, did he suffer any damages as a result of such discrimination?

3. If so, what is the measure of such damages? Do they include compensation for loss of opportunity? Can this Tribunal make an award for loss of opportunity?

IV. THE LAW

Section 2 of the Canadian Human Rights Act reads as follows:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able or wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or being prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. Sc. 1976-77, c.33, S.2 1980-81-82-83, c. 143, ss.1, 28

Section 3(1) of the Act states that:

For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Section 7 of the Act states that:

It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. 1976-77, c.33, s.6.

Section 10 reads as follows:

It is a discriminatory practice for an employer, employee organization, or organization of employers:



(a) to establish or pursue a policy or practice,

or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or intends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. 1976-77, c.33, s. 10; 1980-81-82-83, c.143, s.5

The first case referred to by counsel for the Commission was that of Balbir Basi v. Canadian National Railway Company 9 C.H.R.R.D/5029. This was a case of alleged discrimination based on race. Mr. Basi filed a complaint with

the Canadian Human Rights Commission alleging that as an East Indian he had been denied an employment opportunity with the Canadian National Railway Company because of his race. The selection process followed by the Canadian National Railway Company was such that Mr. Basi's application was not properly reviewed before a short list had been chosen from the first sixteen applications reviewed. Mr. Basi was the only applicant not on the short list who received a letter telling him that the position was filled. The Tribunal concluded that Canadian National had been unable to provide a credible explanation for the discrepancies in their account for the selection procedures as they applied to Mr. Basi and that their conduct amounted to discrimination since a person no better qualified than he had obtained the position. The Tribunal found that discrimination was one of the factors although not the sole factor in denying Basi the position.

Counsel for the Human Rights Commission submitted that in reference to Mr. Spurrell's claim, one of the significant findings in the Basi case is that discrimination need not be the only ground on which a person was rejected for employment. It is sufficient if discrimination is one of the grounds for rejection for a Complainant to be successful. Mr. Duval argued that the Respondent had the burden to satisfy the Tribunal that age was not a factor at all in Mr. Spurrell's case. He submitted that the Respondent could not meet that burden because of the direct reference to age in one of the documents filed as an exhibit by the Respondent.

Counsel for the Respondent also referred to the case of Foster Wheeler Ltd. v. The Ontario Human Rights Commission (1987) 16 C.C.E.L. 251. This was a decision of the Ontario Divisional Court referring to a prohibited ground of discrimination under the Ontario Human Rights Code. The Divisional Court stated at page 253:



"It is well established that even if only one of the grounds for failing to refer or to recruit an individual is a prohibited ground under the Code, the presence of that prohibited ground, even where there are other non-prohibited grounds, is sufficient to establish a breach of the Code provided it is a proximate cause of the refusal to recruit."

Counsel for the Respondent submitted therefore that the Complainant in order to be successful before this Tribunal must satisfy the Tribunal that in the process of refusing employment to the Complainant, the Canadian Armed Forces used age as one of the proximate causes of such refusal to offer employment. Respondent's counsel also referred to the case of Bains v. Ontario Hydro 1982 C.H.R.R. D/1136.

Mohan Bains alleged that he was discriminated against because of his race and his age when he was refused employment as a welding technician with Ontario Hydro. The Board of inquiry which was convened under the Ontario Human Rights Code found that there was insufficient evidence to substantiate the complaint of Mr. Bains that he was refused employment because of his age. The paragraph referred to by Respondent's counsel in support of the proposition that hiring is inevitably a subjective process is found in paragraph 10037 of the Bains decision which reads as follows:

> Of course, the simple fact that a candidate who, on detailed scrutiny three years after the event, appears to be slightly better qualified and yet was not selected, is not, of itself, proof that that particular candidate was a victim of discrimination. Hiring is an inexact process and perfection is unattainable. A hiring decision which, in retrospect, appears to be wrong, may be so without being discriminatory. There is the necessary element of artificiality involved in compelling a personnel officer, three years after a hiring decision, to break down each component of that decision, isolate and analyse it, as though it were an algebraic equation. Hiring is inevitably subjective. However, I digress for that is not the case here as two other factors went into the final decision.

V. THE EVIDENCE

Counsel for the Commission placed significant emphasis on a meeting between the Complainant and Lieutenant Ritcey, at which meeting the Complainant was advised that his application for selection into the Air Traffic selection board had been rejected. Entries from the confidential files of the Complainant revealed a notation dated 15th August 1985 which read as follows:

S/A has been informed of non-selection for ATC wishes to try Air Nav. He was informed that he was selected mainly because of his age. He was informed that he would probably run into the same problem in Air Nav. He however wants to try it anyway.

The entry was made by Lieutenant Bert Ritcey. The Complainant's evidence was that as he grew more and more impatient waiting for the notification as to whether he would be selected to continue on with the Air Traffic Controller competition, he decided to make certain inquiries with the recruiting office on Laurier Street in Ottawa. It was he who contacted Lieutenant Ritcey to attempt to find more information concerning his file.

In his evidence, Lieutenant Ritcey recalled meeting the Complainant and giving him the bad news that he had not been selected. It is apparent from the evidence that Lieutenant Ritcey had nothing to do with the selection process to that point and that when pressed by the Complainant for more information he agreed to telephone the Directorate of Selection. He spoke to a Captain Harrison and asked him for further information as to why the Complainant was not selected. Lieutenant Ritcey recalled being told by Captain Harrison that the selection board had not found the Complainant suitable and that he might not fit into the Long Range Planning Model.

Lieutenant Ritcey did not recall using the specific words attributed to him by the Complainant being "the bottom line is your age". However, he did not deny that he might have said those words to the Complainant. Lieutenant Ritcey admitted to not understanding the Long Range Planning Model and its relationship to an applicant's age. He further admitted that because he did not understand that model or how it related to the recruiting process, he did not do a proper job of explaining to the Complainant how this Planning Model might have affected his application for the Air Traffic Controller function. With regard to the August 15, 1985 entry in the Complainant's file, Lieutenant Ritcey provided a similar explanation that the entry was a further demonstration of his lack of understanding of the information that had been given to him by Captain Harrison.

Captain Harrison could not recall mentioning the Long Range Planning Model. He did not recall the specific telephone conversation with Lieutenant Ritcey, therefore, he could not state whether specific reference was made to the Long Range Planning Model. He did advise the Tribunal that with regard to

his own involvement on selection boards and the manner in which he rated candidates, age was not a factor.



Lieutenant Colonel Moffat who was one of the individuals responsible for the rating of candidates in the 1985 Air Traffic Controller Selection board, stated that age did not make any difference in his evaluation of the candidates. What was of greater significance to him in the selection process was to examine the success that a candidate had in whatever occupations they had pursued until the time in which the file came across his desk. In other words, it was the "life experience" of the candidate that was of greater significance to Lieutenant Colonel Moffat.

Lieutenant Colonel MacDonald also reiterated that age was not a factor in the selection process of Air Traffic Control applicants. He also testified that the Long Range Planning Model was not in use at the time of Mr. Spurrell's application. His evidence was that this was not a very useful application from the recruiting perspective because it was somewhat arbitrary and could in fact affect candidates that were very good candidates in other ways. His belief was that Mr. Spurrell was not assessed against the Long Range Planning Model because it was not in use at the time in which his application was submitted.

The Tribunal finds that Lieutenant Ritcey did inform the Complainant that he was not selected to continue in the Air Traffic Control selection process mainly due to his age but that such information was incorrect and was in fact based on Lieutenant Ritcey's misunderstanding and lack of information concerning the Complainant's file. This misinformation was carried even further when Lieutenant Ritcey noted in the Complainant's file that the Complainant would probably run into the same problem in the Air Navigator selection process.

It is clear from the evidence presented to the Tribunal that the reason for the initial rejection of the Complainant's application for the Air Navigator's position was due to certain medical information and had no bearing on his age at the time of his application. The individuals involved in the actual selection process, Lieutenant Colonel MacDonald and Lieutenant Colonel Moffat as well as Captain Harrison all testified that age was not a factor in the non-selection of Mr. Spurrell. The only

contradictory evidence on this point came from Lieutenant Ritcey, an individual who had not been previously involved with the Complainant's file, but who happened to be the person at the desk when the Complainant inquired as to the status of his file in August, 1985.

The Tribunal accepts the Respondent's submission that the hiring process employed by the Canadian Armed Forces in the case of Mr. Spurrell was, if not a flawless process, at the very least a thorough one in which there were a certain number of objective considerations consistent with the hiring decisions.



The Complainant was assessed along with thirty-nine other applicants. He was put through a number of tests of an objective nature relating to his general aptitude, academic achievement and military potential.

The Claimant was ranked nineteenth out of the group applying for the fourteen air traffic control positions that were available at the time. The Tribunal did not receive evidence indicating that the Complainant was better qualified then the fourteen applicants who were selected to continue with the Air Traffic Control trade. The Tribunal accepts the Respondent's evidence that if there had been an attempt to discriminate against the Complainant on the basis of his age, such discrimination would have removed Mr. Spurrell from the process at an earlier stage.

The Respondent maintains that although Mr. Spurrell was qualified for the Air Traffic Controller position, he was not as well qualified as the applicants who were chosen for the number of positions available. There was nothing in the evidence to suggest that had there been additional positions available in the Air Traffic Control field, the complainant would not have been selected for one of those available positions.

The Respondent has admitted to considering the age of the applicants only in the context of "what have they done with their life", "what experiences have they enjoyed to that point in their life". The Tribunal sees no violation of the Canadian Human Rights Act by such consideration. The Respondent did not testify that the candidate's age was never considered. The Respondent's evidence was that a candidate's age was not a factor

in the final selection or non-selection of that candidate. There is a significant difference in these two positions. The former acknowledges the reality that the age of an applicant is an item that is note worthy for reasons that should be obvious to any one who finds himself in a position of employer or potential employer. However, to carry it further, a decision made by a potential employer not to employ an individual on the basis that that person's age is deemed to be unsuitable for employment, would amount to a discriminatory act on the part of such potential employer. The preponderance of evidence suggests that the Respondent did not cross that line and that the decision not to process the Complainant for selection to the Air Traffic Control position was not based on the Complainant's age.

With regard to the policy complaint, the Tribunal takes cognizance of the fact that a number of candidates outside of the preferred age range applied for and received offers of selection for their chosen trade. The Tribunal heard the evidence of Lieutenant Colonel MacDonald stating that the Long Range Planning



Models were not being employed at the time of Mr. Spurrell's application. The Commission's counsel argued that some of the candidates outside of the preferred age range who were selected for the Air Traffic Control occupation may have been re-enrollees to the Canadian Armed Forces. This may be the case, however it was also noted by the Tribunal that such re-enrollees would have had to go through a process very similar to that of the new recruit coming "off the street". The concern of the Canadian Armed Forces with regard to the potential return on the investment made in such an individual would be the same for the re-enrollee as it would be for the new recruit. A preferred age range does not in and of itself amount to a discriminatory policy under the Canadian Human Rights Act. The evidence placed before the Tribunal indicated that a number of the candidates who were outside of the preferred age range were given offers of employment.

For all of the above reasons the complaint filed under Section 7(a) and 10 of the Canadian Human Rights Act alleging that the Respondent has engaged in a discriminatory practice on the ground of age is dismissed. I will now proceed to deal with the complaint under Section 7(a) of the Canadian Human Rights Act relating to the disability ground.

DISABILITY COMPLAINT

The Tribunal having determined that it had jurisdiction to hear the complaint of Mr. Spurrell under Section 7(a) of the Canadian Human Rights Act, that he was discriminated against on the basis of disability; the complaint relating to disability was heard on September 11th and September 12th, 1991.

The Tribunal was required to consider whether any discrimination had occurred on the basis of a perceived disability on the part of Mr. Spurrell and if so, what were the remedies available to the Complainant. As part of its deliberation, the Tribunal was also required to consider the effect of the admission by the Canadian Human Rights Commission that the Canadian Armed Forces visual acuity standard was a bona fide occupational requirement (BFOR).

A brief review of the facts is in order. The Complainant underwent an ophthalmology examination on May 10, 1985 at the National Defence Medical Centre (NDMC). This examination took place as a result of his initial application for the Air Traffic Controller Classification on March 11, 1985. The Complainant was deemed to meet the minimum vision enrolment standards for the Air Traffic Controller classification by the NDMC ophthalmologist. However, the Complaint was subsequently not selected for the Air Traffic Controller Classification. Upon learning of this decision in 1985, he expressed a desire to be



considered for the Air Navigator Classification. As a result, the Recruiting Centre reviewed the Complainant's vision profile by telephone on September 13, 1985 with a Sergeant Knapp, an ophthalmic technician at the NDMC's eye clinic. Sergeant Knapp informed the Recruiting Centre that the Complainant was not fit for the Air Navigator Classification because of his vision. The Complainant was so advised on September 13, 1985. A letter which was sent by the Canadian Forces Recruiting Centre commanding officer on October 23, 1985 to the Complainant provides the following explanation concerning the Complainant's application for the Air Navigator Classification:

The reason you could not be processed as an Air Navigator is a medical one. The medical requirements for air crew are very stringent. Your eye sight meets

the minimum standard for Air Navigator as far as visual acuity is concerned. There are however other standards which must be met. Unfortunately, the National Defence Medical Centre has determined that your eye sight does not meet the cycloplegic standard for Air Navigator.

Documentary evidence provided to the Tribunal indicated that the minimum vision profile for the Air Navigator Classification is a vision (V) rating no higher than 3 and a colour vision (CV) rating not above 2. However, in addition to having a vision profile of no more than V3 CV2, Air Navigator applicants must also not exceed a myopic standard of -2.00 diopters spherical equivalent in either eye. The Complainant's opthalmology case record completed at the NDMC eye clinic on May 10, 1985 shows the Complainant's vision profile to be V2 CV2 which satisfied the vision profile of V3 CV2 for Air Navigator. However, the Complainant's myopia does not satisfy the myopic standard of -2.00 diopters. His myopia is -2.75 diopters in both eyes which exceeds the minimum for Air Navigator. The Complainant's myopia was determined from his results on the cycloplegic refractive test.

An investigation was launched by the Canadian Human Rights Commission into the Complainant's case. The Head of Ophthalmology at MDMC who was not involved in the Complainant's case in 1985, reviewed the Complainant's ophthalmology test results with the investigator. He stated that although defective, the Complainant's colour vision was safe and met the minimum standard for Air Navigator. He considered the Complainant's vision to be perfectly correctable, however, he noted that the Complainant's myopia exceeded the minimum standard for Air Navigator. He indicated further, that going by the book, the Complainant was unfit for any air crew position because of his cycloplegic refractive error. He did add however that Ophthalmologists at the NDMC eye clinic have discretionary power when recommending if an air crew applicant is fit or not. A



marginal excess refractive error can be deemed acceptable when all other facets of the vision examination are normal. In his opinion, he would have recommended the Complainant as fit for Air Navigator in spite of his cycloplegic refractive error, had he been consulted.

The Respondent then indicated that since an error had been made in not exercising discretion in the Complainant's favour, and since the Complainant was in fact deemed to meet the vision standard for Air Navigator, he was eligible for further processing.

On February 7, 1986, the Complainant was invited to attend a week long air crew testing program in March 1986 in Toronto which would be the next step in the classification selection process for the Air Navigator position. The Complainant declined the Respondent's offer to attend the air crew testing program. The Complainant's refusal to accept the offer was based on several considerations. He had just secured a permanent position as a bus operator and was scheduled to start work within three weeks. He was concerned that he would jeopardize his new job by requesting to take leave within weeks of being hired. Furthermore, he realized that the Respondent was offering him the opportunity to undergo further testing, he was not guaranteed enrolment as an Air Navigator. There was still the possibility of being eliminated further along in the selection process. Also of concern to the Complainant was the fact that he had stopped his physical training several months earlier and had put on, in his estimation, at least ten or fifteen pounds.

On September 24, 1987 the Commissioner of the Canadian Human Rights Commission advised the Human Rights Co-Ordinator for the Department of National Defence that after reviewing the investigation report of the Complainant Brent Spurrell against the Department of National Defence alleging discrimination in employment on the ground of disability:

The Commission had decided, pursuant to subparagraph 36(3)(b)(i) of the Canadian Human Rights Act, to dismiss the complaint because the Commission is of the opinion that the Respondent has established a bona fide occupational requirement within the meaning of paragraph 14(a) of the Act.

THE LAW

Counsel for the Respondent directed the Tribunal to Sections 15 and 27 of the Canadian Human Rights Act. The relevant portions of Section 15 read as follows:

15(a) It is not a discriminatory practice if

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

(e) an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable;

27(2) of the Act states that

The Commission may, on an application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a particular case or in a class of cases described in the guideline.

27(3) states that

A guideline issued under Subsection (2) is, until it is subsequently revoked or modified, binding on the Commission, any human rights tribunal appointed pursuant to Subsection 49(1) and any review tribunal constituted by Subsection 56(1) with respect to the resolution of any complaint under Part III regarding a case falling within the description contained in the guideline.

Counsel for the Respondent referred to the case of Brideau v. Air Canada 1983 4 C.H.R.R. D/1314. In the Brideau case the Tribunal stated at D/1316:

In Foucault it was decided that what matters is not the physical handicap but the "perception" the employer has of the future employee's physical condition. In the instant case the complainant, Mr. Valere Brideau was "perceived" by Air Canada as having air bubbles on his lungs and therefore as having a physical handicap although the condition did not exist.

The Tribunal added at D/1317...

it is the "perception" an employer has of the future employee's physical condition that must be considered, and not the physical handicap itself.

The Brideau case involved an applicant to Air Canada for a position as a flight attendant. The applicant was



subjected to a medical examination. Through a faulty medical assessment the physicians acting on behalf of Air Canada concluded that Mr. Brideau had bubbles on his lungs and he was rejected on that basis. Subsequent medical information proved this assessment to be erroneous. Air Canada reversed its position and offered to reactivate Mr. Brideau's file and to compensate him for his expenses. The Tribunal accepted his jurisdiction on the basis of the perceived discrimination which it concluded was just as much discrimination as real discrimination. In Brideau the Tribunal found however that the defence of BFOR existed in that a flight attendant could not have air bubbles in his or her lungs because such a condition would pose a danger to their health. The Tribunal found that the defendant had established a BFOR and as a result the complaint was rejected.

CONCLUSION

As in the Brideau case, the instant case of Mr. Spurrell relates to a perceived disability which was revised some five months later with Mr. Spurrell being offered the opportunity to continue pursuing a position as an Air Navigator in the Canadian Armed Forces. The Tribunal finds that the Respondent is entitled to rely on a defence of bona fide occupation requirement. The Canadian Human Rights Commission in their letter of September 24, 1987 acknowledged that the Respondent had established BFOR within the meaning of then paragraph 14(a) of the Act. Although it was argued successfully by counsel for the Commission that the Complainant should have the opportunity to have his Section 7 complaint heard by a Tribunal, this Tribunal accepts the arguments of the Respondent's counsel that the same standards which were applicable in the policy complaint of Mr. Spurrell, are applicable to his Section 7 complaint. The Complainant was advised as stated in the Commission's letter of

September 24, 1987 as to their finding with regard to the BFOR. The evidence indicates that the Commission has neither revoked nor amended their position in this regard. In accordance with Section 15(a) of the Canadian Human Rights Act the Tribunal is therefore bound by the finding of BFOR. The complaint made by Mr. Spurrell based on Section 7 of the Canadian Human Rights Act relating to the perceived disability is dismissed.

It is clear from the evidence that Mr. Spurrell's file was not handled properly by the Canadian Armed Forces. The Respondent's counsel agreed with the assessment by Mr. Spurrell that his file was handled improperly and in fact stated on the record that the Complainant's application was not processed in the way that it should have been. Furthermore, the Respondent's counsel on behalf of the Canadian Armed Forces and her Majesty the Queen in Right of Canada offered their apologies to Mr. Spurrell for the manner in which his application for entry into



the Canadian Armed Forces was handled. This Tribunal agrees that such an apology is in order. To the credit of the Canadian Armed Forces, they reversed the finding regarding the perceived disability within a reasonable period of time. The Complainant was not able to take advantage of the offer that was extended to him for reasons that were perfectly understandable. As regrettable as these circumstances may be for the Complainant, the Tribunal finds that they do not create a legal obligation on the part of the Respondent to provide compensation to the Complainant for the handling of his file. For all of the foregoing reasons all of the complaints heard by the Tribunal in this matter are dismissed.

Dated at Ottawa, May 15, 1992

Hugh L. Fraser
TRIBUNAL