T.D. 6/90
Decision rendered on April, 6, 1990

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

HUMAN RIGHTS REVIEW TRIBUNAL

IN THE MATTER OF a hearing before a Human Rights Review Tribunal appointed under subsection 42.1(2) of the Canadian Human Rights Act

BETWEEN:

CANADIAN BROADCASTING CORPORATION

Appellant
(Respondent)

and

GAIL O'CONNELL
ANNE CHIRKA
PATRICIA OXENDALE

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

DECISION OF THE REVIEW TRIBUNAL

HEARD BEFORE: Marvin N. Stark, Chairman
Robin Adams, Member
Donald Lee, Member

Appearances: Barbara A. McIsaac, Counsel for the
Canadian Broadcasting Corporation

Rene Duval, Counsel for the
Canadian Human Rights Commission

DATE AND LOCATION: December 12-13, 1988
Calgary, Alberta

MAJORITY DECISION BY: Robin Adams
(Donald Lee concurring)

DISSENTING OPINION BY: Marvin N. Stark

This is an appeal from a Decision made by a Human Rights Tribunal ("Tribunal") rendered on May 20, 1988 in which that Tribunal found that the Appellant, Canadian Broadcasting Corporation ("C.B.C."), engaged in discriminatory practices in that it differentiated adversely in relation to the complainants, Ms. Gail O'Connell, Mrs. Anne Chirka and Ms. Patricia Oxendale, "as employees and engaged in a practice or policy which deprived or tended to deprive them of employment opportunities on a prohibited ground of discrimination" (p. 56).

The question in this appeal is whether the Tribunal erred in law or fact so as to justify interference with its decision by this Review Tribunal.

It is a general principle, adopted and applied in Brennan v. The Queen (1984) 2 F.C., p. 799 that where no evidence in addition to that before the Tribunal was before the Review Tribunal, the latter should accord due respect for the view of the facts taken by the Tribunal and, in particular, for the advantage in assessing credibility which he had in having seen and heard the witnesses. It remains the duty of the Review Tribunal to examine the evidence. if it is persuaded that there was palpable or manifest error in the interpretation of the facts then it must and only then substitute its view of the facts for that of the Tribunal.

With this principle in mind, I turn first to the Appellants' submission that the Tribunal erred in making findings of fact and inferences which are unsubstantiated by the evidence.

The Tribunal made the following crucial findings of fact:

1. Experience acquired in mobile and remote broadcasting was and is considered desirable for professional growth, as well as for the greater interest and financial rewards which it brings.

In making this determination, the Tribunal rejected the Employer's argument that mobile and remote assignments were only desirable because the

complainants characterized them as such and that the assignments only took on a discriminating character at a purely subjective level. This finding was based primarily upon the testimony given by each of the complainants and the evidence given by Mr. Kimber, the Executive Producer of "Sportsweekend" (page 41).

2. The pattern of mobile and remote assignments during 1983 and 1984 in the schedules indicate that the three complainants were treated differently from the male technicians who had the same classification and job description as them. Specifically, in the case of Ms.

O'Connell, she suffered in comparison with Mr. Nesbitt in terms of overtime earnings in 1983, although not in 1984. In both years she received less in the way of mobile and remote assignments. Mrs. Chirka's overtime hours and earnings were significantly lower than those of Mr. Nesbitt for both years and she received fewer mobile and remote assignments. In Ms. Oxendale's case she compared very unfavorably with Mr. Jessup during 1983 and 1984 in terms of both overtime earnings and outside broadcast assignments.

In drawing the foregoing conclusion, the Tribunal relied heavily upon figures drawn from data collected from a common source and calculations which were derived using a standard system of assessment and introduced into evidence by counsel representing both the Commission and C.B.C. The Tribunal decided that this evidence of the record was the most reliable guide on relative overtime earnings than any other figures brought into evidence.

In giving weight to this statistical evidence, the Tribunal recognized that this type of evidence had to be viewed in context and he indicated in his decision at page 41 that:

> " The simple differentiation between individuals in terms of overtime worked and earned and in job assignments cannot in every case be considered as raising a prima facie case of discrimination, even where they have the same job description and similar seniority and experience. There may be differences in

> the levels of skill, in attitude, in initiative, in inclination, in availability and in flexibility which may justify the use of some employees rather than others."

Having recognized the fact that other considerations factor into the scheduling process the Tribunal then found that taking all the evidence into account, the complainants were not given equality of opportunity in proving themselves and so were denied the possibility of enriching and furthering their careers (p. 42).

Counsel for the Appellant has submitted that the Tribunal failed to give proper consideration to the explanation C.B.C. offered in respect to overtime and assignment differentials which show on the record. In particular, that the following facts were not given due weight:

(a) Ms. Chirka testified that she was happy in 1984.

(b) Ms. Chirka was on maternity leave when crew assignments would have been made, thereby missing the opportunity to participate in hockey and football games.

(c) While Ms. Chirka was on Electronic News Gathering Editor training, she was taken out of rotation.

(d) Ms. Chirka turned down an opportunity to do a C.F.L. game in 1984 for personal reasons.

(e) In 1983, 59 hours of the 84 hour differential between Mr. Nesbitt and Ms. O'Connell were due to Mr. Nesbitt's assignment to the N.H.L. playoff schedule and hockey assignment. There is no evidence why Ms. O'Connell was not being assigned.

(f) In 1984, Ms. O'Connell worked 276 overtime hours and Mr. Nesbitt worked 259 overtime hours.

(g) Ms. Oxendale expressed reluctance to work on the mini-mobile unit and agreed that her primary responsibilities were in the studio.

(h) Mr. Jessup performed the same kind of work as Ms. Oxendale, but under a different environment. The mini-mobile unit sometimes worked on the maxi-mobile unit.

It is C.B.C.'s contention that these facts should have led the Tribunal to the view that each of the three Complainants were treated differently in 1983 and 1984 for reasons not consistent with discrimination.

I am not persuaded that the Tribunal erred in its interpretation of the facts. There is substantial evidence to support the Complainants' position. The documentation showed that the women; and these three were the only women out of a total of 24 technicians; were getting much less, not fewer assignments and their overtime earnings were

substantially less. Furthermore, the assignments were given to men with no better qualifications or seniority than the women. There were instances of hostility from co-workers and specifically, one of the producers had referred to Ms. Oxendale as a "bitch" or a "slut" - both forms of insult which demean her status as woman.

More particularly, and in respect to the Appellant's submissions concerning each Complainant's case, the Tribunal found:

(a) Ms. Chirka was happy in 1984, but this was probably attributable to her assignment to Electronic News Gathering. In fact, for the first three months, she did not receive any mobile or remote assignments. Heavy program scheduling in April resulted in her receiving two assignments to coveted sporting events.

(b) Ms. Chirka had not put significant restrictions on her availability. She turned down only one job out of 23 because it conflicted with her personal schedule. There were opportunities denied her that were not explained because she was on maternity leave, thereby missing assignment to hockey programs, or because she was on Electronic News Gathering.

(c) Ms. O'Connell had fewer assignments to mobiles than her male counterpart in 1983 and 1984, but she had more overtime than he in 1984. The Tribunal found that the latter was not particularly significant because wage loss was less important to Ms. O'Connell than loss of career opportunity. This judgment appears to have been made by assessing the oral testimony of the witnesses and, in particular, giving considerable weight to Ms. O'Connell's evidence when she stressed the importance of career development over overtime differentials; for example, the experience to be gained in exposure to new equipment, (pages 8 -10) (p. 39). The Tribunal also highlighted at page 39 evidence given by Mrs. Kelly, the Human Resources Officer at C.B.C., when she commented "all three were, in my opinion, at least as interested in job satisfaction as they were in the financial rewards."

(d) Although Ms. Oxendale was hired to a studio position, the Tribunal found it relevant that her expectations at the time of hiring were that she might expect outside assignments after a year (p.45). There is evidence that she pursued her goal by discussing assignment to outside broadcasting with Mr. Raine during and after April, 1983 (p.42). The Tribunal noted at page 43 that the only response of management to these requests was to "allow her to fill in on mobile work when someone else was sick and to assign her to train on outdated equipment, in

particular, the mini-mobile." He then concluded that "the schedules suggest that there were opportunities to test their (the complainants') talents early in 1983 and that there was no serious attempt to incorporate the women (in particular Gail O'Connell and Patricia Oxendale) into remote assignments in a systematic way until the summer of 1984."

(e) The Tribunal did not directly deal with evidence submitted in respect to Mr. Jessup's unique situation in being assigned primarily to the mini-mobile. I surmise from this omission that:

(i) the fact that the mini-mobile was sometimes used in conjunction with the maxi-mobile did not significantly increase Mr. Jessup's hours;

(ii) comparisons to be made between Mr. Jessup and Mr. Trudell were not particularly relevant as that evidence was included in that category of evidence introduced for the years preceding 1983 and which the Tribunal characterized as incomplete and not reliable.

Furthermore, as counsel for the Commission pointed out during his submissions on the appeal, Mr. Trudell's rate of pay was double that of Mr. Jessup, thus signifying a discrepancy in seniority and/or skills. No such discrepancy existed between Ms. Oxendale and Mr. Jessup.

3. The only years in which the Tribunal could discern a pattern of differentiation were 1983 and 1984. Counsel for C.B.C. argued that the Tribunal failed to look at the overall picture and it was incumbent upon the Tribunal to examine evidence produced for the years 1981, 1982, 1985 and 1986. With respect, the Tribunal did not fail to look at that evidence, - it found that on all the evidence produced it was impossible to make valid comparisons for the longer period of time because neither party provided consistent or satisfactory data with which to make a relative assessment.

Furthermore, oral testimony in this regard was inconclusive. The fact that there was insufficient evidence to substantiate a finding of differential treatment for those years cannot be used to show that there was no pattern of discrimination - only that the evidence could not support a prima facie case for those years.

4. The Tribunal also found it significant that two of the three Complainants had advised either the Technical Producers who were their immediate superiors at the management level, or senior management of their desire to be included in mobile or remote assignments. After assessing the oral testimony, including that given by Marty Raine, the Tribunal found the expressed interest of the three Complainants for work on mobiles or remote broadcasts was "falling on deaf ears" and "they were merely being used as

fill-ins when male technicians were for one reason or another not available" (p.45).

To summarize, the Tribunal determined:

1. Assignment to mobile and remote broadcasting is desirable for professional growth;

2. The pattern of mobile and remote assignments during the years, 1983 and 1984 indicate that female technicians were treated differently from male technicians and, in the absence of a reasonable explanation by C.B.C., this differentiation was due to unlawful discrimination;

3. The Complainants notified management of their concerns as early as April, 1981 and the Employer failed to address the issue of discrimination.

I can find no manifest error in the Tribunal's findings of fact. The question is now whether those findings of fact have been correctly interpreted upon application of the law.

Prima Facie Case - Burden of Proof

The law which is applicable in this case is summarized in Israeli v. Canada Human Rights Commission, 1983, 4 C.H.R.R., D/1616 at 1617 and (1984) 5 C.H.R.R., D/2147 where it was stated:

> "The burden of proof in discrimination cases is important, as is the order of presentation of the evidence. Cases of refusal of employment on discriminatory

> grounds before boards of inquiry in Canada, whether at the federal or provincial level, all seem to employ the same burden and order of proof. The complainant must first establish a prima facie case of discrimination. once this is done, the burden of proof shifts to the employer to provide a reasonable explanation for the otherwise discriminatory behavior. Finally the burden shifts back to the complainant to prove that this explanation was merely a "pretext".

This proposition was quoted with approval in Morissette v. Canada Employment and Immigration Commission, 8 C.H.R.R., D/4390 and in a particularly useful decision, Dhami and Canada Employment and Immigration Commission, HRTD 17/89.

The Tribunal found at p. 39 that the evidence adduced by the Commission showed that "the three complainants were treated differently from the male technicians who had the same classification and job description as them during the two years 1983 and 1984," and further, "particularly when the differences in overtime figures and number of assignments are correlated the picture is one of apparent adverse treatment."

Having established a prima facie case, the burden then shifts to the Respondent to provide a reasonable explanation for the otherwise discriminatory behavior.

The Tribunal's analysis of the explanation offered by C.B.C. is convoluted, sometimes contradictory and, more importantly, does not address the issue of the shifting burden of proof; however, this Review Tribunal can clarify these points having regard to the Tribunal's findings of fact. The Review Tribunal can also deduce the Tribunal's opinion concerning the reasonableness of the Employer's explanation by examining certain conclusions which are contained in the decision. The following statements are of import:

(a) at page 41, "however, the fact that there are justifiable reasons for differentiation should not be allowed to deflect attention from the co-existence of less valid reasons for distinguishing between employees." It is apparent, on the balance of probabilities, that C.B.C.'s explanation failed to satisfy the Tribunal that the women were singled out for

differential treatment for reasons other than illegal discrimination. The Employer's argument was useful in explaining some of the differential treatment, but it was not reasonable to believe that the big discrepancy in overtime and mobile assignments was attributable only to those factors alleged by C.B.C.; in other words, the evidence which supported the prima facie case of discrimination had not been sufficiently challenged by the explanation offered by the Employer.

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(b) At page 47, "the argument of creative discretion cannot justify a pattern of conduct which results in an individual or group being excluded from serious consideration for an employment opportunity on a prohibited ground of discrimination."

This finding was in response to C.B.C.'s argument that if these women were treated differently it was not because of their sex but because of a system which was founded on producer discretion. As the Tribunal summarized at p.40, "what counts in this context, so the argument goes, are the desires and imperatives of the producer who must have creative freedom, and the chance that a technician will get a network assignment which will bring him or her to the favourable attention of a producer who is ready to use that individual again and so create the experience base for future assignments. If there is differentiation, it flows necessarily from the system and applies equally to male, as it does to female technicians."

The Tribunal does not use the word "pretextual" to describe this argument tendered by C.B.C. but he characterizes it in terms which fall within the legal definition of the word. "Pretext" is defined in Black's Law Dictionary as follows:

> ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense . . .

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It was the Tribunal's opinion, stated at page 47, that the producers' control over the selection of technical staff was overplayed in the C.B.C. evidence. He went so far as to state I have strong doubts as to whether the system is as inflexible and precedent bound as the C.B.C. witnesses averred. It is clear from the oral evidence and documentation that substitutions are made, and that, if circumstances demand it, accommodations can be made to include those who want this type of exposure" and later he refers to the argument as "implausible."

In summary, the Tribunal found that the evidence supported a prima facie case of discrimination. The burden then shifted to the Employer to provide a reasonable explanation for the actions which caused the women to be differentiated from the men. On the balance of probabilities, the explanation tendered by C.B.C. did not adequately explain the differential treatment; furthermore, in applying the concept of the shifting burden of proof enunciated in the Israeli case, supra, the argument raised by C.B.C. in respect to producer discretion was pretextual and was not of sufficient import to explain a system which is described by the Tribunal as failing "to create conditions in which

employment equality is possible because traditional sentiment is allowed to get in the way of job opportunity for women".

I would therefore dismiss the appeal.

March 2, 1990

Robin Adams

Don Lee

DISSENTING OPINION OF MARVIN N. STARK

I have read and considered with care the conclusions and the reasons of my colleagues with whom I sat on this Review Tribunal. I respect and appreciate why they concluded that there was discrimination in this case - however, I do not concur.

In reviewing the decision of the Tribunal below I have difficulty in classifying the nature or classification of discrimination upon which the Tribunal based its decision. But more to the point, I cannot discern what evidentiary test and process the Tribunal applied to reach its conclusion. However, it does appear to me that the Tribunal may have applied the wrong test or onus to both the complainant and the Respondent.

I agree with the general principle asserted by my colleagues adopted and applied in Brennan V. The Queen. However, I also agree with Lord Bridge's observation in George Mitchell (Chesterhall) Ltd. V. Finney Lock Seeds Ltd. (H.L.) 11983 all E.R. 737 at 7431 that "the ..... Appellate Court should treat the original decision with the upmost respect and refrain from interference with it unless satisfied that it proceeded on some erroneous principle ..... ".

For the following reasons it is my impression that the Tribunal below did proceed on an erroneous principle".

The task of this Review Tribunal is to determine whether the Appeal is to be allowed or dismissed on a question of law or fact or mixed law and fact pursuant to Sections 42.1(4), 42.1(5) and 42.1(6) of the Canadian Human Rights Act. In other words, the Review Tribunal must answer the following questions:

(1) Did the Tribunal below apply the law properly to the facts?

(2) Did the Tribunal below make findings of fact which could reasonably be supported by the evidence?

PART II - THE LAW

The law of discrimination is loosely divided into two categories: direct discrimination and adverse effect discrimination. Direct discrimination includes not only those cases "where an employer adopts a practice or rule which on its

face discriminates on a prohibited ground; (O'Malley v. Simpson Sears Ltd. (19851 2 S.C.R. 536) but also those cases where the rule or practice complained of is at first glance innocent, but upon further inquiry is found to be based upon a prohibited ground.

Adverse effect discrimination is described in O'Malley (supra) as la 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".

Although the Tribunal below discusses the law of discrimination in its decision, (Page 29 to 34), it does not come to any conclusion respecting the law to be applied in this particular case. After reviewing the facts and discussing the applicable law, the Tribunal states that:

> 'This is a case which does not fall neatly into the jurisprudence on discrimination in employment on grounds of sex. It does not involve a complaint of a policy or practice which is discriminatory on the face of it, i.e. which openly or by necessary implication discriminates. The very fact that the complaint involves three

> female employees of the CBC is proof that neither the corporation nor its constituent stations discriminate against women in the sense of denying them access to employment. Moreover, there is no suggestion in this case that the Complainants were victims of policies or practices which left them more open to discharge or termination because they were women, or denied them access to promotion. It cannot be said that the case falls easily into the category of adverse impact discrimination. There is no suggestion that the CBC or its Calgary station was applying practices, standards or rules, neutral in themselves, for instance, height or weight requirements, which might operate unfairly against women."(Page 34).

While it is true that the facts of this case do not fit neatly into the usual categories of sexual discrimination cases

such as direct discrimination or adverse impact discrimination, it was incumbent upon the Tribunal below to reach a decision as to what law applied to the circumstances of the case before applying that law to the facts. As the Tribunal in Israeli vs. CHRC (1983, 4 CHRRD/1617 para. 13858) observed: "The burden of proof in discrimination cases is important, as is the order of presentation of the evidence." A failure to adhere to the burden of proof and evidenciary rules can lead to a misinterpretation of the facts before a Tribunal.

In cases of alleged discrimination, the Canadian jurisprudence identifies three steps which must be followed to substantiate a complaint. Historically, the three steps evolved to ease the burden of proving discrimination in cases where typically all of the relevant evidence would be in the control of the Respondent.

In Israeli, (para. 13858), the Tribunal summarized the three steps now identified by the Canadian jurisprudence:

> "Cases of refusal of employment on discriminatory grounds before boards of inquiry in Canada, whether at the federal or provincial level, all seem to employ the same burden and order of proof. The Complainant must first establish a prima facie case of discrimination. once this is done, the burden of proof shifts to the employer to provide a reasonable explanation for the otherwise discriminatory behaviour. Finally, the burden shifts back to the Complainant to prove that this explanation was merely a pretext and that the true motivation behind the employer's action was in fact discriminatory."

(a) The First Step - the prima facie case.

The first step is for the Complainant to lead evidence and lay down facts which, without further explanation, would lead to the conclusion that: the Complainant was subjected to differential treatment. If the Respondent chooses not to respond or to explain those facts, then they would be sufficient in and of themselves for a finding of discrimination against the Respondent.

If the Respondent does choose to respond to the allegations of the Complainant, we go into the second step of inquiry.

(b) The Second Step - the response.

At this point, the Respondent is given the opportunity to provide an explanation for the apparently discriminatory conduct.

The Respondent can provide this explanation in a number of ways depending upon the reasons for the prima facie discriminatory conduct. For example, the Respondent can admit that it discriminated but that the basis of the discrimination was a bona fide occupational requirement of the position and therefore the discrimination was justifiable. The b.f.o.r. defence was applied in Bhinder v. Canadian National Railway [1985] 2 S.C.R. 561.

Another explanation open to the Respondent is to show that the Respondent took reasonable steps to accommodate the Complainant's special needs but that any further action taken by the Respondent would have resulted in undue hardship being occasioned upon the employer. This "reasonable accommodation" explanation was addressed in O'Malley (pp.552-560).

A third option available to the Respondent is to provide a reasonable alternative explanation for what appears on the face of it to be discriminatory conduct based on a prohibited ground. This reasonable explanation does not attempt to justify discriminatory behaviour, as do the b.f.o.r. and reasonable accommodation defences, but rather provides the Respondent's reasons behind the conduct which, without those reasons would appear to have been based on a prohibited ground. This "reasonable explanation" was discussed in Israeli.

(c) The Third Step

> Once the Respondent has been given the opportunity to provide a response to the prima facie case, the onus switches back to the Complainant to convince the adjudicator that the Respondent's explanation is, on the balance of probabilities (not merely possibly), a pretext. As the Chairman in Ingram V. Natural Footwear (1980) 1 CHRR D/59 stated at paragraph 473:
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> "Once the employer has come forward, however, the burden rests with the complainant to prove, on the
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> balance of probabilities, that the explanation put forward is false and pretextual".
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> Pretext is defined by Funk & Wagnall's Standard College Dictionary as "1. A fictitious reason or motive advanced to conceal a real one. 2. A specious excuse or explanation." The trier of fact must then decide whether the explanation provided by the Respondent in answer to the Complainant's prima facie case either justifies the Respondent's discriminatory conduct or provides a reasonable explanation for conduct which would otherwise appear to be based on a discriminatory ground.

The three steps to be taken to prove discrimination are an attempt to balance the equities of the parties involved. They address the obvious difficulty facing a complainant if she had in the first instance to prove discrimination on the part of the Respondent. On the other hand, they also address the equally clear difficulty which the Respondent would face if it were not given the opportunity to explain its conduct. The key to the procedure is whether the conduct complained of was, on the balance of probabilities, based on a prohibited, discriminatory ground.

In the instant case, the Tribunal's discussion of the applicable law concentrated on the jurisprudence relating to "adverse impact" discrimination. This necessarily led to a discussion of the exceptions to a finding of adverse impact discrimination, such as the "bona fide occupational requirement exception which was applied in Bhinder (supra) and the reasonable accommodation exception which was discussed in O'Malley (supra).

With respect to Mr. McLaren, his discussion of the law neglected to discuss the jurisprudence found in cases involving refusal of employment on discriminatory grounds. These cases involve applicants for employment who are competing against other similarly qualified applicants for an employment opportunity. The thrust of the law in these cases is to ensure that: the

applicants are competing on a 'level playing field', therefore the law of employment discrimination is designed to discover if a selection has been based upon a prohibited ground.

The Complainants' situation in the instant case is analogous to the situation of Complainants in refusal of employment cases in that the conduct complained of is that during the selection process the employer allegedly based its decision,

at least in part, on a prohibited ground. Because the case before the Tribunal was analogous to the cases on refusal of employment on discriminatory grounds and because the Respondent was relying upon neither the "b.f.o.r." nor the "reasonable accommodation" exceptions to a finding of adverse impact, the Tribunal should have given consideration to the employment discrimination jurisprudence.

PART III - THE TRIBUNAL'S APPROACH

The difficulty with the decision of the Tribunal below is that there is no clear indication of where the burden of proof rested or where it was held to have been satisfied; however, the parties did present their evidence in such a manner that the initial steps of the inquiry can be identified.

(a) The First Step - the prima facie case.

A prima facie case may be established by showing that:

(1) The Complainant was qualified for the particular position or assignment;

(2) The Complainant was not given the position or assignment;

(3) Someone apparently no better qualified received the position or assignment.

Although the Respondent argued that this prima facie case was not estabished by the Complainants, the Tribunal below held that "the evidence adduced by the Commission shows my opinion that the three Complainants were treated differently from the male technicians who had the same classification and job description as them during the two years 1983 and 1984 (in particular as compared with Messrs. Nesbitt and Jessup) (Page 39)." This finding of fact indicates that the Complainants' initial burden of establishing a prima facie case was satisfied; however, it does not establish that the differential treatment was based on a prohibited ground of discrimination.

The determination of whether the prima facie discrimination is based upon a prohibited ground comes after the Respondent has an opportunity to respond. In other words, the burden of proof should then have switched to the Respondent who should have had the opportunity to provide a reasonable explanation for what would otherwise have been discriminatory behaviour.

(b) The Second Step - the response.

Once the second step is reached, the Respondent should have a clear indication that the case it is trying to meet would, in the absence of a response, be sufficient to support a finding of discrimination. The Respondent must now either justify the discriminatory conduct (using the "bona fide occupational requirement" exception) or give a reasonable explanation for the otherwise apparently discriminatory conduct. The Respondent did not accept that a prima facie case had been established, its argument was presented in a manner which was supposed to suggest an absence of differential treatment altogether. In fact, the Tribunal in its decision states that the Respondent's counsel "had not introduced any evidence to support a b.f.o.r. On the contrary her objective had been to demonstrate that there was no discrimination at all in this case" (p.37). Although there should have been a clear indication of what burden of proof had to be met by the Respondent, the Respondent's argument was an effort to convince the Tribunal that there was a reasonable explanation for what the Complainants saw as discriminatory differentiation. In other words, the Respondent recognized that, as in a discrimination in employment type of case, their burden of proof was to provide a reasonable explanation as to why the Complainants did not get assigned to the positions under consideration. This is different from what the Tribunal below, in not recognizing this third response option, seems to have required of the Respondent as a satisfactory answer to the complaints.

The Tribunal below limited its discussion of the law to those cases concerning either direct or adverse effect discrimination. The jurisprudence requires the Respondent in the second step to "justify" its conduct, (see O'Malley and Bhinder, supra). The Tribunal below did not consider the situation where a prima facie case of adverse effect or direct discrimination was not established, and therefore, did not consider the Respondent's option of providing a reasonable explanation for the conduct complained of. At page 33 of the decision the Tribunal Stated the burden of proof to be met by Respondents in cases where a prima facie case has been established:

"Where a Complainant has established a prima facie case of either 'direct' or 'adverse effect' discrimination, the burden shifts to the Defendant to justify the discriminatory practice or rule."

The burden of proof which requires a Respondent to "justify" the discriminatory practice or rule has previously been discussed in terms of a "Legal" burden of proof as opposed to an "evidentiary" burden of proof. For a good discussion of the relevant came law see the decision of the Fetterly Tribunal in Dhami v. Canada Employment and Immigration Commission H.R. TD 17/89 at 18 in which that Tribunal also adopts the concept that the Respondent, in the absence of a prima facie case of either direct or adverse discrimination, need only satisfy an evidentiary burden of proof in order for the burden to shift back to the Complainant.

In the instant case a prima facie case of either direct or adverse effect discrimination (as defined in O'Malley, supra) was never established, therefore the burden on the Respondent should only have been to provide a reasonable explanation that was equally consistent with the conclusion that discrimination on the basis prohibited by the code was not the correct explanation for what occurred. In my view, the Respondent did provide that reasonable alternative explanation, and because that burden was met, the evidentiary burden should then have switched back to the Complainants to prove that the Respondent's explanation was merely a pretext and that the true motivation behind the employer's action was in fact discriminatory. It is this final shift of the burden of proof that does not appear to have taken place in the hearing before the Tribunal.

The Respondent's explanation as to why the Complainants received fewer hours of overtime and fewer mobile assignments than their male counterparts can be summarized as follows:

(i) Ms. O'Connell had worked outside the VTR pool until October 1982; in addition, 59 of the 84 hour differential between her hours and Mr. Nesbitt's for 1983 were due to Mr. Nesbitt's assignment to the NHL playoff schedule of 1983. In 1984, Ms. O'Connell made more overtime than Mr. Nesbitt.

(ii) Mrs. Chirka's 1983 and 1984 overtime earnings were lower than Mr. Nesbitt's because she was not assigned to the NHL games in 1983, as

those assignments, were made before Mrs. Chirka returned from her maternity leave.

In June and July of 1983 Mrs. Chirka was in an ENG training program.

Mrs. Chirka made it clear that, in her opinion, she was not discriminated against in the years before her maternity leave (i.e. prior to 1983), even though Ms. O'Connell complains of discrimination during those years.

For 1984, there is no valid comparison for Mrs. Chirka because from early 1984 on she was working in ENG, not in VTR (see the Tribunal's decision, p.2).

Mrs. Chirka was given fewer mobile assignments not only for the same reasons as above but also because she actively avoided out-of-town assignments, even to the extent of turning down the opportunity to cover a 1984 CFL football game.

(iii) Ms. Oxendale compared unfavourably to Mr. Jessup in both overtime earnings and outside broadcast assignments for 1983 and 1984 because Ms. oxendale was hired to replace Mr. Jessup when Mr. Jessup was moved out of the studio and into the mini-mobile. As well, Ms. Oxendale expressed reluctance to work in the mini-mobile.

When Mr. Jessup had replaced his predecessor, Mr. Trudel (who had also moved up to the mini-mobile), a similar disparity had occurred between their overtime earnings as that which occurred between Ms. Oxendale and Mr. Jessup (see the Tribunal's decision, p.38).

Ms. Oxendale had been assigned to some mobile work in 1982, soon after beginning work in Calgary. Her difficult personality contributed to the reluctance to schedule her for mobile assignments.

(c) The Third Step

The Respondent's explanation should then have led to the third step. However, the complainants did not attempt to show that this explanation was a pretext, but rather that the Respondent had not yet justified their discriminatory conduct with one of the exceptions, i.e. "b.f.o.r." or "reasonable accommodation". In effect, the Complainants argued that the Respondent's

failure to react positively towards the complaints of the Complainants was further evidence of discrimination.

It is because of this line of reasoning that the Respondent had to overcome an evidentiary burden which was more onerous than just providing a reasonable explanation. For example, when the evidentiary burden in the second step is seen as a requirement to justify one's conduct rather than a requirement to provide an alternate reasonable explanation for the prima facie discriminatory conduct is tantamount to calling on the Respondent to admit to a discriminatory practice in order to justify it. As well, the Respondent is in a Catch-22 situation in responding to the initial complaints of the Complainants. For example, if the Respondent reacts by altering its conduct toward the Complainants, this reaction can be interpreted as circumstantial evidence that the Respondent had indeed been discriminating against the Complainants and is now correcting that conduct. On the other hand, if the Respondent does not react to the complaints of the Complainants, then this non-reaction can be interpreted as circumstantial evidence that the discrimination is continuing in the form of "insensitivity to the Complainants' concerns (as it was interpreted in this case). As the Appellant points out in its Memorandum of Fact and Law the perceived failure of the CBC to respond to the complaints of the three women is not evidence of the cause of the complaints. In other words, the failure of the CBC to respond to the complaints is not evidence that the complaints were justified in the first place.

The Respondent's explanation should have been accepted as a reasonable explanation of its conduct until the Complainants provided submissions to show that the explanation was, on the balance of probability, false and pretextual (Ingrim v. Nature Footwear 1980), and that the Respondent's scheduling decisions had been based, at least in part, on a prohibited ground.

I am not persuaded that the evidence supports a finding that the Respondent's explanation was, on the balance of probalities, false and pretextual.

Perhaps the requirement that a Complainant must convince a Tribunal that a Respondent's explanation is false and pretextual or (as my colleagues cite from Black's Law Dictationary) the explanation was an ".... ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense .... " is too heavy a burden to impose the Complainant. It may be a fairer test to impose that a Complainant be

required to convince a Tribunal that the Respondent has only supplied a possible explanation - not a probable one.

PART IV - CONCLUSIONS

It is the purpose of the Canadian Human Rights Act to assert our Society's belief in the right of an individual-to-live free from discrimination. The Canadian Human Rights Act is a vehicle for individuals to use in pursuing any complaints they may have of discriminatory conduct directed towards them.

It is the purpose of the jurisprudence of discrimination to ensure that the procedures of pursuing a claim under the Canadian Human Rights Act allow the evidence of both parties to be assessed fairly and in context.

The procedural and evidentiary rules applied by the Tribunal follow the requirements of the O'Malley and Bhinder cases, which deal with the justification of adverse effect and direct discriminatory conduct. However, the Tribunal did not find a prima facie case of either adverse effect or direct discrimination in this case, and therefore the requirement on the Respondent to justify its conduct was a burden beyond that which the Respondent should have had to meet.

I find that the three-step approach to the evidentiary burden and order of proof which was identified in Israeli v., CHRC (supra) was the correct approach to the evidence adduced in this case, and should have been applied by the Tribunal at first instance. The Tribunal below wrongly required the Respondent to "justify" its conduct, rather than requiring the Respondent to provide an explanation shifting to the Complainants, the burden of asserting that explanation was on the balance of probabilities false and pretextual.

For these reasons I would have allowed the appeal.

Dated at Richmond, in the Province of British Columbia, the 27th day of March, 1990.

MARVIN N. STARK