T.D. 5/97
Decision rendered on June 4, 1997

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

MONICA KOEPPEL

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

DEPARTMENT OF NATIONAL DEFENCE

Respondent

TRIBUNAL DECISION

TRIBUNAL: RONALD W. McINNES Chairperson
PAUL GROARKE Member
GEORGE IMAI Member

APPEARANCES: MR. E. TAYLOR Commission Counsel
MS P. LAWRENCE Commission Counsel

MS D. BROWNRIDGE Complainant's Counsel

MAJOR R. SMITH Respondent Counsel
MR. S. RESTALL Respondent Counsel

DATES & PLACE OF HEARING May 27,28,29,30,31 & June 3,4,5,6 & 7, 1996, Winnipeg, Manitoba and July 16,17,18 & 19, 1996, Toronto, Ontario

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THE COMPLAINT

By Complaint dated June 7, 1993 Monica Koeppel alleged that the Respondent, Department of National Defence ("DND") was engaging in a discriminatory practice from on or about August 12, 1991 to the date of the Complaint at the Canadian Forces Base in Winnipeg on the grounds of disability (hearing-impaired) in respect of her employment.

To explain why certain evidence was adduced and thought relevant, it is useful to set out the particulars of the Complaint:

The Department of National Defence has discriminated against me in employment because of disability contrary to section 7 of the Canadian Human Rights Act. I have a hearing loss in both ears which is severe enough to make it difficult for me

to communicate effectively by telephone, despite the use of hearing aids or a telephone amplifier. On July 2, 1991 after twelve years as a public servant, I transferred to the Central Registry at Canadian Forces Base Winnipeg as a Central Registry Clerk. Although my duties consisted primarily of sorting mail and filing I participated, together with my two co-workers, in telephoning answering.

My original supervisor told me not to worry about telephone answering, and allowed me to concentrate on my other duties. However, the person who replaced her as of August 12, 1991 had a negative attitude to my disability. She failed to explain things to me, did not speak clearly, and insisted that I answer the telephone, although doing so had caused me to suffer from stress, precipitated migraine headaches, and resulted in considerable absenteeism. On November 22, 1991 I submitted a report from an audiologist, which made it clear that I should not be expected to answer telephones.

On that same day I was failed on probation, and assigned to a series of other jobs. On July 17, 1992 I was reassigned to the same position I had had beginning on July 2, 1991. I continued to experience problems caused by the stress of having to answer the telephone and, as a consequence, was obliged to go on leave without pay beginning March 1, 1993. I believe that my supervisors could have easily accommodated my disability by having my co-workers answer all telephone calls.

POSITIONS OF THE PARTIES

Counsel for the Canadian Human Rights Commission (the "Commission") and counsel for the Complainant took the position that this was a case of indirect or adverse effect discrimination and that the Respondent had not made sufficient effort to accommodate the disability of the Complainant.

The primary position put forward by counsel for the Respondent was that there was no discrimination and that this was solely an "industrial relations" problem related to the attitude and absenteeism of the Complainant in a variety of employment situations. If there was any element of discriminatory action with respect to the Complainant's employment in the Central Registry ("CR") in the Base

Orderly Room ("Base") at DND, it must be characterized as direct and not a discriminatory practice because it was a bona fide occupational requirement within Section 15 of the Canadian Human Rights Act. (CHRA). Alternatively, counsel for the Respondent argued that, if there was indirect discrimination, DND had accommodated the Complainant to the point of undue hardship.

EVIDENCE

The Complaint relates to Ms. Koeppel's employment with DND between July 1991 and March 1993 with particular emphasis on the period between July 1992 and February 1993. However, because of the positions taken by the parties, it is necessary to review, to some extent, Ms. Koeppel's entire work history in the Public Service.

Previous Work History

Ms. Koeppel commenced her career with what was then Health and Welfare Canada in April 1981 when she was appointed to the position of support services trainee for an eight month term at the CR-02 employee group and level. This group consists of clerical and regulatory workers. Ms. Koeppel remained in this group at the CR-02 level throughout her career.

Ms. Koeppel became an "indeterminate" or permanent full-time Public Service employee when she was appointed to the position of Generalist Clerk (Central Registry) in the Income Security Branch in July 1981. Due to what was described as "a recent supervisory breakdown", there was no assessment of Ms. Koeppel's performance for much of her time in this position.

Between October 1983 and June 1984, Ms. Koeppel was on special assignment as a purchasing clerk with the Medical Services Branch. Her performance review for this period was generally very positive although it was noted that there were "some oral communication problems" and that she continued to have health problems requiring continued utilization of sick leave.

In July 1984, Ms. Koeppel was transferred to the Income Security Program Branch as a Training Utility Clerk. During the period between July 1984 and April 1985, Ms. Koeppel received "Unsatisfactory" ratings. Her supervisor commented that Ms. Koeppel had difficulty working under pressure situations and was easily irritated especially when there was a heavy workload. It was also noted that Ms. Koeppel had a health problem which resulted in frequent absences which, in turn, added to the backlog in her work.

Ms. Koeppel explained that she was trying to do her best in this position but found that the dust from files in the work place aggravated her asthma. She testified that this was the cause of both her irritability and her absences from work during this period.

In discussion with her counsel, the following exchange occurred:

Q. I note in box 4 there are comments there. It refers to your absence from work. It says ten days in the last three months. Why were you absent from work for ten days?

A. Because asthma and stress, related to, you know, stress related problems. And also I had difficulty with communications there, looking after my contact

with people. And because there was high demand.

Q. You had difficulty communicating with whom?

A. With some people who don't know how to speak to me. They hand me a piece of paper, you pull these files out, I want it now. And I find it pretty stressful, you know.
. . .

Q. And in box 2, on page 286, it refers in that box to irritability. Can you tell us more about that?

A. Because I wish I could do better, I was so irritable with my health problems. And I wish that I

did not have the health problems. I wasn't happy with what I'd been through. And I found it very frustrating with the job and its high demands for me.

In June 1985, Ms. Koeppel was referred to Dr. Terry Jolly for a Public Service Health Assessment of Fitness for Duty because of her high utilization of sick leave.

The purpose of these assessments, also called a "fitness for work evaluations", is to determine whether an employee is medically capable of performing the duties of his or her position in a satisfactory manner. They are conducted by Health and Welfare Canada where there is reason for management to believe that deterioration in work performance is medically related. If the occupational health doctor concludes that there is no reasonable possibility of improvement, this is a basis for dismissal of the employee from the Public Service. Dr. Jolly testified that it is often used by managers to get rid of an unsatisfactory employee by having the medical examiner act as "hatchet man". However, in this case, Dr. Jolly reported:

In addition to her hearing handicap, Ms. Koeppel has a recurrent and ongoing medical condition which is the main cause of her frequent absences. This is accentuated by the dusty environment to which she is exposed as a file clerk. Thus for her own health, it is undesirable that she work in that particular location. Her inability to cope with pressure is a natural corollary of her hearing handicap which undoubtedly carries with it a psychological scar. She is, however, a bright individual who requires challenge rather than pressure and I feel will respond to this. She has performed satisfactorily in word processing, materiel management and central registry duties in the past and it is recommended that she be found a position within NHW in one or other of these areas.

Ms. Koeppel also testified that her absence from work during this period was because of stress as well as asthma. She related her stress to difficulty with communications and contact with people as well as the heavy workload. There were no telephone duties associated with this position.

Following Dr. Jolly's report, Ms. Koeppel's duties were altered to minimize her contact with dust. In her performance

appraisal between April and October 1985, she was rated as "Satisfactory". For the period from October 1985 to October 1986, she was rated "Fully Satisfactory", although it was noted that the heavy workload during peak periods affected her health. The annual appraisal for the period between September 1986 and October 1987 resulted in a "Satisfactory" rating. The review was complimentary of her performance and abilities but noted that frequent absences affected her overall work performance since she was constantly in the position of having a large backlog. She was also rated as "Satisfactory" in the performance review for the period October 1987 to September 1988. It was noted in that review that increased workload during peak periods affected Ms. Koeppel's overall performance. She had difficulty in coping with the pressure and resulting stress. Also, when she was backlogged, she had difficulty in her relationships with co-workers.

Effective July 1988, Ms. Koeppel assumed the duties as a clerk in the Central Registry. It is perhaps for this reason that there was a second performance review covering the period from April through June, 1988 signed by different person as supervisor. This review rated Ms. Koeppel as "Fully Satisfactory" and the comments were brief but positive.

This document was signed several months prior to the annual appraisal referred to above.

In September 1988, Ms. Koeppel was transferred to the position of Generalist Clerk in the Income Security Program Branch of Health and Welfare Canada. For the period September 1988 to March 1989, Ms. Koeppel was rated "Satisfactory" in her new position in a "Probationary Appraisal". However, her supervisor included the following comment:

Ms. Koeppel's skills such as tact and courtesy require improvement. She responds poorly to feedback or criticism.

It seems that repeated discussion resulted in a decline of co-operation with myself and fellow employees.

The supervisor recommended courses on interpersonal skills and telephone etiquette for Ms. Koeppel.

In her annual appraisal for the period from October 1988 to September 1989, Ms. Koeppel was rated "Satisfactory" by a different supervisor. The supervisor commented that "peak work loads, cut-off and shortage of staff tend to result in some moodiness and negative attitude" and she recommended courses in self-motivation and interpersonal relationships.

In the space for her comments, Ms. Koeppel wrote that she felt that she was underestimated and that the challenging aspects of her job had been taken away.

The annual appraisal for Ms. Koeppel for the period from October 1989 to September 1990 rated Ms. Koeppel as "Satisfactory" with no negative comments or recommendations. There was no performance review produced for 1990 - 1991.

Work History at DND

Ms. Koeppel testified that, in March 1992, she heard rumours that Health and Welfare Canada was downsizing its staff in

Winnipeg and that CR-O2's were being laid off. In the interest of improving her employment security, she made application to DND. Her application for employment was dated March 1991 and in it she identified herself as a disabled person and checked off "hard of hearing". She also noted "I wear a hearing aide [sic]".

By letter dated June 24, 1991, Ms. Koeppel was offered a lateral transfer indeterminate appointment to DND as a Central Registry Clerk effective July 2, 1991 at the CR-02 level. The letter pointed out that Ms. Koeppel would be on probation for a period of six months pursuant to the provisions of the Public Service Employment Act. Ms. Koeppel accepted the offer on June 28, 1991.

a) Chain of command

At this point in time, Ms. Rylla O'Connell. a CR-04, was the supervisor in the Central Registry. Also employed in the office was Judy Thorne, a CR-03, and two military personnel.

The "chain of command" for the Central Registry ("CR") at this time was as follows: Ms. O'Connell reported to Warrant Officer ("WO") Iris Karpenic; WO Karpenic reported to Chief Petty Officer ("CPO") Peter Barefoot, the Base Superintendent Clerk; CPO Barefoot reported to Captain Brian Quick, Assistant Base Administration Officer. Captain Quick was the officer in charge of the Base Orderly Room which included the Central Registry.

b) Job description

The Position Analysis Schedule or job description for the Central Registry Clerk was entered into evidence. That document summarizes the duties as follows:

Under the general supervision of the Base Central Registry Supervisor maintains and controls a BF system, creates new files and temporary dockets when necessary, sorts mail and assists in dispatching and distributing of all outgoing mail, responsible for charging out files and putting away files, assists the classification clerk with the classifier's duties, performs the duties of the CR 3 during absence of incumbent and assists with the messengers service to the offices in the Base headquarters building.

Of these duties, 25% of the time is estimated for assisting in handling and maintaining files; 25% in assisting and sorting daily mail; 15% in performing messenger service within the Base Headquarters Building; 10% in maintaining a rotating BF Card Index; and 15% for other related duties. Among the seven items under "other related duties" is "by answering telephone and supplying counter service for file requisitions and routine inquiries".

This does not appear to be a completely accurate account of the job. In her evidence, Polly Moore (a later Supervisor) testified that the Position Analysis Schedule was a summary of the duties of the CR-02 but that Ms. Koeppel would not have performed all these duties. She stated: "well, with the time frame for work, she -- her main duties were to do the mail, do the messages, file them according to date,

time, group, and answer telephone inquiries and counter inquiries".

c) Initial interview and meeting

Ms. Koeppel did not initially remember whether she had been interviewed prior to receiving the letter offering her the position as Central Registry Clerk. She made mention of a very short 20-30 minute meeting with someone, possibly in the last week of June. On cross-examination, it was put to Ms. Koeppel that she had an interview with WO Shantz (the predecessor of WO Karpenic) and CPO Barefoot on June 20, 1991. She responded that she could remember it but not very well. Ms. Koeppel thought the first meeting occurred on July 2, 1991, the first day of her employment with DND. She recalled CPO Barefoot and Ms. O'Connell being present but could not remember whether there was a third person. With respect to the discussion about her hearing disability, she testified:

And they asked me: Can you do the telephone? It's very, very difficult question when I said to them, if they asked me to do the telephone, I said my only answer was I cannot promise, I cannot guarantee I could be 100 per cent satisfactory in my performance on the phone because of my hearing disability.

Ms. O'Connell testified that she took no part in the hiring process of Ms. Koeppel because she was on leave at the time.

Ms. Thorne's evidence was that she first met Ms. Koeppel during an interview session for the CR-02 job. Her memory was very vague as to the date and location of this interview but she did recall that CPO Barefoot was present. Her only specific recollection was that CPO Barefoot had asked Ms. Koeppel whether she would have problems answering the telephone. She could not recall Ms. Koeppel's exact response but testified that it was to the effect that she would not have a problem.

CPO Barefoot testified that his first recollection of a meeting with Ms. Koeppel was in the summer of 1991 at an interview for employment. Ms. Koeppel was interviewed by himself, WO

Shantz and someone from the Central Registry staff. He testified that he asked at this meeting whether Ms. Koeppel's hearing impairment would pose a problem with performance of her duties in the Central Registry, including counter inquiries and answering the telephone. He was not certain that Ms. Koeppel was present when he asked this question but recalls that he was assured that her hearing impairment would not hamper her in her employment. He recalled that Ms. Thorne had been present on one occasion when this issue was discussed and also that he was assured by both Ms. O'Connell and Ms. Thorne at some point that Ms. Koeppel's hearing impairment would not be a problem.

Despite the confusion in the memories of the witnesses, it is a reasonable inference that an employment interview did take place prior to Ms. Koeppel being offered the position as Central Registry Clerk. It probably occurred in CPO

Barefoot's office with WO Shantz and Ms. Thorne present as well as Ms. Koeppel. Since no other meetings are mentioned prior to the date Ms. Koeppel commenced her employment, it must have been at this meeting that she indicated that she could not guarantee "100 per cent satisfactory" performance on the telephone. While neither CPO Barefoot nor Ms. Thorne recalls Ms. Koeppel using these precise words, they came away from the interview with the impression that she could handle the telephone answering duties required of this position.

Ms. Koeppel made several references in her testimony to the effect that she advised DND that she could not "guarantee" that she would be "100 per cent satisfactory" in answering the telephone. Although she seemed quite certain she had used those words, they are somewhat misleading since Ms. Koeppel also testified that she had previously had a great deal of difficulty when required to answer the telephone in a position she occupied with Health and Welfare Canada in 1988. She responded to this problem by complaining to her union shop steward. Apparently a grievance was filed and this resulted in the replacement of Ms. Koeppel's supervisor and the end of any requirement to use the telephone as part of her duties.

Ms. Koeppel testified that, either at the meeting on July 2, 1991 or shortly after, Ms. O'Connell waived her telephone duties.

On cross-examination, she conceded that Ms. O'Connell had not actually said this to her and it was simply an impression that she formed. She had no recollection of having to do any telephone work in the first few weeks of her employment. It was Ms. O'Connell's evidence that she did not waive telephone duties for Ms. Koeppel. She testified that she first met Ms. Koeppel on July 2, 1991 on which date she reviewed her duties as a CR-02 in the Base CR. She also denied Ms. Koeppel had ever said to her that she could not guarantee 100 per cent that she could answer the telephone. She did not recall having any conversation with her regarding answering the telephone.

In any event, Ms. Koeppel began work for the DND in the Base CR on July 2, 1991. Her immediate supervisor was Ms. O'Connell until she was transferred in mid-August. At that time, Ms. Thorne assumed the supervisory duties. During this time period, there were four people working in the CR - Ms. Thorne, Ms. Koeppel and two military personnel, one of whom was identified as a Corporal Hiscox. During some part of this time, there was also a person named Judy who was temporarily assigned to assist with the workload.

d) Probation

Despite some confusion amongst witnesses, the evidence is clear that Ms. Koeppel was on probation for her first six months in this position. Initially, things appeared to go well.

Comments on her Record of Probationary Period for July 16 were to the effect that she was adjusting well in her new position and quickly learning the military terminology.

However, by August 1, 1991 her supervisors were commenting on her difficulty in relating to and communicating with others in the office. Her hearing disability was noted as a possible contributing factor. It was also noted that Ms. Koeppel tended to become frustrated and irritated. The rating for August 14 and August 28 noted her as unsatisfactory in the areas of "dealing with others,

cooperativeness", "communication with supervisor/others" and "adaptability to changes".

Between early September and mid-October, there was an intermittent strike by the Public Service Alliance of Canada which affected the civilian employees at Canadian Forces Base ("CFB") Winnipeg. Within the CR room, the only civilians were Ms. Thorne and Ms. Koeppel. Ms. Thorne went on strike and took part in picket duties while Ms. Koeppel crossed the picket lines, often with considerable difficulty, to continue working. It was suggested by counsel for the Commission that this occurrence led to a personal animosity by Ms. Thorne against Ms. Koeppel and Ms. Thorne thereafter began to harass Ms. Koeppel with a view to having her fail her probationary period in the CR. Ms. Thorne rejected this suggestion although she and other witnesses agreed that there was a heightened degree of tension on the Base generally during and following the strike.

The next notation in the Record of Probationary Period is signed by Ms. Thorne on October 10, 1991 and by WO Karpenic and Ms. Koeppel on October 21, 1991. In answer to the question "Will the employee be acceptable for retention at the end of the probationary period?", "No" is checked off. In explaining her reasons for this response, Ms. Thorne wrote:

Ms. Koeppel's overall performance as a CR clerk can be classified as marginal to satisfactory. She has, however continually demonstrated an inability to work unsupervised. During hectic and busy periods she quickly becomes frustrated which has a negative impact on the performance and productivity of fellow workers.

The Central Registry is, for the most part, a constantly fast-paced area with an abundance of activity and personnel contact. Ms. Koeppel places considerable emphasis on completing tasks that require minimal or virtually no public interaction. She is reluctant to answer telephones, which is a crucial part of the CR function."

There are no further comments or ratings for Ms. Koeppel in the Record of Probationary Employment. The evidence is not entirely clear as to what happened next. Cindy Reid, who was the Respondent's representative instructing counsel and who had been Civilian Personnel Officer at CFB Winnipeg

between April 1992 and January 1994, gave evidence that the only person with authority to reject or dismiss an employee on probation is the Base Commander. It seems a reasonable assumption that this would only occur on the recommendation of the Civilian Personnel Officer who, at that time, was a

Tim Stauffer. Mr. Stauffer was not called as a witness but a Note To File dated November 15, 1991 was introduced into evidence on cross-examination by the Complainant's counsel. In that note, Mr. Stauffer, apparently following a telephone call from CPO Barefoot, wrote:

. . . He was also concerned about Monica Koeppel. Wants to reject her on probation. Says she won't answer the phone or serve customers and she is never there anyway. Monica Koeppel is an employment equity group member (hearing impaired). She transferred here from another department in July. Ted indicated before he left, that this was not a situation were [sic] rejection on probation was a reasonable option. Monica has 10 year + career in the Public Service and her personnel file indicates that she is an adequate employee. CWO Bearfoot [sic] indicated he wants her out now and he is prepared to write a letter to B Adm O and the B Comm if necessary. Attempts were made to transfer Ms. Koeppel to the BOR at ACHQ although they have not been successful to this point in time. Ms. Koeppel has also indicated to me recently that she may no longer be interested in leaving the BOR. Should be discussed at the next PY meeting to facilitate a possible move for Ms. Koeppel.

The "Ted" referred to in this note was Mr. Ted Dobie who was the Base Civilian Personnel Manager at the time.

The evidence as to specific occurrences at the CR during this period was rather vague. CPO Barefoot testified that prior to Ms. Koeppel's arrival, "we had a very harmonious group in there". However, he testified that after her arrival:

. . . I don't know whether she felt she was getting special treatment or that she wasn't getting treated properly, but the atmosphere within the central registry after Monica came

in was very, very tense and upsetting to a lot of people and that created a problem with productivity.

On cross-examination, he conceded that, during the same period, he had lost a number of senior people on his staff and that a Public Service strike had occurred.

Ms. Thorne had relatively little independent recollection of this period and essentially just confirmed the comments which she had either written or signed as agreeing to in the Record of Probationary Period. She testified that the problem that she had with Ms. Koeppel was her attitude and her refusal to answer the telephone.

Ms. O'Connell just agreed with her comments from the Record of Probationary Period. Her only recollection of a complaint from Ms. Koeppel relating to her hearing impairment was when she asked to have her desk moved further from a noisy air conditioner. This was done. She had no recollection of any complaints from Ms. Koeppel about difficulties using the telephone. The only comment from Ms. Koeppel that she recalled was that she felt left out sometimes because she could not always hear what was being said in the office. In response to a question from a panel member as to assistance

with her disability, Ms. O'Connell commented that Ms. Koeppel was still being trained at the time Ms. O'Connell left and her assessment was not completed.

On November 4, 1991, Ms. Koeppel attended at the Health Sciences Centre in Winnipeg for an audiological assessment. She obtained a letter from Heather E. Cowan, Audiologist, dated November 7, 1991 and addressed "To Whom It May Concern".

The letter read, in part:

Monica was seen at the Rehabilitation Hospital November 4, 1991 for a follow-up audiological assessment. The results were consistent with those established previously and indicate that Monica sustains a moderate to moderately-severe, permanent, sensorineural hearing loss for both ears, more pronounced for the right ear.

Monica expressed concerns regarding the expectation that she be required to use the telephone at work. I found Monica to be a bright and articulate woman concerning the impact and implications of her hearing handicap.

There are situations which will be very difficult for Monica, - the telephone is one, - especially in the presence of any background noise.

. . .

I don't think it is a realistic requirement that she be expected to use the telephone at work. Her inability to function and cope with this demand is not an ideal reflection of her overall capabilities. It is merely the individual nature of her hearing loss.

Ms. Koeppel testified that she gave this letter to Ms. Thorne on November 21, 1991. Although the letter ended up in the files, nothing particular seems to have resulted from it.

This can perhaps be explained by the fact that Ms. Koeppel was moved to a new position the next day. Although Ms. Koeppel interpreted this as a reprisal for her continuing complaint about telephone duties, it seems a more reasonable inference that efforts to move Ms. Koeppel had been in process for some time prior to this (as indicated by the note of Mr. Stauffer) and that the proximity of these two events was purely coincidental.

It should also be mentioned that Ms. Cowan tested Ms. Koeppel's hearing at about the time of the letter and gave her a prescription for a new hearing aid which Ms. Koeppel obtained. Ms. Cowan was not a witness and there was no further information with respect to any other recommendations that she may or may not have made.

e) Transfers

On November 22, 1991 Ms. Koeppel was called by WO Karpenic as she arrived at work and was told that she was moving. There was no evidence that the move was intended as an accommodation for Ms. Koeppel by moving her to an environment that did not require using a telephone or was explained to Ms. Koeppel as such. Ms. Koeppel testified that she was scared because she did not know what was happening.

Ms. Koeppel cleaned out her desk and met with Captain Mary

Simard, the Base Official Language Coordinator who was to be her new supervisor on, at least, a temporary basis. Ms. Koeppel testified that there was very little for her to do in this office and that there was no telephone. She remained in this position until the end of December 1991.

Sergeant Spraklin was the Chief Administrative Clerk for a CR unit in Air Command Headquarters at CFB Winnipeg. Sergeant Spraklin testified that, in late 1991, she met with WO Karpenic at the request of her superior, CWO Sudletsky, to discuss Ms. Koeppel moving there. She met with Ms. Koeppel and advised CWO Sudletsky that they could employ her. CWO Sudletsky had advised her that this would be a temporary situation.

On January 7, 1992 Ms. Koeppel was transferred to Air Command Headquarters and began training with the technical librarian, Shyra Ayer, in the aircraft maintenance unit.

Her primary duty was updating loose leaf technical manuals. This area was referred to in evidence by the acronym "DCOS Maint". Ms. Koeppel was not required to use the telephone in this position and, in fact, Ms. Ayer testified that she took the telephone off the hook whenever she was out of the office so that no calls would come in. She commented that she noticed Ms. Koeppel using the telephone on a number of occasions to make personal calls without any apparent difficulty.

Ms. Koeppel was the only other employee in the office and sat at a desk facing away from Ms. Ayer. Ms. Ayer testified that Ms. Koeppel seemed to have no difficulty in overhearing social conversations when they occurred at Ms. Ayer's desk and readily joined in but often claimed not to hear Ms Ayer when she gave her instructions. Ms. Ayer testified that Ms. Koeppel was a very good worker but she did have complaints about her behavior. Fairly often she was "grouchy" or "snappy". Ms. Koeppel did explain that she suffered from headaches and, on two occasions, Ms. Ayer took her to the first aid room to allow her to lie down.

Ms. Koeppel appears to have been moved to the DCOS Maint CR in January, 1992. This was a relatively small office with only one other employee, Fay Boyes, who was a CR-03. Normally, Ms. Boyes would answer any telephone inquiries but Ms. Koeppel testified that she was expected to deal with these when Ms. Boyes was out of the office. These would have been routine enquiries as this CR had no responsibility for routing message traffic.

Sergeant Spraklin testified that Ms. Koeppel was primarily recording and filing messages on a computer. She testified that it was part of Ms. Koeppel's responsibility to locate messages on the computer when persons came into the office with a request. Usually these would be oral requests or written on a piece of paper. She testified that very few requests came in by telephone.

Sergeant Spraklin found Ms. Koeppel to be a willing worker, interested in learning about computers. Initially, her

attendance was good but she then began to complain about migraine headaches resulting from the pressure of talking on the telephone. She also stated that she felt these migraines resulted from the pressure of work building up and also Ms. Koeppel's feeling of being excluded from conversations and being talked about by her co-workers. On cross-examination, she agreed that Ms. Koeppel had told her on occasion that she had to see a doctor because a high pitched noise from her hearing aid was causing a headache.

Sergeant Spraklin also testified that Ms. Koeppel had told her that she had problems with her family life and, in particular, with her mother. On a couple of occasions, she asked for assistance in arranging an appointment with the Employee Assistance Program ("EAP") representative at Air Command. EAP is a program set up in each department to assist employees dealing with personal problems. The representative counsels the employee and also attempts to put the employee in touch with support groups where he or she might get assistance.

Ms. Koeppel related an incident which occurred during this period and resulted in her calling Sergeant Spraklin at her home.

Apparently, Ms. Koeppel's mother had called CWO Sudletsky expressing concern about the amount of medication that Ms. Koeppel was taking. The implication was that Ms. Koeppel was becoming addicted to painkillers. There was no indication in the evidence as to why Ms. Koeppel's mother choose to speak to CWO Sudletsky or what she hoped to accomplish. There was also no evidence that this concern was justified. In any case, this resulted in a meeting with CWO Sudletsky, Ms. Koeppel's supervisor, Sergeant Armstrong, and another Sergeant at which time they advised her of the telephone call and her mother's concerns. Apart from this, the evidence relating to this meeting was vague. Ms. Koeppel testified as to her reaction:

Its like a threat to me. I was so upset. I was ripping myself from the inside out. I felt like I hate myself. All these problems I had for so long and I came home, I had a crying fit, I screamed at my mother, I hate her, I want to go down and kill her for what she did to me.

The next morning, Ms. Koeppel called Sergeant Spraklin at her home at about 6:00 am to tell her that she was not a drug addict and she was only taking medication prescribed by her doctor.

It was clear from her evidence that Ms. Koeppel's disability and ongoing health problems, together with her difficulties at work, made her particularly sensitive to such suggestions.

It is also a clear illustration of a problem which did not arise from her employment but which caused her considerable distress. We would also note that this was not alleviated by the manner in which her supervisors dealt with the incident.

The final witness for the Respondent was Cindy Reid. She acted as the Respondent's instructing representative to its

counsel at the hearing and was in attendance for the evidence of virtually all of the other witnesses.

Ms. Reid commenced employment as Civilian Personnel Officer for DND for CFB Winnipeg on April 17, 1992. Her role was to

provide advice to managers on the management and administration of civilian personnel. She remained in that position until January 1994. Ms. Reid was personally acquainted with Ms. Koeppel from July, 1992. She was also familiar with Ms. Koeppel's entire personnel file because, as part of her job, she conducted a comprehensive review of Ms. Koeppel's employment with DND for the purpose of preparing a response to Ms. Koeppel Human Rights Complaint in the fall of 1993.

Ms. Reid continued the narrative from the point where Ms. Koeppel returned to the Base CR in July of 1992. Ms. Reid explained that Ms. Koeppel had only been "on assignment" with DCOS Maint and that her "substantive position" was with the Base Orderly Room. In other words, her continuing full-time position was as a clerk in the Central Registry, Base Orderly Room - the position which she had previously occupied until November of 1991.

She introduced a memorandum written by CWO Sudletsky in July, 1992 at her request to document a telephone call to her in which he expressed his dissatisfaction with Ms. Koeppel.

The memorandum concluded:

In conclusion we want Ms. Monica Koppell [sic] moved from the DCOS Maint Division ASAP.

Ms. Reid testified that she spoke with Ms. Koeppel by telephone either later the same day or the day following the telephone call from CWO Sudletsky. She described the discussion as being "disjointed" and stated that Ms. Koeppel was very upset. They arranged to meet the next day. At this meeting, Ms. Koeppel reiterated her fears and concerns about what was happening in her present position and also reviewed the difficulties she had experienced previously in the Base CR. She also spoke of her medical problems and her difficulties with her mother.

Ms. Reid then made further inquiries of CWO Sudletsky as well as Sergeant Armstrong and Gail Frame, the occupational health nurse. Finally, she spoke to WO Karpenic and advised her that the managers at DCOS Maint did not want to continue Ms. Koeppel's assignment in that division and that there were no other positions available to which she could be assigned.

The only alternative was for her to return to her substantive position in the Base CR.

f) Return to Base CR

At this point in time, none of the employees in the Base CR were the same as those who had worked there in 1991 and, with the exception of WO Karpenic, everyone else in the direct supervisory chain of command had also changed. Polly Moore, the supervisor of the CR, also wore a hearing aid. However, unlike Ms. Koeppel, she developed her hearing impairment later in life and, in the opinion of Ms. Koeppel, was unable

to understand the particular difficulties faced by someone born deaf.

In late July 1992, Ms. Koeppel commenced employment again in the Base Orderly Room in her position as a Central Registry clerk. A meeting was held on her first day at which Ms. Koeppel, Ms. Reid, WO Karpenic and Mrs. Moore were in attendance. All of these individuals agreed that it was made clear to Ms. Koeppel that answering phones and responding to counter inquires was part of her job and it was expected that she would share in those responsibilities with other staff.

Ms. Reid also testified that those present spoke with Ms. Koeppel specifically about her hearing impairment and the ways she might communicate with people either over the telephone or at the counter. Suggestions made were that she might ask people to write their inquiries at the counter and to ask them to either raise their voice or alter their speech to assist her understanding. Ms. Koeppel was asked if there were any "special measures" required to assist her and she indicated that none were necessary.

With respect to this meeting, Ms. Koeppel testified:

. . . I forced myself to say: Well, I won't have problem, I'll do my best . . .

and:

But I kept my composure when I was there at the meeting. I tried to bear with them, I tried to understand what their expectation[s] were, but I keep telling them about my hearing problem, they don't seem to listen to me.

With respect to this period of time in the Base CR, Ms. Koeppel testified:

That is where I have a great difficulty and I use the phone so much at that time when I got back in 1992, I put tremendous amount of pressure on myself because they wanted to do this, you know, compared to 1991, it's like a full-blown thing thrown at me, forced to do it.

On cross-examination, there was the following exchange:

Q. Would it be fair to say, Monica, that your approach to answering the telephone was you tried and you continued to try to answer the phone?

A. Yes.

Q. And this is part of the pressure I believe you described you put on yourself to succeed, correct?

A. I tried to hear and hear, pushing on my ears: Do it, get all the information in by brain. I get headaches then. There are often many times when I pick up a phone and I answer it, very often I get a confused look on my face, trying to make out the voice, what is being said, I have to figure out what is being said then I will get the message. That's the most difficult part.

Q. But what I'm saying to you is, you're trying to succeed, correct?

A. I try to, because I try to show that I'm a good

person, I try to show everyone how hard it is for me to do.

Q. And it is your suggestion or your evidence that this is creating stress, giving you headaches, correct?

A. Indeed yes.

Ms. Koeppel testified that, apart from Mrs. Moore, there was only a civilian co-worker named Irene DuBois in the CR. Later, in September or October, Corporal Jean-François LeBlanc joined the staff.

In the course of her testimony, Ms. Koeppel stated that Corporal LeBlanc offered to answer some telephone calls for her but this offer appeared to displease Mrs. Moore. Corporal LeBlanc was called as a witness on behalf of the Complainant. He worked in the CR from September 1992 until January 1993. He had no recollection of providing Ms. Koeppel with assistance in answering the telephone. He did recall occasions when she got mad because callers would make her repeat things or hang up on her. He also testified that Ms. Koeppel had a temper and left the impression that it was sometimes directed at co-workers.

Another co-worker called on behalf of the Complainant was Irene DuBois. Ms. DuBois was employed in the CR prior to Ms. Koeppel arriving in July 1992 and, at the time of the hearing, was still employed in the CR. She testified that she observed that Ms. Koeppel was having difficulty answering the telephone and suggested to Mrs. Moore that it would be easier if she answered the telephone instead of Ms. Koeppel. Mrs. Moore responded that it was Ms. Koeppel's job. Ms. DuBois also testified that Ms. Koeppel was very "moody" and that, on more than on occasion, she stepped on Ms. DuBois' feet in what she described as a "purposely accidental" manner.

Ms. Koeppel was asked on various occasions during both tours of duty in the BOR CR if she wanted a telephone amplifying device. Prior to November 1992, Ms. Koeppel had always stated that this was not required. At a meeting on November 22, 1992, Ms. Koeppel did agree to the device and it was obtained shortly thereafter.

Ms. Koeppel's evidence throughout was that she had refused the telephone amplifier because it would be of no

assistance to her. This device simply increased the volume of sounds coming over the telephone whereas Ms. Koeppel's difficulty was in discriminating the words that the caller was using. Having all of the sounds louder was of no benefit to her and could, on some occasions, make it more difficult for her to discern what was being requested. She also testified that the additional volume could create feedback from her hearing aid and that this was painful to her. She only agreed in November to accept the device to show that she was being cooperative and because of the pressure

that was being put on her. Her evidence with respect to the usefulness telephone amplifier was concurred in by the audiologist, Mr. Gillespie.

When Ms. Koeppel returned to the BOR CR, it was decided by her superiors that there would be regular progress meetings to afford both Ms. Koeppel and the employer to, as Ms. Reid described it, express any concerns that they may have. Ms. Koeppel interpreted the meetings as probationary-type monitoring sessions for her.

One of these meetings was held on October 22, 1992 as a result of a number of concerns raised by Mrs. Moore.

Mrs. Moore told Ms. Reid that Ms. Koeppel had been complaining that her co-workers were not helping her and had also complained that instructions that Ms. Moore had given her about keeping her hearing aid turned up were disciplinary in nature. At this meeting, Ms. Koeppel was present together with Ms. Reid, Ms. Moore and WO Karpenic. A document setting out concerns at the meeting was prepared and provided to Ms. Koeppel.

Ms. Reid testified that, during this meeting, Ms. Koeppel was asked if she would like to be referred to the EAP representative for that department and, as a result, Ms. Koeppel was referred to WO Anne Pritchard-Thornhill.

Ms. Reid's evidence was that WO Pritchard-Thornhill put Ms. Koeppel in touch with the

Society for Disabilities of Manitoba which, in turn, referred her to Ava Hawkins, an employment counselor with the Deaf Services Division of an agency called Reaching Equality. Although they took part in a number of significant meetings thereafter, neither WO Pritchard-Thornhill nor Ms. Hawkins was called as a witness for either side.

During her testimony, Ms. Koeppel had identified a ten page report (entitled "Extended Incident Report") of incidents occurring between August 1, 1992 and January 3, 1993. Despite lengthy explanations and argument as to the admissibility of and weight to be accorded to these notes, it never became entirely clear as to exactly when and how information about these incidents came to be in the form in which they were introduced.

It was a running commentary that Ms. Koeppel kept on her computer at home and added to from time to time either from memory or from other notes. One entry dated October 31, 1992 was of particular interest although it seems that the date may be only referring to the commencement of meetings with WO Pritchard-Thornhill.

It read:

I first met with my EAP referral counsellor WO Anne Pritchard-Thornhill and was happy with her skills of counselling. Since then, once every two weeks I had met with her. I had come down with an answer where my personal problems had actually came from. My family has problems and

my health problems were the initial issues discussed, thought to be affecting work. It was what I had thought before. It later turned out to be my hearing disability that caused the major problem in the workplace since last September. From that viewpoint I came to realize that I was continually accused of "refusing to hear" and repeatedly being criticized about my attitude and my personal peers. These actions by my supervisor has caused a great deal of stress within myself in the workplace. The whole issue is that I am not being accepted or welcomed in the unit at all.

It is unfortunate that there was no direct evidence from Ms. Koeppel on this entry as it appears to reflect a pivotal point in her thinking about what had happened to her. It is also unfortunate that WO Pritchard-Thornhill was not called as a witness to, perhaps, shed some light on how and when this "realization" had come about.

Ms. Koeppel wrote a letter dated November 21, 1992 to the Director, Civilian Employment Equity at National Defence Headquarters in Ottawa appealing for his help and stating that there had been a profound lack of understanding of her handicap by her supervisors ever since she joined the DND and that for "mysterious reasons I am treated like dirt".

Ms. Reid was away for most of December and this letter was brought to her attention on her return in January 1993. She was contacted by a Mr. Hamlin, Staff Relations Officer at Military Headquarters and a meeting was arranged with him, Ms. Reid and Judith Hayes, the Employment Equity Co-ordinator at Air Command Headquarters. Ms. Hayes was asked to conduct an independent review of the actions of Ms. Koeppel's supervisors with respect to her re-integration into her position at the Base Orderly Room.

Ms. Hayes met with Ms. Koeppel and interviewed the various supervisory personnel. Ms. Koeppel's performance appraisals over her entire employment history in the Public Service were reviewed. Ms. Hayes also consulted with the Public Service Commission Co-ordinator of Services to Disabled Persons Programs, John Ely. According to her report, Mr. Ely concurred that the possibility of reaching an equitable solution in the present working arrangement was limited and that, before any transfer arrangements could be discussed, Ms. Koeppel's lifeskills required improvement. She recommended that a meeting be held with Ms. Koeppel and an advocate from Reaching Equality to discuss the following suggestions:

1. The employee take some unpaid leave to assist her in recovering from her health problems.

2. The employee, working with an advocacy organization, access lifeskill training to assist her future re-entry in the workforce.

3. The employee, with assistance from CFB Winnipeg, identify and undertake some supplementary training (i.e. computer related skill improvement).

4. The BCPO assist the employee upon completion of above with

re-integration through relocation into the Public Service workforce.

5. The BCPO provide the necessary monitoring and supports to enable successful re-entry (i.e. sensitivity training for units).

While Ms. Hayes' review was ongoing, Ms. Reid received a four page memorandum from WO Karpenic and Mrs. Moore dated January 21, 1993 setting out "work related incidents" respecting Ms. Koeppel since July 20, 1992. And concluding:

We are now at the point where we feel we have done everything possible to accommodate the employee. The reasons for her absenteeism appear to be beyond management's control and what needs to be addressed is the prognosis of her medical condition and the possibility/probability of improvement.

The "incidents" in the memorandum were primarily about Ms. Koeppel's attitude and absenteeism. Ms. Reid explained that what was being requested was a fitness for work evaluation. This process was initiated and Ms. Koeppel was again referred to Dr. Jolly at National Health and Welfare. Because of other intervening events, it was apparently not proceeded with.

g) Leave of absence

During the early part of February, Ms. Reid met with Captain Quick. She also had several meetings with Ms. Hawkins. Ms. Reid's evidence was that Ms. Hawkins' only recommendations were to move Ms. Koeppel to another position or to remove all telephone answering requirements from her present position.

In his testimony, Captain Quick stated that they considered eliminating certain aspects of the job (presumably telephone

answering and counter inquiries) but came to the conclusion that they could not do this because of the team nature of the operation and the small size of the office staff. At any particular time, there might be only one employee in the office and he or she would have to handle all duties. He did not feel that eliminating these duties was an option.

It was determined that there should be a meeting to review the various initiatives that were ongoing and to discuss the recommendations of Ms. Hayes. Ms. Reid also testified that there were rumours at this time that Ms. Koeppel had expressed a wish to resign from the Public Service.

On February 12, 1993, a meeting was held to try to reach some resolution. Present at this meeting were Ms. Koeppel, Ms. Reid, WO Karpenic, Captain Quick and Ms. Hawkins and Muriel Florence from Reaching Equality. According to Ms. Reid, Ms. Koeppel was advised that, if she wanted to resign, her resignation would be accepted. She was also advised that transferring to another position was not a viable option at that time as no other suitable positions were available.

The remaining possibility was for Ms. Koeppel to take an unpaid leave of absence along the lines suggested in Ms. Hayes' report.

While the meeting was purportedly held to clarify such things as

the rumour that Ms. Koeppel wanted to resign, information that Ms. Koeppel was experiencing ongoing health problems and the fitness for work evaluation, the result was a foregone conclusion. There was really no alternative to a leave of absence unless Ms. Koeppel resigned. The position taken by Ms. Hawkins and Ms. Florence, who presumably were there to provide support and advice to Ms. Koeppel, was unclear from the evidence. Neither of these persons was called as a witness at the hearing.

Captain Quick's evidence was that he strongly put it to Ms. Koeppel that the leave without pay option was in her best interest. He stated that he saw it as time to concentrate on herself and address the problems that she was having in her life. He felt that this was a responsible management

decision and not simply a way of escaping the problem. He, personally, did not feel that she would have time to address her personal problems if she continued to work full time. He did not feel that he was forcing this option on her but regarded it as a logical outcome of the discussion.

No decision was made by Ms. Koeppel at this meeting. She was asked to make a decision by February 22 and a letter dated February 16, 1993, summarizing the discussion at the meeting and the various "options" discussed, was sent to her. On February 17, 1993, Ms. Koeppel submitted an application requesting a leave without pay for personal needs for a 15 month period from March 1, 1993 until May 31, 1994. It was explained that the leave had to be at least 12 months to permit DND to hire someone to replace her on a permanent basis in the CR. In return, Ms. Koeppel was entitled to priority status at the end of her leave. This meant that she was entitled to the first available position at her previous level without the necessity of going through a competition process.

Ms. Koeppel confirmed in her evidence that Ms. Hawkins had advised her to take the leave of absence. Ms. Koeppel's view of the meeting and the subsequent letter was that she was really given no choice. None of the "options" meant continued employment. What she wanted was a transfer to a job that did not involve answering the telephone. However, she felt she had to take the leave of absence because it left a chance that she might "recover" and be ready for employment again after the 15 months.

Ms. Koeppel's leave was subsequently changed to a leave of absence for sick leave so that she could apply for disability benefits through the DND benefit plan with SunLife. Her application was approved and, pursuant to the terms of the plan, she received benefits equal to 70% of her salary. In addition, she paid only the employee share of premiums for all DND benefit plans while on sick leave. On leave for special needs, she would have been required to pay both the employee and employer portions of the premium if she wished to keep the benefit plans in force.

Ms. Koeppel's last day at work was February 26, 1993. She

testified as to her feelings on that day:

. . . I was very confused, I was really messed up emotionally, mentally, and I felt like I'm going down in a black hole, somebody being stepped on me, because I felt completely worthless, I don't belong anywhere and I have a lot of anger towards my parents, what my mom did to me at Air Command and it led onto this point. I wish all this never happened and since that thing at Air Command, I was not getting on with my mother. It caused family problems, because it's what happened. It's just I took the anger out on them.

h) Subsequent events

Ms. Koeppel testified that after she went on leave, she became very depressed and contemplated suicide. Her parents arranged for her to see a psychologist, Ivan Rutner, beginning in May of 1993. During the period May 4, 1993 to December 28, 1995, Ms. Koeppel had 58 sessions with Dr. Rutner. His total charges at $150.00 per session totaled $8,700.00.

On June 7, 1993 Ms. Koeppel filed the Complaint with the Commission which led to this hearing. Following investigation, the Commission investigator concluded that her complaint was unfounded and recommended that it be dismissed. The investigator's report was introduced as an exhibit on consent. We were advised by counsel that Ms. Koeppel engaged a lawyer to make representations to the Commission not to accept the recommendation of the investigator. These representations were presumably successful in that the report indicates that the Commission referred the Complaint for mediation and, eventually, this Tribunal was appointed.

By letter dated May 4, 1994, Carol McGetrick, Civilian Personnel Officer for Wing Commander, wrote to Ms. Koeppel noting that her approved period of leave was approaching an end and asking whether she intended to indicate an interest in returning to work or planned to resign. She also advised her that she was entitled to receive priority for consideration for appointment for any vacancies for which she was qualified for a period of one year from May 31, 1994. A reply was requested by May 13, 1994. Ms. Koeppel responded by letter dated May 19, 1994 questioning whether there was a bona fide intention to reinstate her and noting

that were very few vacancies in the CR-02 category at that time. She also stated that she did not intend to return to work because of the ongoing health problems caused by her previous treatment by DND. She concluded her letter with the statement that she chose "neither option" offered by Ms. McGetrick.

Because of the ambiguity of Ms. Koeppel's response, her priority status was activated effective May 31, 1994. It is perhaps indicative of the continuing confusion that the Staffing Priority Notification indicated that Ms. Koeppel was on a leave of absence for personal needs. Evidence at the hearing indicated that an employee who was on leave of

absence for sick leave would not have been eligible for priority status. There was no evidence from the Respondent as to whether a position for which Ms. Koeppel was qualified became available during this period. Ms. Koeppel testified that she was not offered a position.

On re-examination, Ms. Reid testified that, to her knowledge, DND has been able to place all employees who had the priority status of Ms. Koeppel and who indicated a desire to return to work following a leave of absence.

At about this time, Ms. Koeppel engaged a lawyer to make inquires as to her employment status. She also applied for an extension of disability benefits from SunLife on the basis that she was still unable to return to work. The extension was granted.

The DND insurance contract with SunLife provided for payment of benefits up to 24 months if the employee became continuously totally disabled so as to be prevented from performing each and every duty of her normal occupation. Thereafter, the employee must be continuously totally disabled to the extent of being unable to perform any commensurate occupation for which she is or may become reasonable qualified by education, training or experience. The decision to declare a person fit for work does not take into account whether a particular kind of work is available. A letter dated December 7, 1994 to this effect was sent to the Base Civilian Officer. The letter further noted that Ms.

Koeppel's initial period would end May 28, 1995 and that, based on the medical information on file, benefits would not be provided after that date unless her condition were to deteriorate. Ms. Koeppel either was aware of this provision or became aware in the early part of 1995. She made no application for an extension but, in February, she made inquiries with respect to superannuation benefits from DND.

Ms. Koeppel testified that she applied to Gallaudet University in September or late August 1994 and took the entrance exam in November 1994. She passed the test and was advised of this in February, 1995. Gallaudet is a university in Washington DC which offers a specialized educational environment for persons who are deaf or hard of hearing. Ms. Koeppel moved to Washington DC and began attending classes at Gallaudet in the fall of 1995.

Ms. Koeppel had wanted to go to Gallaudet University since she was 17. She explained what she hoped to gain from entering this University as follows:

. . . I'm just actually doing something what I'm hoping for, going back to school, get a degree and get back on my feet to enter the work force, because my deafness, and understanding myself and accepting myself once more again; and have more self-respect and self-esteem towards it. . . . And then they also in this program teach you how to deal with people, like communication, I improve my communication strategy. And in that case, I will become a better person.

By letter dated June 18, 1995, Ms. Koeppel advised Ms. McGetrick

that she was requesting a voluntary withdrawal from the Public Service and stated that she had decided to "pursue other careers". Her resignation was accepted June 1, 1995.

There was no evidence that Ms. Koeppel undertook any lifeskills training or computer training during her leave of absence as recommended in Ms. Hayes' report and in various earlier evaluation reports. The position of the DND, as indicated by the evidence of Ms. Reid, was that it was left to Ms. Koeppel, possibly with the assistance of Ms. Hawkins, to identify the appropriate training and DND would then assist

her. There was also an indication that DND would have paid for such training but that no request was ever received from Ms. Koeppel.

Towards the conclusion of argument, counsel for both the Commission and the Respondent each submitted that there were a number of witnesses for the other side who were not credible. Memories of witnesses for all parties were understandably vague on many details considering the time which had passed and the degree of their involvement. Where there was inconsistency, we based our conclusions on the direction of O'Halloran J.A. in Farnya v. Chorny, [1952] 2 D.L.R. 354 at page 357:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Central Registry, Base Orderly Room

The Central Registry of the Base Orderly Room was described as the reception centre for all correspondence coming into CFB Winnipeg. This would include all official and personal correspondence by post or courier. However, most of the correspondence was in the form of what was referred to as "message traffic", which was a sort of teletype or telex system used by the military. Such messages might be unclassified or classified at various levels of secrecy.

All messages received were classified, assigned numbers in military jargon for identification, a copy filed at the CR and the original forwarded to the addressee through an internal mail system. As with any organization, much of this correspondence would be routine but there could be very important or urgent messages requiring immediate action. There were four categories of message precedence - flash, immediate, priority and routine. A flash message required an immediate response and had to be hand delivered. An immediate message had to be delivered within the hour, priority within four hours and routine within a 24 hour period.

As the repository of all copies of all messages coming in to the base, the CR was expected to be able to respond to inquiries

with respect to messages previously received. Such inquiries would come from individuals coming to a counter in the CR room or telephoning for the information. Telephone

calls might also come from the message centre to advise that a flash, immediate or priority message had been received and requesting someone from the CR room pick it up and deal with it immediately. The evidence was that there were between ten and fifteen telephone calls to the CR on an average day. There was no evidence as to how many of these would be other than routine inquiries.

On cross-examination, Ms. Thorne described answering the telephone as a "crucial part of the CR function". She stated that she picked up "routine" messages from the message centre twice daily but, when a priority message was received, the message centre would call and someone from the CR would have to pick up the message immediately and deal with it according to its coded level of importance. In response to a question from a panel member with respect to the importance of the telephone, Ms. Thorne replied:

It was very important. One of the crucial functions of the CR was to re-direct messages.

Throughout there were two local telephone lines into the CR - the supervisor's line and a general inquiry line. Asked on cross-examination which telephone would ring "when General Ashley called", Ms. O'Connell replied:

There were two lines into the CR, so it would be either one of them. Because we always had to have a link to the message centre.

There was no other evidence on how a link to the message centre was maintained and no further details were elicited from this witness or others familiar with the CR operation as to the "crucial" nature of the telephone. The evidence of Captain Quick regarding the operation of the CR seemed to conflict with such a characterization. In any event, there was no evidence as to whether urgent calls from the message centre normally came in on the supervisor's line or the general line.

None of the witnesses would hazard a guess as to the measurements of the office but their descriptions would indicate that it was approximately 20' by 30'. The normal complement of employees appeared to be five but varied from three to six during the relevant periods. Besides those coming in to make inquiries, there were numbers of persons coming into the office during the day to pick up and deliver mail and messages.

Ms. Koeppel testified that, during the period of her initial assignment to the Base CR, there were two phones in the room - one on her desk and one on the supervisor's desk. Ms. O'Connell thought that there was a second telephone on the general line on the military postal clerk's desk. The office configuration was changed prior to Ms. Koeppel's reassignment there. Corporal LeBlanc testified that there were two telephones in the CR. The supervisor's telephone was on Mrs. Moore's desk and there was second telephone with a general line on the corner of Ms. Koeppel's desk where it adjoined his desk and that of Ms. DuBois. He stated that it

could not be located anywhere else because of the length of the extension cord. Ms. DuBois concurred in identifying the position of the telephones in the office. Both Ms. DuBois and Corporal LeBlanc also testified that there was a small radio, which Ms. DuBois said was on the table beside her desk, playing at a low volume in the office.

The evidence of the Respondent's witnesses was that the office worked on a team approach. While individuals would have specific jobs that were their responsibility, they would pitch in to help others when their work was done. Counter inquiries were dealt with by whoever was available and the telephone was answered by whoever was closest.

There was no evidence to indicate that dealing promptly with routine telephone and counter inquiries was critical although there is no doubt it was a function of the CR and was expected to be done.

As we have noted, Captain Quick's view of the importance of the CR and the telephone calls which it received was somewhat at odds with that of other witnesses. On cross-examination, he

testified that hours of operation of the CR were from 7:30 am to 4:00 pm with a lunch break between 12:00 and 1:00. During the lunch break, he guessed that the room was locked and secured if everyone had gone out but, if someone stayed in to eat lunch, he or she might answer calls or might just shut the door. He stated:

So if the CR is closed that day, it's closed. If someone is inside and they don't mind answering a query, answering the phone, they can do so. It's more, as far as I am concerned, a personal choice.

However, it was clear that Captain Quick was not intimately familiar with the details of all of the areas which were under his command. He did not, as he phrased it, get involved "in the weeds". On the other hand, no other witness gave contrary evidence as to hours of operation nor was there any evidence as to what happened to messages or enquiries when the CR was not open.

Medical and Psychological Evidence

Apart from her hearing disability, Ms. Koeppel experienced a number of medical problems. She described some of them in the following exchange with her counsel:

Q. Now Monica, you've experienced other medical problems. Will you tell us about some of the problems you've had?

A. Yes, I have. I had asthma for many years, since I was in my teens. I had allergies, dust, mold, cat hair and things like that. And also I have headaches since I was 14 years old because I had a stressful life at home with my parents who were having marital problems and this stress at home and trying to deal with it.

Q. And how does the stress affect your headaches?

A. In many different ways. Like, for example, I worry a lot, because of communication problems I don't know what's going on. Like I don't know what's

happening around me. And it's very frightening and it makes me nervous. And, naturally, I tend to get paranoid that some people are talking about me. Because they don't talk to me, I get nervous, I start to wonder.

Dr. Carl Epp was called as treating family physician and not as an expert. He first treated Ms. Koeppel in 1987 and 1988 and again after he returned to Winnipeg in 1991.

Her main problem was described as migraine headaches, which Dr. Epp testified were quite frequent, as well as allergies and asthma. He felt that the main trigger factor for her migraines was stress. Stress was also a trigger factor for asthma. There were frequently occasions when Ms. Koeppel was attending Dr. Epp for both at the same time.

Dr. Epp had referred Ms. Koeppel to a neurologist, Dr. Anthony Auty, in January, 1992 and he concurred that her headaches were migraine.

A note by Dr. Epp for January 7, 1993 stated "depressed because of tensions at work". He testified that he had not observed depression in her earlier medical history and that probably this was the first time it was clear.

However, in another document, Dr. Epp wrote that symptoms of stress, anxiety and depression first appeared in July, 1992. In this statement, he noted that the condition arose from her employment. On cross-examination, Dr. Epp admitted that, in assessing the cause of Ms. Koeppel's stress, he could only go by what she told him and that he had not conducted any independent investigation.

In addition to her other problems, Ms. Koeppel became concerned about possible breast cancer in November, 1992. She was off work for two weeks in January 1993 for an examination by a surgeon of a lump on her breast. Dr. Epp testified that this was a longer absence than normal for this procedure and was authorized to help her recover from stressful work conditions. This testimony was somewhat confusing as it appears that the biopsy was not done until March.

However, it was clear from both Dr. Epp and Ms. Koeppel that she was worried during this period because, until this surgery was completed, she would not know whether the lump was benign or malignant.

In March 1993, Dr. Epp discussed the proposed leave of absence with Ms. Koeppel. He initially thought a shorter leave of absence might be sufficient but he testified that Ms. Koeppel indicated that she felt a leave of absence for a year would enable her to get things "straightened out" and he concurred with her decision.

On cross-examination, Dr. Epp was referred to an item in Ms. Koeppel's "Extended Incident Report" dated January 4, 1993 where she had written: "when I get home, the first

thing I reach for is the bottle to get things off my mind. It was a bad thing, though." He stated that he was not aware of any problem related to alcohol and had not discussed it with Ms. Koeppel. Ms. Koeppel was not cross-examined about this entry and neither Dr. Epp or any other medical expert was questioned as to the effect, if any, that this might have had on her depression.

Ivan Rutner testified both as treating psychologist for Ms. Koeppel and as an expert in stress related disorders. He was not a medical doctor but did have a Ph.D. He began to see Ms. Koeppel in May of 1993. He testified that she presented as extremely depressed and, in his opinion was suffering from major clinical depression.

He stated:

She was filled with anxiety, showing almost all the clinical signs that we look for in major depression: inability to focus and concentrate, difficulty with sleep, very tearful and full of sadness, difficulty with eating, what psychologists call psychomotor retardation which means as a result of very slow moving, barely able sometimes to have the energy to move on with her life.

Dr. Rutner explained that stress related disorders are psychological and physical problems for which no organic cause can be found. A person develops problems, such as migraine headaches, as a result of suffering significant stress somewhere in his or her life.

Dr. Rutner's conclusion was that Ms. Koeppel's depression stemmed from her situation at DND and arose from her feeling that she was being put in a position where she had to fail, was being mistreated and was being falsely accused of faking her deafness. Dr. Rutner was asked how he knew that these causes were accurate rather something Ms. Koeppel was using to mask other causes. His reply was not totally responsive.

He said, in part:

. . . And, as I said, it is practically impossible if not functionally impossible to be able to see a trained therapist for over a year on just about a weekly basis to be suffering a sense of deep depression to fake it.
He did not address the possibility of the depression having arisen from other causes.

Although objected to as outside his area of expertise, Dr. Rutner made an interesting comment when asked whether, in general, he found that people who had physical disabilities were hypersensitive. He noted that people who are deaf find it difficult functioning socially, especially in groups.

Someone like Ms. Koeppel, who was born deaf but developed the ability to communicate well verbally, is marginalized and not accepted totally by the hearing community because their expectations of what she is capable of doing are usually erroneous. He noted that deaf persons do not pick up on verbal social cues and are not particularly skillful in dealing with the subtleties of interpersonal

communications and dynamics. Because they do not read these social cues, deaf persons are sometimes considered abrupt.

He further commented that deaf persons are excluded from conversations taking place between hearing persons and, if they have feelings of insecurity, may feel that they are

being talked about or laughed at because they cannot hear the conversation. Whatever their validity in a wider context, these comments are consistent with statements made by Ms. Koeppel and descriptions of her by other witnesses.

When questioned specifically about the effect of Ms. Koeppel's telephone answering duties, Dr. Rutner replied:

Well, I placed it as one instance of a hostile work environment in which she felt that she was being excluded, in which she felt that she was, in fact, being set up to fail.

. . .

It triggered in her yet another instance of not being able to feel a sense of competence, a sense of independence, a sense of being able to function independently in a workplace. She was placed in a situation in which she couldn't do it. She knew she couldn't do it, the people around her knew that she couldn't do it and when she brought it to their attention, she was accused of faking, for whatever purpose. And she could not make them understand.

. . .

This was indicative of what the work environment was like in which every day she went to work, every day she was given, from her point of view, an impossible task to do, ended up feeling worthless, useless, as if people were trying to get rid of her because she was defective.

It is noted that he said: "from her point of view". Dr. Rutner candidly admitted on cross-examination that his conclusions were based solely on what Ms. Koeppel conveyed to him. He stated:

Everything that I know about this case is based on what Ms. Koeppel told me, what I observed during my treatment and clinical interview with her. I did not independently verify with her workplace what was happening there.

Apart from one visit in December 1995, Dr. Rutner's treatment of Ms. Koeppel ended in August 1995 when she left for Gallaudet University. He was of the opinion that she was still in need of treatment and hoped this would be available at the university. He was asked by counsel for the Commission:

Q. Did you have any involvement in her decision to go to Gallaudet University?

A. I did. This was the goal that we seized upon. This was the light at the end of the tunnel. Her life in Winnipeg, her career with the Department of National Defence was the source of pain for her. And we looked at attempting to recreate her life, refocus it elsewhere and it was toward Gallaudet that we focused.

Audiological Evidence

Ian Gillespie was qualified as an expert in audiology. He testified in some detail as to the nature and extent of

Ms. Koeppel's hearing loss. Mr. Gillespie had performed an audiological assessment of Ms. Koeppel in February and March, 1993. The purpose of the assessment at that time was to provide the audiometric information that Gallaudet University required about Ms. Koeppel to consider her application for admission He explained that a hearing aid was simply a device that amplifies sound. Some devices are capable of shaping the sound so that there is no over-amplification in certain areas of the speech spectrum. The device worn by Ms. Koeppel had no electroacoustic adjustment which would make possible changes to improve the sound quality of her ear. She was wearing a Starkey hearing aid which fitted directly in the ear. The output of this type of hearing aid was preset and there was no way of adjusting it. There was only a volume control.

Mr. Gillespie explained that the telephone amplifier in the hand set of a telephone is simply a volume control.

The purpose of this control is to raise or lower the incoming signal to a level that the listener is comfortable with and able to understand the information. Someone wearing an in-the-ear hearing aid (as Ms. Koeppel did) might experience problems with feedback. He went on to state that feedback may be uncomfortable for the individual and, depending on how much pressure is in the ear canal, may be painful. He

gave no indication that the device would have been of any assistance to Ms. Koeppel and there appears little likelihood that it would have been since her hearing aid already had a volume control.

Mr. Gillespie's recommendation at the time of the assessment in 1993 was that Ms. Koeppel consider a trial period with new amplification, specifically wearing hearing aids in both ears. He had also discussed with her a programmable digital amplification, with a built in telecoil, which would allow her to program the hearing aids. This would give her the option of switching off one or both hearing aids would make it easier to use the telephone. This type of device would cost between $2,000.00 and $2,300.00.

In response to a question from a panel member, Mr. Gillespie stated that a telecoil device is like a magnet and takes electromagnetic energy from a telephone, for example, and converts that into a signal that the user hears as speech. He stated that these were recommended where the client needed to do telephone work but had to be specially ordered. If installed at the time of ordering a hearing aid, manufacturers charge approximately $50.00 to $55.00. The cost would be considerably higher to instal one in an existing hearing aid.

ANALYSIS

All complaints must be examined in the context of section 2

of the CHRA, which sets out the purpose of the legislation. This specific Complaint is brought under section 7 of the CHRA which provides:

7. 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.

Disability is a prohibited ground of discrimination. The particular disability specified in the Complaint is hearing impairment. It is alleged that the Complainant was treated adversely in her employment and eventually "constructively dismissed" by the Respondent because of her disability.

Standard and Burden of Proof

The burden of proof is on the Complainant to establish a prima facie case of discrimination. Once that is done, the onus shifts to the Respondent to establish, in cases of direct discrimination, a justification for the discrimination, upon a balance of probabilities. In cases of adverse effect discrimination, once a prima facie case has been established, the onus shifts to the Respondent to establish, again on a balance of probabilities, that it has taken reasonable steps to accommodate the employee. (Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202 at page 208, and Ontario Human Rights Commission and O'Malley v. Simpson-Sears Limited, [1985] 2 S.C.R. 536 at page 558-9)

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 (O'Malley, at page 558).

Role of Discrimination

It is well established that it is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that the discrimination be a basis for the employer's decision (Foster Wheeler Ltd. v. Ontario Human Rights Commission, (1987), 8 C.H.R.R. D/4179 at page D/4179 and Holden v, Canadian National Railway , (1990), 14 C.H.R.R. D/12 at page D/15).

Nature of the Discrimination

Where discrimination is alleged, it is necessary to consider whether such alleged discrimination would be direct or indirect in nature because given the current state of the law different consequences may flow depending upon the result of that analysis.

The accepted criteria for distinguishing direct

discrimination from adverse effect discrimination were articulated by Mr. Justice McIntyre in O'Malley ,at page 551:

A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force .

. . An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. [emphasis added]

This principle was cited with approval by the Supreme Court of Canada in Alberta Human Rights Commission v. Central Alberta Dairy Pool et al, [1990] 2 S.C.R. 489.

In Alberta Dairy Pool, the majority of the Supreme Court made the following comment with respect to the defence of bona fide occupational requirement ("BFOR") or qualification ("BFOQ"):

Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justification test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish the BFOQ. (at page 514)

and further stated:

. . . once a BFOR is established the employer has no duty to accommodate. This is because the essence of a BFOR is that it be determined by reference to the occupational requirement and not the individual characteristic. There is therefore no room for accommodation: the rule must stand or fall in its entirety. (at page 516)

With respect to accommodation, McIntyre J. stated in O'Malley :

Where adverse effect discrimination is shown and the offending rule is rationally connected to the performance of the job, the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship. It seems evident to me that in this case, the onus should again rest on the employer, for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence. (at pages 558-559)

This case established that, under the Ontario Human Rights Code, there was a duty to accommodate to the point of undue hardship despite the absence of an express statutory basis for such a proposition in the Code. In Bhinder v. Canadian National Railway Co. [1985] 2 S.C.R. 561, the Supreme Court adopted the reasoning in O'Malley with respect to the duty of accommodation to the point of undue hardship in a case under the CHRA.

The above observations in O'Malley were adopted by Wilson J. in Alberta Dairy Pool where she also stated with respect to undue hardship:

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to lists some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar - financial costs, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances.

Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case. (at pages 520-521).

Further discussion of the duty to accommodate and undue hardship is found in Renaud v. Board of Education of Central Okanagan No. 23 and C.U.P.E.. [1992] 2 S.C.R. 970 where Sopinka J. stated:

The duty resting on an employer to accommodate the religious beliefs and practices of employees extends to require an employer to take reasonable measures short of undue hardship. In O'Malley, McIntyre J. explained that the words 'short of undue hardship' import a limitation on the employer's obligation so that measures that occasion undue interference with the employer's business or undue expense

are not required. (at page 982)

With respect to the duty of the complainant, Sopinka J. stated:

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. (at page 994)

The only case referred to us dealing with disability in employment was Belliveau v. Steel Co. of Canada (1988), 9 C.H.R.R. D/5250, a decision of an Ontario Board of Inquiry.

Speaking of the Ontario Human Rights Code, Mr. Cumming (now Cumming J.) stated:

The structure of the Code places the onus upon the employer to establish that the handicapped person is incapable of performing the essential duties of the job, and at the same [time] establish that the employer cannot take affirmative steps to reasonably accommodate the individual's handicap.

. . . Undoubtedly, this approach was taken by the legislature because many employers prejudge the ability of the handicapped to their disadvantage, and it is within the employer's knowledge as to what the essential duties of the job are, and what are the possibilities of reasonable accommodation. (at page D/5251)

Application of the Law to the Facts

The parties disagree very strongly on the nature of the employment practice or work rule which affected Ms. Koeppel in this case. The requirement at issue is that set out in the Position Analysis Schedule or job description for a

CR-02 under the heading "other related duties" where it states "by answering telephone and supplying counter service for file requisitions and routine inquiries". As set out above, this is one of seven items under this heading which is stated to make up 15% of the duties of the position.

The Commission and the Complainant state that this is, on its face, a neutral work rule which has a discriminatory effect on the Complainant because of her disability. The position of the Respondent is that this is not a neutral rule because, by implication, the requirement to answer the telephone discriminates directly against all individuals with a hearing disability as severe as that of Ms. Koeppel.

Counsel for the Respondent phrased the work rule as:

"everyone working at the CR at CFB Winnipeg must have sufficient hearing to answer the telephone".

It seems quite clear from the Supreme Court of Canada decisions in both O'Malley and Alberta Dairy Pool that the

rule must discriminate on its face in order to be classified as direct discrimination. We would expect such a rule to be phrased in language which overtly excludes people within the affected group from holding a particular position or fulfilling certain responsibilities. If we accept the rather tortuous interpretation urged on us by counsel for the Respondent, it is difficult to see how any rule which has a discriminatory effect on a disabled employee could be characterized as adverse effect discrimination. This would deprive the distinction between direct and indirect discrimination of any meaning with respect to a person with a disability.

It must also be noted that we are not considering a work rule of the nature discussed in O'Malley, Bhinder, Alberta Dairy Pool or various other authorities that have dealt with this issue. Here the issue is the ability to perform one of the duties of the job as set out in the job description. It is, therefore, necessary to consider whether it is an essential duty of the job.

Role of the Discrimination

It is the position of the Respondent that there were no discriminatory practices in the actions of the various representatives of the employer in this case. Counsel argued that it was strictly an ongoing industrial relations problem in which the employer was attempting to deal with Ms. Koeppel's inability to get along with her co-workers and superiors. It was argued that it was Ms. Koeppel's personality that prevented her from performing her job satisfactorily and not her hearing disability. Problems with her interpersonal skills, it was argued, were a factor throughout her work history in the Public Service and not something that arose because of her treatment at DND.

In considering whether a prima facie case has been established, we are concerned only with the period of time during which Ms. Koeppel was employed by DND. Of particular concern are the two periods during which she was employed in the Base CR and, more specifically, the period from July 1992 to February 1993.

There is little doubt that Ms. Koeppel was not the easiest person to work with or to supervise. There was evidence from co-workers and supervisors regarding her temper and moodiness. She did not respond well to pressure in the workplace. She was absent from work often beyond her sick leave entitlement and had to use vacation time or unpaid leave for this purpose. Countering this was the evidence that she suffered from asthma, allergies and migraine headaches. In addition, there was evidence that these conditions were aggravated by stress in the workplace, resulting in a vicious circle in which these medical problems affected her behaviour and increased her absenteeism. These absences increased the backlog of work and added to the stress.

There was evidence that Ms. Koeppel felt that people whom

she could not hear were talking about her and she used the word "paranoid" in describing her reaction. There is no doubt that she personally set a very high standard for herself in her work and strove to overcome any limitations

arising from her disability and that this too caused stress. There was evidence that all her stress was not workplace-related and that Ms. Koeppel had other unrelated medical problems as well as personal problems and and difficulties with her family.

The fact that Ms. Koeppel encountered difficulties in the other positions within DND to which she was temporarily assigned and where, to a large extent, there were no telephone duties does support the position of the Respondent that much more was involved than Ms. Koeppel's hearing impairment. Medical problems, absenteeism, interpersonal relations problems and a perceived uncooperative attitude continued through these periods.

However, the short duration of time involved and the temporary nature of these assignments detracts from their reliability as a guide. It is revealing, however, that the final position with the DCOS Maint CR, which did involve telephone duties to some extent and concerning which Ms. Koeppel's refusal again became an issue, led to her being returned to the Base CR.

Some of these problems exhibited in other positions may be attributable to the unsatisfactory way in which DND had handled the initial problems in the Base CR. It would be misjudging the matter to focus strictly on the problems with Ms. Koeppel once the situation had gone wrong. There is a point where it is impossible to assess relative degrees of blame. The pivotal issue with respect to Ms. Koeppel's work at the Base CR was whether the telephone duties were a necessary facet of her job. This was never adequately addressed by DND.

The Complainant, however, need only demonstrate that her disability was a basis for the actions taken by the employer. Throughout the periods of time in which she worked in the Base CR, her refusal to answer the telephone or deal with counter inquiries was cited as a management concern and, in the latter time period, there was increased emphasis placed on telephone answering duties.

Accordingly, we must conclude that the Complainant has demonstrated a connection between her disability and various actions taken by the employer. We find that a prima facie case has been established.

Nature and Extent of the Disability

Disability is defined in section 25 of the CHRA as follows:

"Disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol, or a drug.

This Complaint is brought on the basis of disability and the disability is specified in the Complaint as

"hearing-impaired". The particulars of the Complaint indicate that Ms. Koeppel has a "hearing loss in both ears which is severe enough to make it difficult . . . to communicate effectively by telephone". This is supported by the the evidence of the audiologist, Mr. Gillespie.

There was evidence from witnesses for the Respondent that Ms. Koeppel appeared to have little difficulty in using the telephone for personal calls. We accept Ms. Koeppel's explanation that personal calls were usually not a problem because she was either familiar with the voice of the person she was speaking to or the person was familiar with her need for clear enunciation and that personal calls were less threatening than business calls. It is, however, quite understandable that some of her co-workers and supervisors would have concluded that she was exaggerating her difficulty with using the telephone. This is particularly true considering the lack of goodwill which eventually permeated the workplace. Nonetheless, there was no evidence that this perceived contradiction was ever broached by Ms. Koeppel, her representatives or her superiors and the matter was never properly resolved although there was evidence of proposed office meetings (in which Ms. Koeppel refused to participate) where this might have come out.

In argument, the issue arose as to whether the sensitivity and resulting irritability and anger exhibited by Ms. Koeppel was to be regarded as constituting part of her disability. From this perspective, the attitudinal

problems of which the Respondent complains could be regarded as disability-related and, perhaps, requiring accommodation from the employer. Related to this issue was the extent, if any, of the obligation of the employer to be aware of and accommodate these secondary aspects or manifestations of the disability.

Counsel for the Commission argued that a purposive interpretation of the CHRA required that these secondary aspects be regarded as part and parcel of the disability for all purposes including a finding of discrimination and duty to accommodate. The Respondents simply argued that it would be intrusive to inquire into such things and stereotypical to assume that such secondary aspects existed. In our view, it is simplistic to ignore the natural interconnection between Ms. Koeppel's disability and some aspects of her behavior which made her dealings with other people more problematical than they might have been. We are required to give the CHRA a liberal interpretation and "disability" must be given reasonable parameters. It seems restrictive and misleading to argue, as the Respondent did, that this case had nothing to do with disability and that the sole problem was Ms. Koeppel's method of dealing with people.

The Respondent argued that Ms. Koeppel's interpersonal

skills were a problem throughout her work history and that it was her personality, rather than her disability, that prevented her from performing satisfactorily. However, if the aspects of her personality which her co-workers and supervisors found objectionable resulted from her disability, this could put them within the protected ground within the meaning of the CHRA.

Stress too could be considered a secondary manifestation of her disability. This appears, at least arguably, to account for some of her hypersensitivity and much of the difficulty she experienced in dealing socially with her co-workers. On the other hand, it is also a reasonable inference from the evidence that the stress arose, at least in part, from the desire of Ms. Koeppel to perform well in difficult circumstances. There was evidence from her

supervisors of situations in which Ms. Koeppel became very upset not because of pressure from her supervisors to get the job done but from pressure that she was putting on herself. Mrs. Moore, for one, had brought this to her attention and commented that "Rome was not built in a day".

Problems associated with a backlog in work are referred to at numerous points in the evidence and the association appears more with the internal pressure of Ms. Koeppel on herself than the external pressure of her supervisors or co-workers.

Even though DND had refused to reject Ms. Koeppel on probation because she was "an employment equity group member", there was no evidence before us that they went to any effort to obtain information about her disability and how it might affect her work performance. On the other hand, there is little evidence from Ms. Koeppel that she provided anyone at DND with information relevant to accommodation apart from the letter from Ms. Cowan and some brochures she tried to give to Mrs. Moore, both of which appeared to relate strictly to hearing impairment. It appears that both sides failed to recognize the connection between the disability and its secondary aspects in the ongoing difficulties.

There may be a distinction between those aspects which are peculiar to an individual and the more general traits commonly associated with a particular disability. A serious hearing impairment which has existed from birth would seem more likely to have psychological parameters than a lesser impairment acquired later in life. A sensitive employer, adhering to employment equity principles, would take steps to have its personnel officers aware of such things when hiring such an employee and would provide sensitivity training for co-workers.

There was virtually no evidence of any persons at DND making any effort to familiarize themselves with problems or requirements of a hearing impaired employee until it was too late. It was obvious from at least October, 1992 when her supervisors wished to reject her on probation that

there were problems. Without further investigation, Mr. Stauffer did her no great favour in refusing the recommendation. Sensitivity training is first mentioned in the recommendations of Ms. Hayes in 1993 and only in the context of re-entry into the workplace after a leave of absence for lifeskills and supplementary training.

The overriding feature of this case is that DND failed to address what effect Ms. Koeppel's disability would have on her ability to perform the duties of the job. It is clear from the evidence of Captain Quick and Ms. Koeppel's immediate superiors that she was hired without regard for the possible problems which she might experience in answering the telephone. It was simply assumed that she could answer the telephone in the same manner and with the same efficiency as other employees. As a result, her disability was ignored and she was continually put in a position where she could not meet the expectations of her employer.

A complainant has a duty to bring to the attention of an employer the facts relating to discrimination (see Renaud, page 994). This is a reasonable prerequisite to the employer's duty to accommodate. Where the complainant does not bring all such facts to the attention of the employer because she is unaware of their importance, we cannot find that the duty switches to the employer to search them out and make efforts at accommodating them.

As indicated above, these issues only arose during argument and no evidence, expert or otherwise, was specifically directed to them. Under these circumstances, we do not feel that we can take this matter further in this case.

DEFENCES

Accommodation

It is the position of the Respondent that it accommodated Ms. Koeppel to the point of undue hardship. The actions of the Respondent which counsel say amounted to accommodation are:

1. not rejecting Ms. Koeppel on probation;
2. offer and provision of the telephone amplifier;

3. moving her to different environments within DND;
4. numerous meetings to discuss her problems, referrals to EAP and the involvement of Ava Hawkins;
5. the independent review conducted by Judith Hayes;
6. the leave of absence to enable Ms. Koeppel "to see if she could get herself straightened out"; and
7. changing the leave of absence from a leave for personal needs to one for sick leave which financially benefited Ms. Koeppel.

The crux of the Complaint is that Ms. Koeppel was required to answer the telephone as part of her duties and that, especially during her second term in the Base CR, considerable pressure was put on her to perform such duties. Although she testified that counter service was also stressful, little emphasis was placed on this aspect

of the job in either the Complaint or the evidence. It is the Complainant's case that everything which happened to Ms. Koeppel flowed almost exclusively from the telephone duties. This is not inconsistent with evidence led by the Respondent, particularly the evidence of Captain Quick, to the effect that Ms. Koeppel would have to answer the telephone. Accordingly, this is the area in which attempts at accommodation must be scrutinized.

Apart from the offer and eventual provision of the telephone amplifier, the Respondent has not been able to point us to any tangible attempts at accommodation during this period. It is clear from the evidence that the telephone amplifier was of no use to Ms. Koeppel and that she did her best to make her supervisors aware of this. She eventually accepted it only to show that she was trying to be cooperative.

The evidence taken as a whole leads us to the conclusion that Ms. Koeppel's supervisors throughout this period felt that Ms. Koeppel's reluctance to answer the telephone was nothing more than an example of her uncooperative attitude.

Accordingly, no accommodation was offered in this regard.

The fact that a co-worker, Ms. Dubois, had offered to assume her telephone answering duties and had been refused is a significant comment on the Respondent's attitude to accommodation. This was compounded by the later failure to take action on the recommendation from Ms. Hawkins that telephone answering be removed from Ms. Koeppel's duties.

The Respondent's position throughout was that telephone answering was part of Ms. Koeppel's job description and a crucial part of the duties of every employee in the CR.

Although not explicitly stated, it would appear to be the position of the Respondent that it would have constituted an undue hardship to have an employee in the CR who could not answer the telephone. The evidence said to support this relates to the "reception centre" nature of the CR for all communications for the Base and, particularly, the evidence with respect to the "priority" message traffic for which the CR was responsible.

We do not find that the evidence supports this position.

The most significant point is simply that relieving Ms. Koeppel of telephone answering duties was never tried.

Without an actual trial, all evidence with respect to what would or might have happened is simply "impressionistic" and it is clear from the authorities that such evidence can never be sufficient to demonstrate undue hardship.

We find it difficult to understand the Respondent's argument that the refusal to reject Ms. Koeppel on probation constituted a type of accommodation. First, there was no evidence as to the reason for this apart from the memorandum of Mr. Stauffer. Secondly, it seems a strange decision if, in fact, Ms. Koeppel was incapable of performing one of the duties of the position which DND considered "essential". Choosing to ignore a disability

and its impact on the employee's ability to perform all aspects of a job does not amount to accommodation.

Moving Ms. Koeppel from the Base CR to other environments within DND may be seen as a type of accommodation if the purpose was to move her permanently into a position where telephone answering was not required. It is a reasonable inference from the evidence that these moves may have been more an attempt to placate CPO Barefoot than to accommodate Ms. Koeppel. It was also made clear to the supervisors in these other areas that Ms. Koeppel's assignment was only temporary.

The Respondent argues that there was an obligation on the Complainant to seek assistance from audiologists to improve her ability to answer telephones if she wished to maintain this position. They note the evidence of Mr. Gillespie that a programmable digital amphlification hearing aid was available in the late 1980's and that his recommendation in 1993 indicates that this could have been of considerable assistance to Ms. Koeppel. There was no evidence that she had made any inquiries in this regard or was aware of the technology although she was apparently being seen by an audiologist, Ms. Cowan, during this time.

On the other hand, there is no evidence that the employer made any effort to determine whether there were any technological alternatives apart from the much-discussed telephone amplifier. Had this been ascertained, there was evidence that some of the cost would have been covered under the Manitoba Health Plan and the employer's health plan and, possibly, payment of the balance by the employer might have constituted an accommodation. However, on the facts of this case, this is now merely speculation.

For reasons that are found elsewhere in this decision, we do not find it necessary to comment on the other belated actions which the Respondent's counsel put forward as accommodation.

The duty to accommodate is in the nature of a defence and the burden of proving that it is impossible to accommodate the complainant due to the hardship involved rests with the employer. In our view, the Respondent has not met the onus of establishing either reasonable attempts at accommodation or that it was prevented from taking further steps because of undue hardship.

Bona Fide Occupational Requirement

In the event that we are in error in characterizing the Respondent's actions as adverse effect discrimination, we have the following comments on whether the Respondent can establish that ability to effectively answer the telephone is a bona fide occupational requirement.

Section 15(a) of the CHRA states that:

It is not a discriminatory practice if

a) any refusal, exclusion, expulsion, suspension, limitation, specification, or preference in relation to employment is established by an employer to be based upon a

bona fide occupational requirement.

In order to succeed in establishing a particular job requirement as a BFOR, it is clearly established that an employer must satisfy both an objective and subjective test:

To be a bona fide occupational qualification and requirement, a limitation . . . must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economic performance of the job without endangering the employee, his fellow employees and the general public. (Etobicoke, at page 208) [emphasis added]

The reasons of Wetston J. in Shut v. Canada (Canadian Human Rights Commission), an unreported decision of the Federal Court of Canada dated October 2, 1996 contains the following statement with which we are in full agreement:

When a BFOR is justified, the employer is permitted to impose a rule which differentiates between employees on the the basis of general personal characteristics. It is only

in the clearest of cases that the courts should allow this type of exception to the rule against discrimination to exist. In order to qualify, the employer must prove that the requirements are reasonably necessary for the adequate performance of the job and that there are no reasonable alternatives to the establishment of such restrictions. In general, to establish necessity the employer is required to show that the employee would pose a safety risk related to economic harm, harm to fellow employees or harm to the general public. Proof of this must be concrete and scientific and not merely impressionistic . . . .

The only job description of a CR employee put into evidence was that of Ms. Koeppel - the CR-02 position. Under the heading of "other related duties" is the requirement of "answering telephone and supplying counter service for file requisitions and routine inquiries". There was no evidence that the CR-02 in the CR was, under normal circumstances, expected to answer calls from the message centre relating to the important messages discussed in the evidence of CPO Barefoot and Captain Quick. Ms. Koeppel's responsibility, as set out in her job description, is only for dealing with "routine inquiries". While, no doubt, this is an important function of an efficient CR, the consequences of a few such telephone calls going unanswered does not appear to create an economic or safety risk. There was no evidence from which it would even be possible to infer that any such calls would not be answered. There was a reference in the evidence that there might only be one person in the CR at a

given time but it was not explained how or how often this might occur. No explanation was offered as to how the CR functioned during the public service strike nor were we referred to any specific incidents where there was a serious problem because of a shortage of personnel in the CR. The record of absenteeism of Ms. Koeppel shows that she was not in the CR on numerous occasions and yet there was no evidence of a serious problem with "crucial" telephone messages during such times. There was only the evidence of Captain Quick with respect to those times when the CR was, in effect, "closed".

The emphasis in the cases cited to us was for the most part on the bona fide aspect of a BFOR. The work rule or duty must, however, also be an occupational requirement. By this, we understand that it must be an essential duty of the job. In the words of Wetston J. in Shut, the employer must prove that "there are no reasonable alternatives" to the establishment of such a rule. In spite of the opinions expressed by various witnesses, there was a dearth of concrete evidence before us on this issue. DND has failed to provide sufficient evidence to satisfy its burden of proof on this aspect of the matter. We are not convinced, on a balance of probabilities, that the ability to effectively answer the telephone is an essential part of the duties of a CR-02 in the Base CR or that it is reasonably necessary to assure the efficient and economic performance of the job. The Respondent fails on this defence as well.

REMEDY

Having concluded that a discriminatory practice was one of the reasons for Ms. Koeppel being placed on leave of absence in February, 1993 and that the Respondent fails on both the defences of BFOR and reasonable accommodation, we proceed to consider the remedy to which Ms. Koeppel is entitled.

Section 53(2)(c) of the CHRA provides:

If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to Subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

. . .

(c) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

Such an order is discretionary although it would

be a rare case in which such an award would be refused where a Tribunal is satisfied that a complainant has suffered financially as a result

of discrimination. The Review Tribunal in Foreman et al v. Via Rail (1980) 1 C.H.R.R. D/233 speculated that "the reason for the permissive language . . . is to cover situations in which no actual loss has been sustained, or in which some special circumstances would render an award of compensation inappropriate". The Complainant must, of course, demonstrate a causal connection between the loss or expense and the discriminatory practice before an award will be made.

Counsel for the Complainant set out a lengthy list of lost wages and other expenses for which she submits the Respondent should compensate Ms. Koeppel:

1. Loss of wages under one of three options:

(a) March 1, 1993 - June 1, 1994 at $22,836 per annum $28,545.00

(b) March 1, 1993 - August 31, 1995 at same rate $57,090.00

(c) March 1, 1993 - April 30, 1999 at $22,836 less summer employment earnings of $36,447.56 for the years 1996 to 1999 $106,277.44

2. Lost earnings due to taking sick leave without pay while employed DND - 18 days at $87.83 per diem $1,580.94

3. Lost wages due to time off for tribunal hearing -$1,555.71

4. Psychologist fees (Mr. Rutner) in the amount of $8,700.00

5. Interest on loans received from her father $811.97

6. Relocation costs to Washington, DC $181.00

7. Tuition at Gallaudet University $41,353.14

8. Other education-related expenses $41,014.64

9. Storage expenses and insurance for furniture in Winnipeg $5,400.00

Counsel for the Commission supported the claims of the Complainant for lost wages for the period March 1, 1993 to June 1, 1994 and lost wages for attendance at the hearing.

Compensation for Loss of Wages

Ms. Koeppel's leave of absence for special needs was initially for the period from March 1, 1993 to June 1, 1994. This leave was subsequently changed to a leave of absence for sick leave which enabled Ms. Koeppel to apply for and receive disability benefits equal to 70% of her salary. In May 1994, Ms. Koeppel was asked whether she was interested in returning to work or planned to resign. Ms. Koeppel replied that she chose "neither option". Her psychologist, Dr. Rutner, was of the opinion that she was still suffering from severe

depression at this time and was unfit to return to work. She applied for an extension of disability benefits from SunLife and this was granted for a further twelve months. Ms. Koeppel applied to Gallaudet University in the Fall of 1994 and took the entrance exam in November 1994 although the audiological assessment by Mr. Gillespie in March 1993 was somehow related to determining her eligibility. In a letter dated June 18, 1995, Ms. Koeppel requested a voluntary withdrawal from Public Service and her resignation was accepted effective June 1, 1995. She commenced her studies at Gallaudet in September 1995.

She is in a program which would result in a university degree no earlier than April 30, 1999.

Counsel for the Complainant argues that the time period during which there is a causal connection between the discriminatory practice and loss of wages is up to the time when the victim is able to commence gainful employment again. Her submission is that the Complainant's depression was the result of the discriminatory actions of DND and that Ms. Koeppel's course of treatment for this condition will extend until her graduation from Gallaudet.

With all respect to counsel, we cannot find on the evidence that a causal connection has been established between Ms. Koeppel's depression and the discriminatory actions of DND. The only evidence to this effect is that of Dr. Rutner. We accept his evidence that Ms. Koeppel was suffering from clinical depression but his evidence as to the cause is based solely on what he was told by Ms. Koeppel. Ms. Koeppel apparently believed that all of her problems arose from the workplace and how she was treated because of her hearing disability.

This appears to have begun shortly after she began meeting with WO Anne Pritchard-Thornhill, the EAP referral counsellor. However, on the evidence as a whole, it is our conclusion that other factors were involved to the extent that we cannot say that the balance of probabilities favours the interpretation which counsel for the Complainant would have us place on events. As examples, we cite the evidence of pressure which Ms. Koeppel admittedly put on herself, her longstanding medical problems, family difficulties, especially with her mother, and, in late 1992 and early 1993, anxiety concerning the possibility of breast cancer. Counsel for the Complainant has also not convinced us that the Complainant's attendance at Gallaudet can be characterized as necessary continuing treatment for depression. Just because the discriminatory practice may have been a contributing factor does not mean the Respondent is to be held responsible for all losses and expenses of the Complainant, regardless of how remote.

In our opinion, the most appropriate period for assessing loss of wages is the period of Ms. Koeppel's initial leave of absence. She was given little, if any, choice about taking this unpaid leave.

Thereafter, other factors were at play which caused Ms. Koeppel to extend her leave and eventually resign.

Counsel for the Commission likened the process of Ms. Koeppel going on the leave of absence to constructive dismissal as of March 1, 1993. Viewed from this perspective, an award of damages for fifteen months would seem adequate, perhaps generous, if we were using the criteria for such awards in the employment law context.

Ms Koeppel began receiving benefits from SunLife commencing June 1, 1993. This was made possible because DND changed the nature of her leave to sick leave. The benefits replaced 70% of the wages which she would otherwise have received. Her income tax return for 1993 shows income of $2,497 for unemployment insurance benefits which she testified was for the period of her leave prior to June 1. Her total wages from DND for the fifteen month period would have been $28,545 and it appears that she received a total amount of $18,482 from these other sources. In our opinion, fair and reasonable compensation for lost wages is her actual loss of income during this period and this is the amount of compensation we order under this head.

By simple subtraction, the loss amounts to $10,063.

If, by reason of our order, any sums received as unemployment insurance benefits must be repaid, the amount should be adjusted accordingly. The Respondent should, of course, make any deductions required by law and remit them to the proper authority.

Counsel for the Complainant argued that the benefits which the Complainant received from SunLife should not be deducted from her claim. In support of her position, she relied on the decision of the Supreme Court of Canada in Ratych v. Bloomer (1990) 69 D.L.R. (4th) 25. With all respect to counsel, we do not find this case helpful to the Complainant's submission.

McLachlin J., speaking for the majority, stated at page 54:

. . . As a general rule, wage benefits paid while a plaintiff is unable to work must be brought into account and deducted from the claim for lost earnings. . . . These comments should not be taken as extending to types of collateral benefits other than lost earnings, such as insurance paid for by the plaintiff and gratuitous payments made by third parties. Those issues are not before the court and must be left for another day.

Although not cited to us, the subsequent decision of the Supreme Court in Cooper v. Miller (1994)113 D.L.R. (4th) 1 is much more relevant in reviewing the argument on this

point. In that case, the court was asked to apply the ruling in Ratych to a variety of other fact situations. Cory J., speaking for the majority, stated:

In my view Ratych v. Bloomer, supra, simply placed an evidentiary burden upon plaintiffs to establish that they had paid for the provision of disability benefits. I think the manner of payment may be found, for example, in evidence pertaining to the provisions of the collective bargaining agreement just as clearly as in a direct payroll deduction. (at page 14)

This makes it clear that the payments which Ms. Koeppel received from SunLife under the collective agreement could meet the requirements for the so called "insurance exception". Insurance arrangements of this nature are, in the words of Cory J., "obtained and paid for by the plaintiff just as much as if [she] had bought and privately paid for a policy of disability insurance."

There was a significant difference between what the majority and minority in Cooper with regard to the principle underlying the insurance exception. At page 10, Cory J. stated, in speaking for the majority:

I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an

insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

At page 35, speaking for the minority, McLachlin J. took a different approach:

A plaintiff who has been compensated for lost earnings by an employment benefits plan has suffered no loss to the extent of those benefits. It is not a question of who will bear the loss, but rather of whether there is any loss to be borne.

A paragraph later, she stated:

The fallacy behind the argument that the tortfeasor should bear the loss is the notion that the tortfeasor should be punished. That is an approach which our law has eschewed except for those special situations in which punitive damages may be awarded.

The decision in Cooper applies specifically to the law of torts and does not necessarily provide instruction to a tribunal applying human rights legislation. A problem does arise, however, from comments made by Marceau J.A. in Canada (Attorney General) v. Morgan (1991) 21 C.H.R.R. D/87 (F.C.A.), a leading authority on the issue of damages in human rights cases. One of the questions addressed by the court was the extent of a respondent's liability for lost wages under the CHRA. At page D/90, Marceau J.A. stated:

. . . I am afraid . . . that there exists some confusion between the right to obtain reparation for a damage sustained and the assessment of that damage. While the

particular nature of the human rights legislation - which has been said to be so basic as to be near-constitutional and in no way an extension of the law of tort . . . - renders unjustifiable the importation of the limitations to the right to obtain compensation applicable in tort law, the assessment of the damages recoverable by a victim cannot be governed by different rules. In both fields, the goal is exactly the same: make the victim whole for the

damage caused by the act source of liability. Any other goal would simply lead to an unjust enrichment and a parallel unjust impoverishment. The principles developed by the courts to achieve that goal in dealing with tort liability are therefore necessarily applicable. It is well known that one of those principles has been to exclude from the damages recoverable the consequences of the act that were only indirect or too remote. [emphasis added]

The underlined portion of this comment by Marceau J.A. would seem to provide support for the position urged upon us by counsel for the Complainant.

These general remarks on the nature of a remedy under the CHRA could be treated as obiter dicta since the other judges in the case rest their judgments on the view that there must be a causal relationship demonstrated between the discrimination and the damages awarded under section 53(2)(c). In the next paragraph, Marceau J.A. himself stated that "one should not be too concerned by the use of various concepts in order to give effect to the simple idea that common sense required that some limits be placed upon liability for the consequences flowing from an act, absent maybe bad faith."

In dissenting on other grounds, McGuigan J.A. took the position, at page D/106, that a "strict tort or contract analogy should not be employed, since what is in question is not a common-law action but a statutory remedy of a unique nature".

It should be stated in this context that the general principles which govern the choice of remedy under human rights legislation are well established. In O'Malley for example, McIntyre J. said at page 547 that the "main approach" of human rights legislation "is not to punish the discriminator, but rather to provide relief for the victims of discrimination". One cannot help but notice that the language used in the jurisprudence echoes the concerns of McLachlin J. in her dissenting judgment in the Cooper case.

The Supreme Court expressed a similar view in Canada (Treasury Board) v. Robichaud, (1987) 8 C.H.R.R. D/4326, at page D/4330, where it held that the purpose of the CHRA is "to eradicate anti-social conditions without regard to the

motives or intention of those who cause them". In the opinion of the Supreme Court, at page D/4331, the CHRA:

> . . . is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination.

The case law makes it clear that these general principles must be borne in mind by any tribunal in determining what level of compensation is appropriate. Although there are no authorities which specifically address the issue, these considerations seem to militate against importing the insurance exception into the area of human rights law. If the insurance exception can be characterized as punitive, as McLachlin J. suggested, it is out of keeping with the remedial nature of the human rights process.

The situation which presents itself in tort law is quite different than the situation which comes before us and the considerations which apply in the instance of a tortfeasor do not necessarily apply under the CHRA. The comments in O'Malley, Robichaud and many other cases hold that there is a public or a constitutional interest in providing redress to those who have suffered loss of wages as a result of discriminatory action. This makes good sense. Society as a whole has an interest in redressing discriminatory acts.

However, this does not require an award against a discriminating party when the complainant has not actually suffered a loss.

In Canada (Attorney General) v. McAlpine (1989)12 C.H.R.R. D/253, a case decided before Morgan, the Federal Court of Appeal set aside an award of a Tribunal for compensation for the loss of "foregone" unemployment insurance benefits.

At page D/256, the Court accepted the submission of the applicant that the provisions of what is now section 53 of the CHRA "provide for specific heads of compensation rather than for compensation generally".

Section 53(2)(c) only permits a tribunal to compensate a victim for "the wages that the victim was deprived of. . .

as a result of the discriminatory practice". The question is whether the complainant in the present case was "deprived" of that portion of her wages which was paid to her through the insurance policy from SunLife. The fundamental principle underlying all three of the judgments in Morgan is that an order compensating a complainant under the subsection should be restricted to those damages which arise directly out of the discrimination. It is significant that Marceau J.A. was concerned that an order of compensation might leave the complainant unjustly enriched.

It would appear that the courts have upheld the insurance exception in the case of torts because the defendant will be unjustly enriched if the plaintiff does not receive the extra payment. lt is difficult to see how this rationale can be used in redressing a discriminatory practice, since an order of compensation is intended to restore a complainant to the position which she would have enjoyed if she had not been subjected to discrimination. Once that has been accomplished, the purpose of the CHRA has been met and the remedies available to a complainant under section 53(2)(c) have been exhausted. A human rights tribunal is

not appointed to decide civil claims between the complainant and respondent.

Even the use of the word "compensate" in section 53, rather than a word like "award", suggests that we do not have the power to put the Complainant in a better financial position than she would have enjoyed if she had worked during the period in question. If she received other compensation from insurance, especially insurance linked to wage loss, she has already received the compensation to which she is entitled and cannot ask for it a second time. In our view, this Tribunal's mandate under the subsection comes to an end once the loss has been made whole.

If we are wrong in holding that the benefits paid by SunLife reduce the amount of lost wages for the purpose of determining damages under subsection (c), that still leaves the matter within the ambit of our discretion and allows us to grant such award as we think is proper in the

circumstances of the case. The parameters of subsection (c) are quite definite and give a tribunal a wide latitude in determining the quantum of damages for lost wages. The tribunal "may" make such order compensating the victim "as the Tribunal may consider proper" for "any or all" wages which the victim has lost as a result of the discriminatory action.

As McGuigan J.A. recognized in Morgan, there is nothing in the subsection which requires a tribunal to compensate the complainant for all of the wages she has lost where a tribunal feels that justice demands otherwise. After careful consideration of the evidence in this case, we are of the view that the amount which we have awarded represents fair compensation for Ms. Koeppel's claim for lost wages.

Compensation for Sick Leave

This claim is for compensation for eighteen days that Ms. Koeppel was not paid for time taken off because of illness after she had exhausted her sick leave credits. This is throughout the entire period of her employment with DND.

Counsel submits that this loss resulted from the discriminatory action of the employer and the resulting stress and depression. Even if these particular days were not for that purpose, counsel submits that we should make this award because there were probably other days taken off for migraine headaches, etc. resulting from stress which, if she had not had to take off, would have left sufficient sick leave credits to cover the lost eighteen days.

With respect to counsel, this is pure speculation which has no basis in the evidence. Accordingly, we decline to make an award under this head.

Time Off to Attend Hearing

This claim is to compensate the Complainant for wages lost while attending at the hearing into this Complaint. It is a novel claim for which no authority was cited. We were not referred nor are we aware of any precedent in any other

type of proceeding where a party is compensated for wages lost or expenses incurred in participating in the hearing of their claim. While we accept that different considerations may come into play in a human rights proceeding, we are still of the view that this cost to the Complainant is not incurred as the result of the discriminatory practice within the meaning of section 53(2)(c) of the CHRA unless some special circumstances are shown. As there were none in this case, we decline to make any award under this head.

Fees Paid to Psychologist

Dr. Rutner was treating Ms. Koeppel for depression. As discussed above, we are not prepared to find that this depression resulted from the discriminatory practice of the employer. Accordingly, we do not make any award under this head.

We would also note that there was some evidence that Ms. Koeppel was covered in part for such services under the government health plan, and possibly, under the employer's health plan. Ms. Koeppel was unable to recall whether she had mitigated her loss for this cost by making any claims.

Interest on Loans from Father

These loans occurred during two periods of time. The first loans (for which Ms. Koeppel could provide only an approximate figure) were in the Spring of 1993, prior to her receiving unemployment insurance or SunLife benefits.

The remaining loans were in 1995 and 1996. There was no evidence of any agreement concerning repayment of these loans or payment of interest. In the absence of evidence to this effect, we are not prepared to make any award under this head.

Education-related Expenses

All of the other expenses claimed relate to Ms. Koeppel's relocation to Washington, DC and attendance at Gallaudet University. We are not satisfied that the Complainant has established a causal connection between the discriminatory practice and these expenses and, accordingly, we make no award with respect to any of them.

Legal Costs

Counsel for the Complainant has also asserted a claim for legal costs on a solicitor-client basis together with disbursements including witness fees, photocopying and other expenses, and travel expenses for the Complainant and counsel. Counsel for the Commission supports the claim for the Complainant's cost of hiring independent counsel.

Legal costs have been awarded by tribunals in certain circumstances as being an expense incurred as a result of the discriminatory practice.

We were referred to Hinds v. Canada (Employment and Immigration Commission) (1988), 10 C.H.R.R. D/5683 where counsel argued for an award of legal costs. The Tribunal stated:

. . . There is no question that it was necessary for Mr.

Hinds to retain separate and independent counsel to act for him in this proceeding. Evidence was adduced showing that a legal opinion within the CHRC concluded that Mr. Hinds' complaint was without merit and Mr. Hinds was made aware of that opinion. After this Tribunal was appointed, Mr. Hinds learned that the lawyer who had prepared the legal opinion for the CHRC was going to represent him at the proceeding.

That caused Mr. Hinds justifiably to lose confidence in the CHRC with respect to properly representing his interests.

Even though he learned shortly before the hearing that a different counsel would be acting for the CHRC, he had lost the necessary confidence in the CHRC generally that it would advance his interests. Furthermore, he was advised that the CHRC would not support his claim for loss of income. This necessitated his retaining Ms. Mactavish to act for him at this hearing. In fact, Ms. Mactavish took the major carriage of Mr. Hind's case and counsel for CHRC played only a minor and secondary role throughout. We believe that in the circumstances it was only because Mr. Hinds was represented by his own counsel that he was able to achieve

the success that he did before this Tribunal. (at page D/5698-99).

The Tribunal, however, concluded:

We do not feel that CEIC is responsible here for the costs of separate counsel and therefore, it is not necessary to decide whether we have the jurisdiction to make an order for costs. . . . We urge the CRHC to indemnify Mr. Hinds for his legal costs. Given the degree of responsibility that Ms. Mactavish took of the proceedings and her effectiveness, fairness by the CHRC would dictate no less.

In Grover v. National Research Council of Canada (1992), 92 CLLC 1746, a Canadian Human Rights Tribunal awarded the costs of the Complainant's counsel as assessed on the Federal Court scale. In doing so, the Tribunal commented that "counsel for Dr. Grover added, in our opinion, a particularly important dimension to the presentation of the Complainant's case" and added:

If the purpose of remedies is to fully and adequately compensate a complainant for the discriminatory practices, then surely the consequence of costs is part and parcel of a meaningful remedy for a successful complainant. We consider the representation by Mr. Bennett of Dr. Grover, to be totally necessary, and an extremely helpful part of the presentation of this case. (at page 16495).

In Canada (Attorney General) v. Thwaites (No. 2) (1994), 21 C.H.R.R. D/224, the Federal Court upheld a Tribunal decision to award the complainant the reasonable costs of independent counsel including the cost of certain actuarial expenses necessary to the presentation of the case. Gibson J. referred to the authority under section 53(2)(c) of the CHRA to award compensation for expenses incurred by victim and held that:

Costs of counsel and actuarial services incurred by Thwaites

are, in the ordinary usage of the English language, expenses incurred by Thwaites. (at page D/250)

The Tribunal decision had agreed with the reasons in Grover that the wording "for any expenses incurred by the victim as a result of the discriminatory practice" is of sufficient latitude to encompass the power to award costs. The Tribunal further stated: "We feel, given the complex nature of this case, that Ms. Reierson served an important and useful function in acting as counsel for Thwaites." (at page D/307)

On a combination of the lines of reasoning in these cases, counsel for the Complainant grounded her submission on the fact that the Complainant here had lost faith in the Commission at the the time the Commission investigator concluded that the Complaint was unfounded and recommended that it be dismissed. The only actual evidence of this was a statement from Ms. Koeppel in her testimony to the effect that she knew the conclusion that the investigator reached and was not happy with the way that he had handled it.

Counsel for the Complainant also pointed out that the legislated duty of the Commission and Commission counsel is to act in the public interest and what is perceived to be in the public interest does not always coincide with the individual Complainant's interests. In this case, that difference was very evident in the submissions as to remedy.

We were not referred to any case in which there had been an award of complete indemnity for all legal fees and disbursements. No explanation was given as to why the Complainant's travel costs were being claimed under this head. There are no circumstances in this case to justify either claim.

Although Ms. Brownridge's submissions as to remedy have been largely unsuccessful, we still feel that she served an important and useful role in these proceedings. She conducted the direct examination of Ms. Koeppel and raised a number of issues in cross-examination. When the differences between her position and that of the Commission are considered, we find that it was reasonable for the Complainant to retain independent counsel. Accordingly, we award reasonable legal costs of the hearing as an expense under section 53(2)(c). If the parties cannot agree on quantum, it is to be assessed on the Federal Court scale.

General Damages

Section 53(3) of the CHRA provides:

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice willfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,
the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the

Tribunal may determine.

Counsel for the Commission put forward the proposition that this Tribunal was entitled to award up to $5,000.00 under each part of this subsection. He suggested that an award of $10,000.00 in this case was justified on the basis of the degree of damage to the self-respect and feelings of Ms. Koeppel as a result of the actions of DND which he contended were engaged in both willfully and recklessly. He argued that the difficulties began when Ms. Thorne, with the connivance of WO Karpenic, determined to get rid of Ms. Koeppel while she was on probation because of her refusal to take part in the strike. Since she could not use the strike as a reason, she seized on Ms. Koeppel's difficultly in using the telephone. Thwarted in this effort by Mr. Stauffer, they then determined to harass her from the position by emphasizing the duties of the position with which Ms. Koeppel had difficulty because of her hearing disability. Failure to finish completing the probationary reports, he argued, showed the "subtle scent of discrimination". When Ms. Koeppel returned to the Base CR, there was increased pressure to answer the telephone. Her superiors also led her to think she was on probation and would be monitored closely. By unreasonable emphasis on telephone answering, they were setting her up to fail. This eventually led to the February 12 meeting where Ms. Koeppel was forced out of her employment.

We are unable to subscribe to counsel's conspiracy theory. While we have found a discriminatory practice by DND, we do not find that it was entered into willfully or recklessly although, certainly, there was a large measure of negligence and ignorance. However, Ms. Koeppel has certainly suffered in respect of feelings and self-respect.

Giving the matter our best consideration, we award the sum of $3,000 under this head.

Interest

We feel it appropriate to award pre-judgment and post-judgment simple interest on the awards for lost wages and general damages as requested by counsel for both the Complainant and the Commission. Counsel for the Complainant proposed the Bank of Canada prime rate to which there was no objection and which was accepted by the Federal Court of Appeal in Canada (Attorney General) v. Morgan, (1991), 21 C.H.R.R. D/87 as "the usual rate to be established, except when the tribunal finds special circumstances in play".

Interest will be calculated at that rate as it existed from time to time on the award for lost wages from the dates on which such wages would have been paid in the normal course until payment and on the award for general damages from the date of the Complaint until payment.

Dated at Toronto, Ontario this 19th day of April, 1997.

RONALD W. MCINNES
Tribunal Chairperson

PAUL GROARKE
Member

GEORGE IMAI
Member