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

BETWEEN:

KATHERINE POPALENI
PAMELA JANSSEN

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HUMAN RESOURCES DEVELOPMENT CANADA

Respondent

REASONS FOR DECISION

T.D. 3/01

2001/03/09

PANEL: Anne Mactavish, Chairperson

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[1] At issue in this proceeding are the provisions of federal employment insurance (EI) legislation that take into account the number of weeks of sickness, maternity and parental benefits received by an individual in determining that individual's entitlement to regular employment insurance benefits. Katherine Popaleni and Pamela Janssen allege that these provisions have a discriminatory effect on each of them, in the provision of a service customarily available to the public, by reason of their sex. Ms. Popaleni also alleges discrimination on the basis of her family status.

I. Legislative Provisions in Issue

[2] Ms. Popaleni's claim for EI benefits was governed by Section 11 of the *Unemployment Insurance Act*,[(1)] the relevant portions of which provide:

> (1) Where a benefit period has been established for a claimant, benefit may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.
>
> (2) The maximum number of weeks for which benefit may be paid in a benefit period for any reasons other than those referred to in subsection (3) shall be determined in accordance with Table 2 of the schedule by reference to the regional rate of unemployment that applies to the claimant and the number of weeks of insurable employment of the claimant in the claimant's qualifying period.
>
> (3) Subject to subsection (7), the maximum number of weeks for which benefit may be paid in a benefit period
>
> a) for the reason of pregnancy is fifteen;
>
> b) for the reason of caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is ten; and

c) for the reason of a prescribed illness, injury or quarantine is fifteen.

(4) Subject to subsection (7), the maximum number of weeks for which benefits may be paid

(a) in respect of a single pregnancy is fifteen; and

(b) in respect of caring for one or more new-born or adopted children as a result of a single pregnancy or placement is ten.

(5) In a claimant's benefit period, the claimant may combine weeks of benefit to which the claimant is entitled for any of the reasons referred to in subsection (3), but the maximum number of combined weeks is thirty.

(6) In a claimant's benefit period, the claimant may combine weeks of benefit to which the claimant is entitled for any of the reasons referred to in subsections (2) and (3), but if the claimant is entitled under subsection (2)

(a) to more than thirty weeks of benefit, the total number of weeks of benefit payable for the reasons referred to in subsections (2) and (3) shall not exceed the claimant's entitlement under subsection (2); and

(b) to thirty or fewer weeks of benefit, the claimant may, subject to the applicable maximums, receive a greater number of weeks of benefit where the claimant is also entitled to benefit for any of the reasons referred to in subsection (3), but the total number of weeks of benefit shall not exceed thirty. [emphasis added]

(7) The maximum number of ten weeks specified in paragraphs (3) (b) and 4 (b) is extended to fifteen weeks where

(b) a child referred to in paragraph (3) (b) or 4 (b) is six months of age or older at the time of the child's arrival at the claimant's home or actual placement with the claimant for the purpose of adoption; and

(c) a medical practitioner or the agency that placed the child certifies that the child suffers from a physical, psychological or emotional condition that requires an additional period of parental care.

[3] The maternity, sickness and parental benefits established by subsection 11 (3) are referred to collectively as 'special' EI benefits, in contrast with benefits paid on account of unemployment, which are known as 'regular' EI benefits. It is the cap imposed by paragraph 11 (6) (a),

preventing the combining or stacking of regular and special EI benefits, that is in issue in Ms. Popaleni's case.

[4] The *Unemployment Insurance Act* was replaced by the *Employment Insurance Act* [(2)] on June 30, 1996, which is the statute governing Ms. Janssen's complaint. What had been Section 11 under the previous legislation became Section 12 in the new *Employment Insurance Act*. Although the section underwent minor changes in wording, its essence remains the same. Paragraph 12 (6) (a) of the *Employment Insurance Act* provides:

> (6) In a claimant's benefit period, the claimant may combine weeks of benefits to which the claimant is entitled because of a reason mentioned in subsections (2) and (3), but if the claimant is entitled under subsection (2)
>
> > (a) to more than thirty weeks of benefits, the total number of weeks of benefits payable because of reasons mentioned in subsections (2) and (3) shall not exceed the claimant's entitlement under subsection (2) …

[5] The "benefit period" referred to in the foregoing provisions is a 52 week period immediately following the claim for benefits, and represents the time in which EI benefits must be taken. No combination of benefits may extend a claim beyond this 52 week period.

II. Ms. Popaleni's Employment Insurance Claim

[6] Information with respect to Ms. Popaleni's EI claim was provided by way of an agreed statement of facts, which indicates that Ms. Popaleni was employed as a clinical therapist in Hamilton, Ontario until December 27, 1995, when she was laid off due to shortage of work. Ms. Popaleni filed an application for EI benefits, and a claim for benefits was established, effective December 31, 1995.

[7] At the time that she was laid off, Ms. Popaleni had 52 weeks of insurable earnings within the qualifying period. At the time, the regional rate of unemployment in Hamilton was 5.9%. In accordance with subsection 11 (2) of the *Unemployment Insurance Act*, and Table 2 of the Schedule to the *Act*, it was determined that Ms. Popaleni's maximum entitlement to regular EI benefits was 36 weeks.

[8] Ms. Popaleni was pregnant at the time that she was laid off, and gave birth on March 27, 1996. Ms. Popaleni collected 36 weeks of EI benefits, including 15 weeks of maternity benefits, 10 weeks of parental benefits, and 11 weeks of regular benefits, eight of which were collected prior to the birth of her child, and three after she collected parental benefits.

[9] Ms. Popaleni appealed her award of regular benefits, alleging that she had been discriminated against by reason of pregnancy and childbirth. Ms. Popaleni alleged that "I am entitled to 11 weeks of benefit (sic) to look for work. Had I not been pregnant, I would have been granted a

full 36 weeks of benefits to look for employment." On May 27, 1996 the Board of Referees dismissed Ms. Popaleni's appeal.

[10] Ms. Popaleni then filed a complaint with the Canadian Human Rights Commission, wherein she alleges that the Department of Human Resources Development (now Human Resources Development Canada, or 'HRDC') discriminated against her by treating her in an adverse differential fashion in the provision of a service customarily available to the public. In particular, Ms. Popaleni states that the fact that her entitlement to regular EI benefits was reduced because she was pregnant and entitled to maternity and parental benefits constitutes discrimination on the basis of her sex and her family status as a mother.

III. Ms. Janssen's Employment Insurance Claim

[11] Information regarding Ms. Janssen's EI claim was also introduced by way of an agreed statement of facts. Ms. Janssen was employed with a stock promotion company in Richmond, British Columbia until she was laid off, effective July 12, 1996. Ms. Janssen applied for EI benefits, and a benefit period was established on July 14, 1996.

[12] Ms. Janssen had 52 weeks of insurable employment. The regional rate of unemployment in Richmond at the time was 7-8%, which entitled Ms. Janssen to a maximum of 40 weeks of regular EI benefits.

[13] At the time that she was laid off, Ms. Janssen received severance pay in the amount of $1,380, which was allocated to the weeks from July 14, 1996 to August 3, 1996. After serving a two week waiting period, Ms. Janssen then collected 17 weeks of regular EI benefits. On December 15, 1996, she began collecting maternity benefits. After collecting 15 weeks of maternity benefits, on March 29, 1997 Ms. Janssen began receiving parental benefits. She collected a total of 8 weeks of parental benefits before her entitlement to benefits was exhausted.

[14] Ms. Janssen's complaint with the Canadian Human Rights Commission alleges that HRDC discriminated against her by requiring her to combine her regular EI benefits with her maternity and parental benefits, thereby reducing her entitlement to regular benefits. Had she not been pregnant, Ms. Janssen says, she would have received 40 weeks of regular EI benefits in order to seek new employment. This, she says, constitutes discrimination on the basis of sex.

IV. Purpose of the Legislation

[15] Gordon McFee testified about the history and purpose of Employment Insurance in Canada. Mr. McFee is the Director of Policy and Legislation Development in the Insurance Branch of Human Resources Development Canada. According to Mr. McFee, an employment insurance scheme first came into effect in Canada in the early 1940's. The scheme was created largely in response to the experience of the Depression of the 1930's, when many people lost their jobs, and

had nothing to fall back on. Its purpose was to provide temporary income replacement to individuals who were involuntarily unemployed, while reintegrating them into the work force. The maximum number of weeks of regular benefits that an individual can claim is currently 45 weeks.

[16] Over time, the profile of the labour market changed, with the increased participation of women in the paid workforce. In order to reflect changing economic and social circumstances, in 1971, the legislation underwent a major overhaul, now providing coverage to workers in the event of pregnancy and sickness, as well as shortage of work. According to Mr. McFee, the modified scheme was still intended to provide short term benefits, but extended the contingencies insured against to include pregnancy and sickness.

[17] Mr. McFee described the 1971 amendments as "the most fundamental changes to the [employment insurance] program since its inception". Before 1971, the plan was purely an insurance plan: with the introduction of maternity and sickness benefits in 1971, the plan departed from pure insurance principles, and a social element was introduced into the scheme.[(3)]

[18] Pregnancy or maternity benefits were introduced to address the presumed period of incapacity surrounding childbirth, and as such were only available to the biological mother of a child. In 1984, the plan was again changed, to provide benefits in the case of adoption. In 1990, parental benefits were introduced, which benefits are payable to both mothers and fathers, adoptive and natural parents alike, and are intended to allow parents time to care for their young children.

[19] Maternity, sickness and parental benefits are referred to collectively as 'special benefits', in contrast to benefits paid on account of unemployment, which are known as 'regular benefits'. According to Mr. McFee, there are two major differences between regular benefits and special benefits: one relates to the way in which a claimant qualifies for benefits, and the other to the requirement that a claimant be available for work. On the first issue, in the case of regular benefits, the number of weeks necessary for a claimant to qualify varies in accordance with the unemployment rate in the geographical area where they live. Special benefits are paid in the case of contingencies other that unemployment, however, and are thus calculated in a manner that is independent of the regional rate of unemployment. A claimant for special benefits is always required to have worked for 20 weeks in the year before the claim, regardless of the regional rate of unemployment. Insofar as availability for work is concerned, it is a fundamental requirement that, in order to be eligible for regular benefits, a claimant must, at all times, be ready, willing and able to work, whereas there is no such requirement in the case of special benefits.

[20] EI legislation continues to evolve. According to Mr. McFee, as of December 31, 2000, parental benefits are being increased from a maximum of 15 weeks to a maximum of 35 weeks.[(4)] Correspondingly, the cap on the total amount of special benefits which a claimant may receive will increase from 30 to 50. Mr. McFee testified that the October, 1999 Speech from the Throne advised that this was being done to enable parents to spend more time at home in the first year of their child's life.

V. Purpose and Selection of the Caps

[21] There have always been limits on the number of weeks of regular EI benefits that an individual could collect. With the introduction of special benefits, a limit or cap was placed on the number of weeks of special benefits that one individual could claim.[(5)] Limits were also placed on the number of weeks of regular benefits that could be collected in combination with special benefits, which is the cap in issue in this case. Finally, in no case could a claimant receive benefits outside of the 52 week benefit period. These limits reflect the fact that EI benefits are intended to be short-term in nature. If there were no caps, Mr. McFee says, the goal of the EI scheme would be frustrated, and claimants could receive benefits forever.

[22] Given that there is always going to be a cap on the benefits payable under the plan, Mr. McFee says that the identification of the appropriate cap in a given circumstance is a function of several factors, including mathematics and 'the proximity between employment and unemployment and the periods of time that surround that event.' In selecting the appropriate limit or cap for maternity benefits, an attempt was made to approximate the time during which women would normally require income support when they give birth. While the evidence indicates that parental benefits are designed to allow parents time to care for their young children, it is not clear how the original selection of 10 weeks as an appropriate period for parental benefits was arrived at. Insofar as the decision to increase the limit on parental benefits from 15 to 35 weeks in the future is concerned, Mr. McFee testified that he is not aware of what went into that decision, beyond what was said in the Speech from the Throne, and a speech that the Prime Minister gave a couple of days later. I was not provided with any specific information as to how the 15 week limit on sickness benefits was chosen.

VI. Effect of the Cap on Combining Regular and Special Benefits

[23] Evidence with respect to the consequences of removing caps imposed on recipients of both regular and special EI benefits was provided by Jean-François LaRue, the Head of Special Groups, EI Policy at Human Resources Development Canada. Mr. LaRue reviewed the claims experience for the EI plan, in an effort to identify how many people are affected by the cap in issue. According to Mr. LaRue, in the 1998-99 fiscal year, there were 61,000 people affected by the rule against stacking regular and special EI benefits, of whom 65% were women.

[24] Mr. LaRue also testified with respect to the financial consequences of allowing the stacking of regular and special benefits. According to Mr. LaRue, the elimination of the restrictions on combining benefits would add an additional $228 million to the cost of the EI plan, again based upon the 1998-99 claims experience. The amendments to the legislation increasing parental benefits from a maximum of 15 weeks to a maximum of 35 weeks in 2001 will further increase the cost, although Mr. LaRue was not able to provide any kind of a projection regarding the amount of the increase.

[25] Limits on the number of weeks of combined regular and special EI benefits are imposed by paragraph 11(6) (a) of the *Unemployment Insurance Act* and paragraph 12 (6) (a) of the *Employment Insurance Act*, and as well by the 52 week limit on the benefit period. Mr. LaRue's cost calculations assume that the 52 week cap imposed on claimants by the operation of the benefit period is removed, along with the rule against stacking regular and special EI benefits. Mr. LaRue acknowledged in cross-examination that some downward adjustment to his cost estimate would have to be made if the 52 week benefit period cap were left in place.

VII. Financial Structure of Employment Insurance Scheme

[26] Mr. McFee testified that the EI plan is a self-funding insurance scheme. That is, the plan is funded by premiums paid by employers and employees. Premium rates are set by the Employment Insurance Commission, and require the approval of the Minister of Human Resources and the Minister of Finance. Premium revenues are used to cover the cost of the benefits paid out, as well as the cost of administering the plan. Although the plan is administered by Human Resources Development Canada, no money from the Government of Canada's Consolidated Revenue fund is used in the EI plan.

[27] The financial position of the EI plan has varied over time, with the plan sometimes operating in a deficit, other times, in a surplus. The last time that the plan operated in a year-to-year deficit was in 1994. On a cumulative basis, the plan has been in a surplus position since 1996 or 1997. According to Mr. McFee, the current surplus in the EI account is 'somewhere around $29 billion'.

VIII. Legal Principles

[28] These complaints are brought pursuant to section 5 of the *Canadian Human Rights* Act.[(6)] Section 5 makes it a discriminatory practice, in the provision of services customarily available to the general public, to deny access to any such service to any individual, or to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. Section 3 of the the *Act* designates sex (which includes pregnancy and childbirth), and family status as prohibited grounds of discrimination.

[29] Pursuant to section 15 (g) of the *Act*, it is not a discriminatory practice to deny access to a service to an individual where there is a *bona fide* justification for that denial.

[30] The Supreme Court of Canada has recently had occasion to revisit the approach to be taken in cases such as this in its decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [(7)] (‘*Meiorin*') and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [(8)] (‘*Grismer*'). The historic distinction between direct and indirect discrimination has now been replaced by a unified approach to the adjudication of human rights complaints. Under this unified approach, the initial onus is still on a complainant to establish a prima facie case of

discrimination. A prima facie case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. (9)

[31] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy has a *bona fide* justification. In order to establish such a justification, the respondent must now prove that:

> i) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> ii) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
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> iii) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate persons with the characteristics of the complainant without incurring undue hardship.

[32] The term 'undue hardship' is not defined in the *Act*, however, *Meiorin* and *Grismer* provide considerable guidance in determining whether or not an undue hardship defence has been made out. In *Meiorin*, the Supreme Court observed that the use of the word 'undue' implies that some hardship is acceptable - it is only 'undue' hardship that will satisfy the test.(10) The Supreme Court has further observed that in order to prove that a standard is reasonably necessary, a respondent always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship. (11) It is incumbent on the respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. (12) In some cases, excessive cost may justify a refusal to accommodate those with disabilities. However, one must be wary of putting too low a value on accommodation. It is all too easy to cite increased cost as a reason for refusing to accord equal treatment. (13) The adoption of the respondent's standard has to be supported by convincing evidence. Impressionistic evidence of increased cost will not generally suffice. (14) Finally, the Supreme Court has indicated that factors such as the financial cost of methods of accommodation should be applied with common sense and flexibility in the context of the factual situation under consideration. (15)

IX. Analysis

A. Is There a *Prima Facie* Case of Discrimination?

[33] There is no dispute that the provision of EI benefits by HRDC is a 'service customarily available to the public', as contemplated by Section 5 of the *Canadian Human Rights Act*.(16) What is in issue is whether the standard in question - that is, the rule against stacking regular and

special EI benefits contained in paragraph 11 (6) (a) of the Unemployment Insurance Act and paragraph 12 (6) (a) of the Employment Insurance Act - has a discriminatory effect on Ms. Popaleni and Ms. Janssen by reason of their sex, and, in Ms. Popaleni's case, by reason of her family status.

(i) Position of the Commission

[34] Counsel for the Canadian Human Rights Commission contends that this is a classic case of what has traditionally been described as adverse effect discrimination.[(17)] It is alleged that the neutral rule against stacking regular and special benefits, contained in paragraph 11 (6) (a) of the Unemployment Insurance Act, imposed an adverse, differential burden on Ms. Popaleni because of her sex and family status, which burden is not shared by other participants in the EI plan. Similarly, the Commission alleges that paragraph 12 (6) (a) of the Employment Insurance Act imposed an adverse, differential burden on Ms. Janssen because of her sex.

[35] The Commission does not take issue with any of the individual weekly limits placed on the various types of benefits provided under the EI plan. What it does take issue with is the rule preventing claimants in the position of Ms. Popaleni and Ms. Janssen from claiming the regular benefits to which they would otherwise be entitled, on top of the special benefits that they had received under the plan. Each woman was unable to collect the full amount of regular benefits that would otherwise have been payable to her, because she had collected special benefits within the same benefit period. This, counsel says, establishes a *prima facie* case of discrimination on the basis of sex and family status.

(ii) Position of HRDC

[36] In contrast, counsel for HRDC submits that no *prima facie* case of discrimination has been established here. The rule against stacking regular and special benefits is applied uniformly in all cases, and does not discriminate amongst groups of individuals. No one is able to collect special benefits on top of regular benefits under the EI plan, whether they be male or female, parents or non-parents.

[37] HRDC submits that any assessment of the limits on combining regular and special benefits must take into account the purpose of the EI plan. Numerous judicial decisions have concluded that the EI plan is intended to provide short term income replacement.[(18)] These complaints, HRDC says, seek to change the essential nature of the plan to that of parental benefits legislation.

[38] Insurance plans invariably place limits on benefits. In this case, Parliament has chosen to place limits on the number of weeks that claimants may receive special benefits in combination with regular EI benefits. HRDC says that it is not for the courts or this Tribunal to second-guess this policy decision.

[39] Finally, HRDC observes that maternity, sickness and parental benefits were not originally provided for in EI legislation. The addition of such benefits, on a limited basis, was ameliorative in nature. Recipients of special benefits receive certain advantages over those claiming regular benefits: examples of these advantages include the fact that recipients of special benefits do not

have to be available for work, their EI income may be 'topped up' to 95% of their regular salary, and they may collect benefits while outside of Canada.

(iii) Purpose of the Legislation

[40] The first step in my analysis is to consider the purpose of the EI plan. This issue has received considerable judicial consideration in the context of challenges to various subsections of Section 11 of the *Unemployment Insurance Act* under Section 15 of the *Canadian Charter of Rights and Freedoms*. In each of the cases cited by HRDC, the Courts have concluded that the EI plan is intended to provide short term income replacement. The fundamental purpose of the legislation is "... to help those members of the workforce who lose their employment and are unable to find immediately another one in replacement." (19) Courts have observed that the focus of the legislation is the circumstances surrounding employment and unemployment, and not the formation of families (20) and that the plan is primarily an insurance scheme to help those who are capable of working, not a disability insurance scheme. (21)

[41] These comments are particularly apt as they relate to regular EI benefits. Clearly, the EI plan was originally introduced to provide employees with insurance against the contingency of involuntary unemployment while they sought alternate employment. However, as Mr. McFee noted in his testimony, with the introduction of maternity and sickness benefits in 1971, the EI plan departed from pure insurance principles, and a social element was introduced into the scheme. As the Ontario Court of Appeal observed in Shafer:

> The specific purpose of both the 1971 and 1984 legislation [which introduced parental benefits into the plan] was to provide partial replacement of income while out of the workplace, either by reason of pregnancy and childbirth or by reason of child care. (22)

Although sickness benefits were not in issue in Shafer, in my view, the Court's observations with respect to the purpose of maternity benefits and parental benefits apply, with the necessary modifications, to sickness benefits.

[42] It is clear that, at the time it was introduced, the exclusive purpose of the EI plan was to provide short-term income replacement for those who were ready, willing and able to work, but who found themselves unemployed. While this remains the primary focus of the legislation, in the last 30 years the plan has evolved to also provide benefits, on a limited basis, to those who may not be available for work by reason of illness, childbirth, or child care responsibilities.

(iv) Choice of Appropriate Comparator

[43] As the Supreme Court of Canada noted in *Gibbs v. Battlefords and District Co-operative Ltd.* (23), the concept of equality is a comparative one. For there to be a finding of discrimination, a burden must be imposed on, or a benefit withheld from, one individual in comparison with the burden imposed or benefit conferred on others. It is therefore necessary to identify the

appropriate comparator in order to be able to identify any differential treatment, as well as the grounds for the distinction. (24)

[44] Counsel for the Commission submits that in this case, Ms. Popaleni and Ms. Janssen should be compared to other participants in the EI plan for the purpose of the discrimination analysis. Although counsel for HRDC did not expressly address the issue of the identification of the comparator group in her submissions, I understand her to have adopted the same comparator group in her analysis. (25)

[45] I agree that the complainants' situation should be compared to that of others participating in the EI plan for the purpose of my discrimination analysis.

(v) Is There Differential Treatment by Reason of Sex or Family Status?

[46] Insurance plans often place limits on the benefits that are payable under the plan. Insurers are not obliged to provide benefits indefinitely, and lines have to be drawn somewhere. (26) Having said that, once a service provider elects to provide benefits, these benefits must be provided in a non-discriminatory fashion. (27)

[47] The question then is: Does paragraph 11 (6) (a) of the *Unemployment Insurance Act* have a discriminatory effect on Ms. Popaleni by reason of her sex or family status? Similarly, does paragraph 12 (6) (a) of the *Employment Insurance Act* have a discriminatory effect on Ms. Janssen by reason of her sex?

[48] Ms. Popaleni and Ms. Janssen each collected 15 weeks of maternity benefits, as well as several weeks of parental benefits. I do not know anything about the particulars of either Ms. Popaleni's or Ms. Janssen's pregnancy or delivery. Thus I have no way of knowing if they were incapacitated, or for how long. I do know that the 15 weeks for which maternity benefits are payable are intended to address the average period of incapacity experienced by women as a result of pregnancy and childbirth, and that parental benefits are intended to partially compensate parents while they care for their new child. Both Ms. Popaleni's and Ms. Janssen's entitlement to regular EI benefits was reduced by the number of weeks of maternity benefits and parental benefits they collected. This suggests that they may have had fewer weeks during which they were able to look for alternate employment, while receiving regular benefits, than others in the same geographical area, who had not had a baby and claimed special EI benefits. While this may appear at first blush to be adverse, sex-based differential treatment, closer inspection indicates that this is not in fact the case.

[49] A man who claims either sickness or parental benefits, and then attempts to claim regular EI benefits in the same benefit period, would suffer the same adverse consequences with respect to his entitlement to regular benefits as did Ms. Popaleni and Ms. Janssen. This is not merely a hypothetical example: Mr. LaRue testified that 35% of those affected by the rule against stacking regular and special EI benefits were men.

[50] The Commission's argument similarly fails when it comes to Ms. Popaleni's complaint of discrimination on the basis of her family status as a mother. Not only do fathers collecting

parental benefits experience exactly the same consequences when it comes to their entitlement to regular benefits, so too do non-parents who may become ill, and collect EI sickness benefits. This is equally true for people whose illnesses qualify as a 'disability' within the meaning of the *Canadian Human Rights Act* as it is for those suffering from transient or minor conditions that do not constitute 'disabilities'.

[51] The provisions of Section 11 of the *Unemployment Insurance Act* have been subject to repeated judicial scrutiny under the provisions of Section 15 of the *Charter*. Of particular note is the decision of the Federal Court of Appeal in *Sollbach v. Canada* [(28)], where the Court considered the application of paragraph 11 (6) (b) of the *Unemployment Insurance Act*. In *Sollbach*, the claimant quit her job to follow her husband to his new job. As a result she was entitled to 27 weeks of regular benefits. After 18 weeks, Ms. Sollbach started collecting maternity benefits. After she had collected 12 weeks of maternity benefits, the EI authority refused further payment on the basis that Ms. Sollbach had received the maximum of 30 weeks permissible under paragraph 11 (6) (b) of the *Unemployment Insurance Act*. [(29)] Ms. Sollbach alleged that paragraph 11 (6) (b) discriminated against her on the basis of her pregnancy. According to Ms. Sollbach, she should be entitled to 52 weeks of benefits, being 27 weeks of regular benefits, in addition to 15 weeks of maternity benefits and 10 weeks of parental benefits.

[52] The Federal Court of Appeal rejected Ms. Sollbach's claim, noting that Subsection 11 (6) does not draw a distinction between pregnant women and others. The gender-neutrality of the legislation was demonstrated by the fact that men who were injured while receiving regular EI benefits would also be subject to the 30 week limitation, as would fathers who had become unemployed, and were also claiming parental benefits.

[53] *Sollbach* deals with paragraph 11 (6) (b) of the *Unemployment Insurance Act*, whereas it is paragraph 11 (6) (a) that is in issue in this case. In my view, however, the reasoning of the Federal Court of Appeal is equally applicable to the complaints of Ms. Popaleni and Ms. Janssen. In this regard I am in agreement with the conclusion of the Umpire appointed under the *Unemployment Insurance Act* in *CUB 50489 (Miller)* [(30)], which found that paragraph 11 (6) (a) of the *Unemployment Insurance Act* did not violate the claimant's equality rights.

[54] Counsel for the Commission contends that EI legislation provides for two streams of benefits, both providing income to people whose employment is interrupted, but for very different reasons. It is therefore inappropriate, the Commission says, to consider the fact that a claimant may have collected special benefits, in assessing their entitlement to regular benefits. Given that regular and special EI benefits are intended to provide for totally different situations, it does seem odd that the collection of one type of benefit would reduce the entitlement to another type of benefit serving an entirely different function. Rightly or wrongly, however, the burden imposed by the rule against stacking regular and special EI benefits is imposed on both men and women, parents and non parents alike. As a result, I find that no *prima facie* case of discrimination has been established.

B. Has HRDC Discharged its Burden?

[55] Having found no *prima facie* case of discrimination, that is the end of the matter. However, in the event that it is subsequently determined that a *prima facie* case of discrimination has been made out, I will consider whether HRDC has established a *bona fide* justification for the rule against stacking regular and special EI benefits.

(i) Rational Connection

[56] Using the approach established by the Supreme Court of Canada in *Meiorin* and *Grismer*, in order to prove the existence of a *bona fide* justification for the standard in issue, HRDC must first establish that it adopted the standard for a purpose or goal that is rationally connected to the function being performed. The focus at this stage is not on the validity of the standard in issue, but rather on the validity of its more general purpose.(31)

[57] HRDC says that the imposition of limits or caps is a necessary feature of insurance schemes. In this case, the purpose of the EI plan is to provide income replacement for a specified period of time. Without caps, claimants would be able to collect EI benefits forever. As such, the prohibition on stacking regular and special EI benefits is rationally connected to the function of the EI plan.

[58] I do not accept that it is necessary to have a rule preventing the stacking of regular and special EI benefits, failing which, claimants would be able to collect EI benefits forever. This is clearly not the case, as all benefits would still have to be taken within the 52 week benefit period, which is not being challenged here.

[59] Both regular and special EI benefits are intended to provide partial compensation to individuals who are not working, albeit for entirely different reasons. Having regard to the short-term nature of both regular and special EI benefits, I am satisfied that temporal limits are rationally connected to the general purpose of the EI plan.(32) In this case, however, the legislation imposes a temporal limit on the combining of benefits serving two entirely different purposes. Regular benefits are intended to provide short term income replacement for those available to work, but unemployed, while allowing for the reintegration of the claimant into the workforce. The purpose of special benefits under EI legislation is different: Special benefits are intended to provide limited, short-term income replacement for those unavailable to work because of illness, childbirth, or child care responsibilities.

[60] I agree with the submission of the Commission that HRDC has not established that there is a rational connection between the general purpose of the rule against stacking regular and special EI benefits in issue in this case, and the payment of benefits under EI legislation. Given that regular benefits and special benefits under the EI plan are intended to insure against different contingencies, it does not make any sense to consider the receipt of one type of benefit in determining entitlement to another, entirely different, type of benefit. The fact that an unemployed person claimed 15 weeks of sickness benefits, for a period in which they were unavailable to work, does not mean that the person is going to be able to find a new job and reintegrate into the workforce any faster that another unemployed person who was not sick.

(ii) Good Faith

[61] The second element that must be demonstrated by HRDC to establish the existence of a *bona fide* justification under the *Meiorin* and *Grismer* test is that it adopted the standard in issue in good faith, in the belief that the standard is necessary for the fulfilment of its purpose or goal. If the standard was not thought to be reasonably necessary or was motivated by discriminatory considerations, then it cannot be justified.

[62] The Commission contends that there is no evidence before me as to how the anti-stacking rule was chosen, and that its imposition reflects an arbitrary decision. This, the Commission says, is circumstantial evidence of bad faith.

[63] There was indeed very little evidence before the Tribunal with respect to the reasons for choosing individual limits in the EI plan, beyond the blanket assertion by Mr. McFee the caps were necessary to prevent unlimited claims. In particular, no satisfactory explanation was offered as to why the decision was made to reduce a claimant's entitlement to regular benefits by the number of weeks of special benefits that the claimant had received, where the claimant's entitlement to regular benefits exceeds 30.

[64] That said, as the courts have often observed, the drawing of lines is an unavoidable feature of insurance schemes.[(33)] The EI plan is a self-sustaining insurance scheme, and as such, those with responsibility for administering the plan have the responsibility for ensuring its on-going financial viability. It is evident from Mr. LaRue's testimony that there would be significant financial consequences if the cap on combining regular and special EI benefits were removed. Based upon the testimony of Mr. McFee, I am prepared to accept that, in imposing the rule against stacking regular and special EI benefits on claimants under the EI plan, HRDC acted in good faith, in the belief that the standard is necessary for the fulfilment of its purpose or goal.

(iii) Undue Hardship

[65] Finally, in order to establish the existence of a *bona fide* justification, the onus is on HRDC to establish that the standard is reasonably necessary to accomplish its goal, in the sense that it cannot accommodate persons with the characteristics of the complainants, without incurring undue hardship.

[66] The essence of HRDC's submissions with respect to the third element of the analysis is that eliminating the rule against stacking regular and special EI benefits would impose a significant financial burden on the EI plan, and on the contributors to the plan, which burden would amount to an undue hardship. In this regard, HRDC points to the evidence of Mr. LaRue, who testified that the elimination of the anti-stacking rule would add an additional $228 million to the cost of the EI plan, based upon the 1998-99 claims experience, and some greater amount after 2000.

[67] In the course of cross-examination it became apparent that Mr. LaRue's cost estimate calculated the cost of removing, not only the rule against stacking regular and special EI benefits, but the 52 week limit imposed by the definition of the benefit period as well. The 52 week definition of the benefit period is not, however, in issue in this case, and therefore some downward adjustment to Mr. LaRue's cost estimate is necessary. While some claimants receiving regular and special EI benefits would otherwise be entitled to more than 52 weeks of benefits,

they would only receive 52 weeks of benefits if the rule against stacking regular and special EI benefits were eliminated, because of the operation of the 52 week limit on the benefit period. Mr. LaRue was unable to advise as to how many claimants would be caught by the 52 week limit on the benefit period, and it is not clear what the adjusted cost of eliminating the cap should be.

[68] Mr. LaRue's evidence regarding the cost of the change must also be examined in the context of Mr. McFee's evidence regarding the overall financial position of the EI plan. According to Mr. McFee, the EI plan has been in a surplus position since 1996 or 1997, and has a current surplus in the account of 'somewhere around $29 billion'.

[69] Based upon the evidence before me, it is not at all clear that the increase in cost that would result from the elimination of the rule against stacking regular and special EI benefits could not be absorbed by the surplus in the EI fund, without having any immediate impact on the contributors to the plan.

[70] Rather than pay for the increased cost resulting from the elimination of the anti-stacking rule out of the accumulated surplus in the plan, HRDC could choose to pass the increased cost on to the contributors to the EI plan. In this regard, counsel for the Commission submits that the service in issue here is provided by HRDC, and that I should only consider the position of HRDC when it comes to the issue of undue hardship. The impact that changes to the EI plan may have on contributors to the plan should be of no concern to me. I do not agree. As the administrator of the EI plan, HRDC has responsibility for the overall viability of the plan. In *Grismer*, the Supreme Court of Canada concluded that in administering the British Columbia motor vehicle licencing system, the Superintendent of Motor Vehicles was entitled to look beyond the licencing authority itself, and to consider the safety of individuals on the roads of the province. In my view, it is equally appropriate to consider the effect that any changes to the EI plan may have on premiums and premium payers, as well as the consequences that these effects may have on the viability of the plan.

[71] Having said that, there is no evidence before me as to what the cost of these changes would mean for premium rates[(34)], and what the consequences of any increase in premiums would be for contributors and the plan as a whole.

[72] In my view, the evidence adduced by HRDC does not meet the standard required by the jurisprudence to establish that accommodating women such as Ms. Popaleni and Ms. Janssen by eliminating the rule against stacking regular and special EI benefits would result in undue hardship.

X. Order

[73] For the foregoing reasons, these complaints are dismissed.

Anne L. Mactavish

OTTAWA, Ontario

March 9, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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DECISION OF THE TRIBUNAL DATED: March 9, 2001

APPEARANCES:

Eddie Taylor For the Canadian Human Rights Commission

Anne M. Turley For Human Resources Development Canada

Reference: T.D. 2/01 (H. McAllister-Windsor v. HRDC)

March 9, 2001

1. R.S., 1985, c. U-1, s. 11, 1985, c. 4 (4th Supp.), s. 2; 1990, c. 40, s.9.

2. S.C. 1996, c. 23. For ease of reference, the current terminology will be used throughout this decision.

3. Mr. McFee is not alone in his view of the fundamentally different character of regular EI benefits and special benefits. The November, 1962, Report of the Commission of Inquiry into the Unemployment Insurance Act (the 'Gill Report') looked at whether maternity benefits should be added to the employment insurance plan. In concluding that maternity benefits should be dealt with separately, the Commission noted that maternity benefits were 'properly within the sphere of some other social security plan' (at para 112).

4. See the Budget Implementation Act, 2000, S.C. 2000, c. 14, Section 3.

5. This type of cap is under scrutiny in the human rights complaint of Helen McAllister-Windsor, whose complaint was heard together with those of Katherine Popaleni and Pamela Janssen. My decision regarding Ms. McAllister-Windsor's complaint is being released simultaneously with this decision.

6. Ms. Popaleni's and Ms. Janssen's complaints relate to matters occurring between 1995 and 1997. As a result, insofar as I am dealing with issues relating to the substantive law, I will be relying on the Act as it stood prior to the 1998 amendments.

7. [1999] 3 S.C.R. 3

8. [1999] 3 S.C.R. 868

9. Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited, [1985] 2 S.C.R. 536 at 558

10. In this regard the decision in Meiorin adopts the decision in Central Okanagan School District v. Renaud, [1992] 2 S.C.R. 984.

11. Grismer, supra., at para. 32

12. Grismer, supra., at para. 42

13. Grismer, supra., at para. 41

14. Grismer, supra., at paras 41 and 42

15. Meiorin, supra., at para. 63. See also Chambly v. Bergevin, [1994] 2 S.C.R. 525 at p. 546

16. Indeed, there is binding judicial authority to this effect. See the decision of the Federal Court in Gonzalez v. Canada (Employment and Immigration Commission), [1997] 3 F.C. 646.

17. Although the term 'adverse effect discrimination' has lost some of its significance as a result of the creation of the unified approach espoused by the Supreme Court of Canada in Meiorin and

Grismer, the term is still useful insofar as it describes the nature of the discrimination alleged here.

18. See, for example, Sollbach v. Canada (Attorney General), (1999), 252 N.R. 137 (F.C.A.), Canada (Attorney General) v. Faltermeier, (1995) 128 D.L.R. (4th) 481 (F.C.A.), CUB 58460 (Miller), CUB 19483 (Irving), CUB 22373 (Lemieux), Schafer v. Canada (Attorney General), (1997), 35 O.R. (3d) 1 (Ont. C.A.), and Tinkham v. Canada (Minister of Employment and Immigration) (1995), 16 B.C.L.R. (3d)) 79 (B.C.S.C.).

19. Faltermeier, supra., at p. 487. See also Sollbach, supra., at p. 139.

20. Shafer, supra., at p. 15.

21. Tinkham, supra., at p.83.

22. At p. 15.

23. 27 C.H.R.R. D/87 at para. 29. See also Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 10 C.H.R.R. D/5719

24. Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, at p. 531.

25. Throughout her submissions, Ms. Turley compared the situation of Ms. Popaleni and Ms. Janssen to that of other claimants under the EI plan.

26. See Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703 (S.C.C.), at p. 746, and Schafer, supra., at p. 28.

27. Gibbs, supra.

28. Supra., footnote 18.

29. Paragraph 11 (6) (b) deals with the situation where both regular and special benefits are claimed, but the claimant's entitlement to regular EI benefits is 30 weeks or less. In such cases, the 30 week cap applicable to special benefits is applied.

30. Supra., footnote 19.

31. Meiorin, supra., at para. 59

32. In this regard, see my decision in the case of Helen McAllister-Windsor.

33. Granovsky, supra., at p. 746, and Schafer, supra., at p. 28.

34. Although Mr. LaRue testified that he had calculated what the impact of the changes sought would be on premiums, this information was not shared with the Tribunal.