T.D. 3/93
Decision rendered on January 14, 1993

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CYNTHIA FLOYD

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN EMPLOYMENT AND IMMIGRATION COMMISSION

Respondent

DECISION

TRIBUNAL:

Perry W. Schulman, Q.C. - Chairman

APPEARANCES:

Margaret Rose Jamieson
Counsel for Canadian Human Rights Commission

Frederick Woyiwada
Counsel for the Respondent

DATES & PLACES OF HEARING: October 19 and 20, 1992
Thunder Bay, Ontario

Cynthia Floyd (the Complainant) has filed a complaint with the Canadian Human Rights Commission, alleging that the Canada Employment and Immigration Commission engaged in a discriminatory practice on July 9, 1989 in that it denied her a benefit customarily available to the general public because of her gender contrary to section 5 of the Canadian Human Rights Act (Exhibit HR-2). I was appointed to hear this matter under Exhibit T1. I heard this matter in Thunder Bay, Ontario on October 19 and 20, 1992. At the conclusion of the hearing I reserved my decision and I am rendering it herewith.

Two witnesses gave evidence at the hearing. Counsel for the Canadian Human Rights Commission called as a witness the Complainant, Cynthia Floyd. Counsel for the Respondent called as a witness Guy Grenon, a senior policy advisor with Employment and Immigration Canada. The facts of this case are not in dispute and it will not be necessary for me to review the evidence of each of the witnesses in detail.

The Complainant has worked for the Canadian Grain Commission in Thunder Bay as a Grain Inspector's Assistant. She was first hired on June 1, 1981. On January 6, 1989, she and other employees were placed on an off-pay status because of a reduction in work. On January 9, 1989, the Complainant applied for Unemployment Insurance benefits. She had, at that time, accumulated 52 insurable weeks (Exhibit HR-5) and was thereby eligible to receive 50 weeks of benefits. On January 26, 1989 the Complainant started to receive Unemployment Insurance benefits. About that time, she found out that she was pregnant, but she assumed that this fact

would make no difference to her entitlement to receive Unemployment Insurance benefits. In about March, a fellow worker provided her with some information which led her to inform the Respondent of her pregnancy. When she did so, she was told that she would be eligible to collect benefits for a maximum of 25 weeks, ten weeks of regular benefits for unemployment and 15 weeks for maternity benefits. She was also told that, as an alternative, she could collect regular unemployment benefits until her child is born, but that she would not be entitled to receive any maternity benefits. Having been given this option, the Complainant decided to collect her regular benefits. On April 18, 1989 she provided the Respondent with a maternity certificate, signed by her doctor, indicating that the expected date of confinement would be July 31, 1989 (Exhibit HR-13). On July 9, 1989 the complainant gave birth following Cesarean Section surgery. On July 10 she informed the Respondent that she had given birth and she was informed that she would be eligible for one week of maternity benefits only. On July 13 she received a notice to report on July 20 (Exhibit HR-15). The Respondent ceased paying the Complainant benefits after July 16. The Complainant prevailed upon her employer to pay her, and thereby allowed her to use up sick leave which she had accumulated, for the

period July 17 to August 18, 1989 (Exhibit HR-17). The Complainant provided the Respondent with a maternity certificate indicating that she was fit to return to work as of that date (Exhibit HR-18). The Respondent paid the Complainant two weeks of regular benefits from August 16 to September 4. The Complainant was recalled to work on September 5, but chose to stay home without pay, returning to work on January 9, 1990. Consequently, although the Complainant had reason to expect on the day that she was placed on off-pay status that she was eligible to receive benefits for 50 weeks, should she be off work that long, she was in fact off 35 weeks to date of recall, with respect to which she received regular benefits for 27 weeks in addition to the one week of maternity benefits. It is the shortfall in receipt of the expected maternity benefits which forms the primary basis of the relief sought in this complaint. The

Complainant seeks as well five weeks of sick leave, which she used up by reason of these events.

The issues which arise from this complaint are as follows:
Firstly, has the respondent committed a discriminatory practice? Is the payment of U.I. benefits the provision of services customarily available to the general public, and if so, can it be said that the Respondent, in failing to pay the benefits sought by the Complainant,

a) denied access to such service to the Complainant
or

b) differentiated adversely in relation to the Respondent
on the ground of gender.

Counsel for the Respondent conceded in argument
that the providing of benefits under U.I.C. is a service customarily available to the general public. I have to decide whether or not the Respondent committed a discriminatory practice with respect to such service. Secondly, if there is a finding of a discriminatory practice, I must assess whether or not the Respondent has proved on a balance of probabilities that the practice was bona fide justified. If a finding is made against the Respondent on that issue, I have to consider what relief, if any, to grant under section 53 of the Canadian Human Rights Act.

It is clear from the evidence and conceded by counsel for both parties that Respondent's employees acted in good faith throughout their dealings with the Complainant. The complaint is based upon the effect which the

legislation has on the Complainant. The Respondent's employees were merely carrying out the letter of the legislation as it then stood.

Since the events in question took place, the Unemployment Insurance Act has been amended in a manner which has resolved the problem which arose here for the benefit of other persons in like position to the Complainant. However, the amendments to the legislation took place too late to be of benefit to the Complainant.

The legislation which is the subject of the complaint is contained in Tab 4 of the book of authorities filed by Counsel for the Canadian Human Rights Commission. The provisions which give rise to the alleged discriminatory effect are, according to Counsel for the Canadian Human Rights Commission, sections 11, 18 and 23. I reproduce at this point the following pertinent sections:

"11.(1) When a benefit period has been established for a claimant, initial benefit may, subject to subsection (2), be paid to him for each week of unemployment that falls in the benefit period.

(2) The maximum number of weeks for which initial benefit may be paid in a benefit period is the number of weeks of insurable employment of the claimant in his qualifying period of twenty-five, whichever is the lesser.

(3) Notwithstanding subsection (2), the maximum number of weeks for which initial benefit may be paid to a claimant

(a) in any benefit period for reasons of
(i) pregnancy,
(ii) placement of a child or children for the purpose of adoption,

(iii) death or disability of a mother of a child,
(iv) death or disability of a person with whom a child was, or children were, placed for the purpose of adoption,
(v) prescribed illness, injury or quarantine, or,
(vi) any combination of the foregoing, or

(b) in respect of a single pregnancy or a single placement of a child or children for the purpose of adoption,
is fifteen."

"18.(1) Notwithstanding section 14 but subject to this section, initial benefit is payable to a major attachment claimant who proves her pregnancy.

(2) Subject to subsection 11(3), initial benefit is payable to a major attachment claimant under this section for each week of unemployment in the period

(a) that begins
(i) eight weeks before the week in which her confinement is expected, or
(ii) with the week in which her confinement occurs, whichever is the earlier; and

(b) that ends
(i) with the week immediately preceding the first week for which benefit is claimed and payable pursuant to another section of this Part, or
(ii) seventeen weeks after the later of
(A) the week in which her confinement is expected, and
(B) the week in which her confinement occurs, whichever is the earlier."

"23. Notwithstanding paragraph 14(b) and sections 18, 20, 20.1 and 20.2, a claimant is not entitled to be paid extended benefit for any working day for which the claimant fails to prove that the claimant was capable of and available for work and unable to obtain suitable employment."

Mr. Grenon, in his evidence, provided an interesting and helpful review of the history of the development of Unemployment Insurance benefits in Canada and his evidence was supplemented by production by counsel for the parties of extracts from a variety of publications, statutes and court decisions in which the history of the legislation has been reviewed. Counsel for the Canadian Human Rights Commission stated in argument at pages 213 and 219 of the transcript:

"... The combined effect of sections 11, 18 and 23, while giving the Complainant 15 weeks of maternity leave in theory, restricted the taking of those 15 weeks of maternity leave to what was referred to as the initial benefit period

or phase one.

Because of section 23, the pregnant claimant is not able to collect unemployment insurance benefits in the extended period, which is the period after the initial benefit period, starting with the 26th week, if that person is not capable of and available for work."

"... Did it incorporate, allow or indeed mandate a discriminatory practice by restricting the receipt of maternity benefits to the initial benefit period or phase one benefits of 25 weeks? Even in Cynthia Floyd's case, who qualified for 52 weeks, she was denied the full receipt of the 15 weeks of maternity benefits then after the first 25 weeks."

In dealing with this issue I must first make a determination of which group the Complainant belongs to and to which group should hers be compared, in order to see whether or not the Complainant has been treated in a different and in a discriminatory manner. On this point, Counsel for the Canadian Human Rights Commission stated, "The group Cynthia Floyd belongs to is pregnant women who qualify for receipt of unemployment insurance benefits" (page 219 of the transcript). She also urged, "The other members of the community, the larger group in question here in this case, would be all those who pay into the Unemployment Insurance Act and who pay into the Unemployment Insurance Fund" (page 221).

On the other hand, Counsel for the Respondent submitted in argument that the comparison to be made is between the position of recipients of maternity benefits as opposed to the position of recipients of other benefits in the special benefits category (page 283 of the transcript).

In my view, the proper groups to be compared for this purpose are female employees who are moved into off-pay status and who opted to take and drew regular benefits to date of birth of their children and learn they are pregnant while on that status, on the one hand, and all employees who participate in the Unemployment Insurance Plan.

The next point to be dealt with is did the statute in question treat the groups differently, and if so, was the Complainant's group treated in a discriminatory fashion?

After careful review of the evidence which has been adduced and the authorities and documents which have been submitted I have reached the conclusion that the Complainant's group was indeed treated under the legislation in question in a fashion different from the larger comparable group, that the difference was significant and that the effect on the Complainant amounted to a discriminatory practice within the meaning of section 5(b) of the Canadian Human Rights Act. In short, I am faced with a situation where the Complainant clearly received less money from UI between January and September 1989 than co-employees involved in the same lay-off.

This was the result of a pregnancy of which she was not even aware at the commencement of the lay-off. Given the difference in treatment of her and her co-employees, there is an apparent unfairness to the situation, which, unless justified by convincing evidence, suggests, at least in this context, that the Complainant has been subjected to treatment which the Supreme Court of Canada in Brooks vs Canada Safeway Limited [1989] 1 SCR 1219 sought to obviate. In making this finding, I lay particular stress on

the following factors:

1. Persons in the larger group were entitled to receive regular benefits from January 6 to September 4, 1992, excluding the waiting period. The Complainant was disentitled to receive benefits during eight weeks of the period. If the Complainant had been stationed in an isolated community where her employer was the only potential employer, the Complainant would have lost her right to receive benefits by virtue of section 23 because of her pregnancy even though no work would have been available to her during that time.

2. Because of the operation of sections 11, 18 and 23, the Complainant was able to collect one week of maternity benefits only, rather than 15 to which she would have been entitled if she had become pregnant while on full-work status. Members of the larger group collect 15 weeks of benefits when they become pregnant while on normal work status.

3. From 1971 when maternity benefits were first added to the legislation, until 1983 there were three features of the coverage, namely the magic ten rule, section 46 of the Act, and the first 15 weeks rule, which features distinguished maternity benefits from other special benefits to such a significant degree that Counsel for the Respondent more or less conceded in argument that they were discriminatory in effect.

4. The benefits in question in this case are of great social importance. They are intended to recognize the large percentage of women now present in the workplace and to ensure that women are not required to bear a disproportionate share of the financial burden involved in raising children.

5. The purpose of the Canadian Human Rights Act as articulated in section 2 is to extend the laws in Canada, of which the Unemployment Insurance Act is one to the principle that every individual should have an equal opportunity with other individuals to make for herself the life that she is able and wishes to have, consistent with her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practises based on sex. The remedial nature of the Act has been articulated often by our courts.

In making a finding of a discriminatory practice I distinguish the decision of Jerome A.C.J. sitting as an Umpire under the Unemployment Insurance Act in The Matter of a Claim for Benefits by Donna Irving (March 18, 1991) C.U.B. 19483. In the Irving case, Ms. Irving received 15 weeks of maternity benefits and later in the same year sought to collect additional sickness benefits, but was prevented from doing so by the 15-week cap set out in section 11(3) of the U.I.C. Act prior to the enactment of subsection 5 which extended the cap to 30 weeks. Ms. Floyd, on the other hand, seeks to recover maternity benefits which were denied to her by virtue of the combined effect of sections 11, 18 and 23, a different situation.

Secondly, the Irving case was decided under section 15 of the Canadian Charter of Rights and Freedoms, Constitution Act 1982. While both section 15 of the Charter and section 5 of the Canadian Human Rights Act pursue equality as a goal, decisions made under the Charter are not necessarily applicable under the Canadian Human Rights Act because the sections are not identical in purpose and effect.

Has the Respondent proved, on a balance of probabilities, that the discriminatory practice was bona fide justified within the meaning of section 15(g) of the Canadian Human Rights Act? There is considerable

authority as to the meaning of the words "bona fide occupational requirement" as used in section 15(a). The Supreme Court of Canada has established under that section a two-part test which an employer must meet in order to justify a particular limitation as a bona fide occupational requirement or qualification. The test has a subjective and objective

element. Under the subject aspect of the test, the employer must show that the limitation was imposed in the honest belief that it was in the interest of adequate performance of the work. Under the objective element of the test, the employer must show that the limitation was reasonably necessary to assure the efficient and economical performance of the job. In addition, in a case involving an allegation of adverse effect discrimination, there are authorities which hold that if an employer refuses to make reasonable accommodation for the needs of an employee, without having to incur undue hardship, the practice will not be justified. It is clear from the authorities that the test under section 15(g) is similar to the test under section 15(a). It is often difficult, however, to transpose the test which has been carefully crafted by our courts for employment situations so as to suit the mould of the case of denial or differentiation in providing of services. Under the subjective test, the Respondent would have to show that the denial of the benefits took place in the honest belief that it was imposed in the interests of proper administration of the U.I.C. scheme and on that score it has been conceded by Counsel for the Canadian Human Rights Commission that this aspect has been satisfied. Under the objective test the Respondent would have to show that the denial of benefit was reasonably necessary to assure the efficient and economical carrying out of the U.I.C. scheme. In my view, a high standard of care is required of the Respondent on this issue because of the importance of the right which has been prima facie infringed. On this branch of the case, Counsel for the Respondent made four points. He referred to the purpose of the legislation, which he said was to recognize women's increasing role in the workforce and he referred to the necessity to make a special provision for pregnant women. He said that it was reasonably necessary to do it in the way it was done so as not to destroy the overall vision of the statute, it had to be done without discriminating against all other potential claimants who were not pregnant women and it had to be done within parliament's view of valid use of taxpayers' money. He urged me to interpret the evidence which was adduced, particularly Exhibit R-2 Tab 10, to find that cost of providing the benefit would have been large. He concluded by stating:

"I am suggesting essentially the four points that I referred to, that it was unnecessary to do so to recognize women's increasing role in the workforce, to do so without destroying the overall vision of the Act, to do so without discriminating against all others who are not pregnant women and to do so in considering of the tremendous amount of money that is at stake here."

His submission on this aspect of the case is set out in pages 306 to 314 of the transcript. I must say, having reviewed the evidence to which Counsel for the Respondent referred, that I find it to be impressionistic and lack

the depth and clarity of the evidence which was adduced to support the insurance scheme which was under consideration in Zurich Insurance Co. v. Ontario (Human Rights Commission) (1992) 2 S.C.R 321. I point out that the

parties have acknowledged that the problem which arises in the instant case has been obviated by subsequent legislation. That being so, no reason has been offered in evidence as to why the matter could not have been resolved to the benefit of the Complainant, earlier, by a like statutory change. As I did in the case of Canadian Paraplegic Association and Canadian Human Rights Commission (February 17, 1992), I consider it appropriate to take into account subsequent events in assessing whether or not a respondent has satisfied the burden of proving bona fide justification of a discriminatory practice made in the providing of a service.

For the above-stated reasons I have concluded that the Respondent committed the discriminatory practice referred to in the complaint and the Respondent has failed to justify the practice. I therefore proceed to consider what relief the Complainant is entitled to. I deal with the question of relief under the following headings:

1. DECLARATION As earlier stated, the legislation in question has been amended and the problem which the Complainant encountered has been resolved by legislation for the benefit of other persons. There would be no sense in declaring the legislation to be invalid. However, I do declare that sections 11, 18 and 23 of the Unemployment Insurance Act operated to create a discriminatory practice during the period of time in question in the complaint.

2. DAMAGES I find that the Complainant has lost 12 weeks of benefits as a result of the discriminatory practice. The period with respect to which I make the finding is the fourteen weeks of maternity benefits lost less two weeks of regular benefits received August 16 to September 4, 1989. Counsel for the Canadian Human Rights Commission has also asked me to increase the amount of the award by virtue of five weeks of sick leave which the Complainant was required to use. Counsel for the Respondent argued that the Complainant would be receiving double compensation if she were awarded benefits in such amount and I agree.

The principle that plaintiffs should not be compensated in tort actions for earnings said to be lost in circumstances where there would, in effect, be a double recovery, has recently been reviewed by the Supreme Court of Canada. That decision is Ratych v. Bloomer (1990 S.C.R. 940). At page 972, McLachlin J. stated:

"I accept that if an employee can establish that he or she has suffered a loss in exchange for obtaining wages during the time he or she could not work, the employee should be compensated for that loss. Thus in Lavigne v. Doucet [(1976), 14 N.B.R. (2d) 700, 15 A.P.R. 700 (C.A.)] the New Brunswick Court of Appeal quite rightly allowed damages for loss of accumulated sick benefits. I also accept that if an employee can establish that he or she directly paid for a policy in the nature of insurance against unemployment, equivalent to a private insurance, he or she may be able to recover the benefits of that policy, although I would leave resolution of this questions for another case."

Further, in an article entitled, "A Purposeful Uniform Collateral Benefits Rule" (1992) 3 C.I.L.R. 1-3661. At 11, the author stated, after referring to this excerpt from Ratych v. Bloomer:

"It is important to note the concept that the plaintiff must incur an actual loss. It does not follow that the actual loss suffered is simply the monetary "face value" of the lost sick days. One must look into the facts and obtain the particulars of the sick day plan for the individual plaintiff."

After reviewing the evidence and these authorities, I have

concluded that the Complainant suffered a real loss during the five weeks in question; that the loss is compensated for by the aforesaid award of twelve weeks' benefits; that to award her compensation in that regard would offend the principles set out in Ratych v. Bloomer, a case which I consider to be relevant in considering a claim under the Canadian Human Rights Act.

3. GENERAL DAMAGES I find that the Complainant is entitled to compensation of $500 for suffering in respect of feelings caused by the discriminatory practice.

4. INTEREST I find that the Complainant is entitled to interest on monies awarded under paragraph 2 at the Bank of Canada Prime Rate as at the date of the complaint and to run from the date of the complaint to the present date. Interest shall be calculated on a simple interest basis.

I reserve the right to reconvene this hearing at the request of either party if the parties are unable to agree on the amounts awarded hereunder. I wish to express my appreciation to counsel for the parties for the helpful, thorough and carefully-considered submissions which have been made. The length of the hearing was greatly shortened by virtue of the realistic assessment of positions made by both counsel.

Dated this 29th day of December, 1992.