T.D. 16/90
Decision rendered December 19, 1990

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

BRENT L. SPURRELL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION OF TRIBUNAL
ON THE MOTION TO QUASH

TRIBUNAL: Hugh L. Fraser - Chairman

APPEARANCES:

DAVID BERTSCHI Counsel for the Complainant

ALAIN PRÉFONTAINE Counsel for the Respondent

BRIAN EVERNDEN Counsel for the Respondent

LT. COL. R.A. MACDONALD Counsel for the Respondent

RENÉ DUVAL Counsel for the Canadian Human Rights Commission

DATE AND PLACE OF HEARING: September 20, 1990
Ottawa, Ontario

This matter concerns complaints filed under Section 7(a) and 10 of the Canadian Human Rights Act by Brent Spurrell dated October 22, 1985 against The Department of National Defence in which the complainant alleged that the respondent engaged in a discriminatory practice on the ground of disability in a matter relating to employment.

On October 31, 1986 the investigator appointed by the Canadian Human Rights Commission filed her summary investigation report with the Commission. The investigator found as a fact that the respondent's standard for visual acuity for the relevant occupation required an eye sight which should not be affected by myopia greater than 2.00 diopters spherical equivalent in either eye. The investigator also found as a fact that the complainant's eyesight fell short of this standard, his myopia being -2.75 diopters in both eyes. The report filed by the investigator also noted that in February of 1986 the respondent had offered the complainant the opportunity to have his file reactivated but the complainant had declined the offer. The investigator further noted that this offer was predicated upon subsequent medical advice received by the respondent that the complainant did meet the required visual acuity standard.

On September 24, 1987 the Chief Commissioner of the Canadian Human Rights Commission wrote to the respondent advising that the complaint made under Section 10 (otherwise known as "the policy complaint") was dismissed pursuant to subparagraph 36(3)(b)(i) of the Canadian Human Rights Act because the standard for visual acuity was found to be a bona fide occupational requirement. However, the complaint made pursuant to Section 7 of the Canadian Human Rights Act (otherwise known as "the personal complaint') was referred to a Tribunal. The position taken by the respondent is that the section 7 complaint should not have been referred to a tribunal. The respondent therefore brought a motion to quash the personal complaint of Brent Spurrell based on visual disability. The question put to the Tribunal with regard to this motion is whether a Tribunal has jurisdiction to hear the Section 7 complaint?

Evidence and Argument

The first point examined by the respondent was the role of the Human Rights Commission once it has received the report of its investigator. This question was examined by the Supreme Court of Canada in the matter of Syndicat des Employés de Production du Quebec et de l'Acadie v. Canadian Human Rights Commission and Canadian Broadcasting Corporation and The Attorney General of Canada F. C. A. (1986) 90 N. R. 16, 9 (rendered October 12, 1989) onpages 16 and 17 of his reasons Mr. Justice Sopinka states that:

"Section 36(3) provides for two alternative courses of action upon receipt of the report. The Commission may either adopt the Report "if it is satisfied" that the complaint has been substantiated, or it may dismiss the complaint if "it is satisfied that the complaint has not been substantiated". If the report is adopted, I presume that it is intended that a Tribunal will

be appointed under s.39 unless the complaint is resolved by settlement. I come to this conclusion because otherwise there is no provision for any relief to the complainant consequent on adoption of the report. This aspect of the Commission's procedure has been clarified by amendments to the Act (S.C. 1985, c.26, s.69). The current version of Section 36(3) is contained in s.44(3) of the R.S.C., 1985, c.H-6 (as amended by c.31 (1st Supp.), s. 64) and now provides that, upon receipt of the report of the investigator, the Commission may request an appointment of a Tribunal if it is satisfied that having regard to all the circumstances an inquiry into the complaint is warranted.

The other course of action is to dismiss the complaint. In my opinion it is the intention of Section 36(3)(b) that this occur where there is insufficient evidence to warrant the appointment of a Tribunal under s. 39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage. "

The respondent further submits that the Commission could not have been satisfied in law that a further inquiry into the complaint of visual disability was warranted based on the fact that the complaint under Section 10 had been dismissed by virtue of the conclusion that the standard was found to be a BFOR.

The respondent also argued that Section 15(e) of the Canadian Human Rights Act provided a second legal reason why the Commission could not request the appointment of a Tribunal to hear the Section 7 complaint. Section 15(e) reads as follows:

"It is not a discriminatory practice if an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable. "

Subsection 27(2) of the Act reads as follows:

"The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which,

in the opinion of the Commission, any provision of this Act applies in a particular case or in a class of cases described in the guideline. "

Section 27(3) states:

"A guideline issued under subsection (2) is, until it is subsequently revoked or modified, binding on the Commission, any Human Rights Tribunal appointed pursuant to subsection 49(1), and any Review Tribunal constituted pursuant to subsection 56(1) with respect to the resolution of any complaint under part III regarding a case falling within the description contained in the guideline. "

The respondent's submission is that the Commission, when it dismissed the Section 10 complaint, exercised its power under Section 27(2) even though the letter dismissing the complaint does not bear the title guideline.

Counsel for the complainant argued that while the Tribunals have looked at the facts surrounding the Commission's decision to bring the matter before a Tribunal, the basis upon which they

have investigated such matters have been very narrow. The complainant referred the Tribunal to the case of Local 916 Energy and Chemical Workers v. Atomic Energy of Canada Limited (1984) S.C.H.R.R. D/2066. Paragraph 17574 includes the following statement:

"... we conclude that there is no evidence that the Commission exercised its discretion improperly under either s. 33 or 36."

Paragraph 17577 begins as follows:

"In all of these arguments the fundamental question arises whether a Tribunal appointed under the Act has jurisdiction to examine or second guess the exercise by the Commission of its statutory authority. Mr. Juriansz says that we have not. There are several cases dealing with this matter, although in a different context from this case. A Tribunal has examined the method of its own appointment and decided since there could be a reasonable apprehension of bias even though not based on a specific section of the Act it was improperly appointed (Ward v. Canadian National Express and the Canadian Human Rights Commission (1981) 1 CHRR D/415. Another case dealt with

whether the complaint which a Tribunal was appointed to hear was a proper one. CHRC v. Bell Canada (1981) 1 CHRR D/265 concluded that since the complaint lacked particulars, the Tribunal had no authority to deal with it. The case involved a complaint initiated by the Commission under Section 32(3) which allows the Commission to initiate a complaint where it "has reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice". The Tribunal held that a proper complaint had not been filed since the complaint was in the form of a general letter from the Commission to the company; thus, since the complaint was inadequate, the Tribunal had not been appointed properly, and had

no jurisdiction to hear the matter."

The essence of the complainants argument on the motion is that there were in fact three complaints. Two of the three complaints were referred to a Tribunal. The Section 10 disability complaint was dismissed. The complainant also argued that there was no reason why the dismissal of the Section 10 complaint would automatically mean that the Section 7 complaint would be dismissed. In other words it was possible to have a Section 10 complaint succeed where a Section 7 complaint failed or vice versa.

The Commission Counsel referred to the decision of Local 916 Energy and Chemical Workers v. Atomic Energy of Canada Limited arguing that a Tribunal is a statutory body and as such has only the powers that are explicitly given to it, and those that are incidental or inherent to the exercise of its jurisdiction. Mr. Duval also pointed out that a Commission's decision is reviewable in the Federal Court of Appeal. In the recent decision in the case of S.E.P.Q.A. v. Canadian Human Rights Commission the Supreme Court ruled that the Canadian Human Rights decision because it is administrative in nature ought to be reviewed under Section 18 of the Federal Court Act instead of Section 28. Nonetheless, the point argued by the Commission is that the Tribunal cannot review the decision of the Commission to direct a matter to a Tribunal. The Tribunal in accordance with Section 53 of the Human Rights Act has a very limited jurisdiction which is to inquire into the complaint and to make an appropriate award if the complaint is substantiated or to dismiss the complaint if the Tribunal finds that the complaint is not substantiated. The Commission therefore concludes that the Tribunal has no jurisdiction to review the Commission's decision to direct a matter to the Tribunal. This matter should in the Commission's opinion, only be addressed by proceedings in the Federal Court of Canada.

The matter to be decided on this motion by the respondent is whether or not the Tribunal appointed under the Act has jurisdiction to hear the complaint made under Section 7 of the Act relating to the disability of the complainant. As part of this deliberation the Tribunal is asked to examine the conduct of the Canadian Human Rights Commission in dismissing the Section 10

complaint on disability while referring the Section 7 complaint to a Tribunal. The Tribunal was asked to consider the case of Syndicat des Employés du Productions du Quebec et de l'Acadie v. Canadian Human Rights Commission and Canadian Broadcasting Corporation and The Attorney General of Canada and in particular, the reasons of Mr. Justice Sopinka.

I find this decision to be extremely useful in guiding this Tribunal as to the role that it may play in examining its jurisdiction. On page 16 of his reasons Sopinka, J. quotes Section 36(3) (now 44(3)) which provides that the Commission may either adopt the report "if it is satisfied" that the complaint as been substantiated or it may dismiss the complaint "if it is satisfied" that the complaint has not been substantiated. Sopinka, J. noted that if the Report is adopted "I presume that it is intended that a Tribunal will be appointed under Section 39 unless the complaint is resolved by settlement. I come to this conclusion because otherwise there is no provision for any relief to the complainant consequent on adoption of the Report." He added that this aspect of the Commission's procedure has been clarified by amendments to the Act in 1985.

The Act now provides that upon receipt of the Report of the investigator the Commission may request appointment of a Tribunal if it is satisfied that having regard to all the circumstances an inquiry into the complaint is warranted. Where there was insufficient evidence to warrant the appointment of a Tribunal the other course of action was to dismiss the complaint. Sopinka, J. continues by stating that:

"it is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage. It was not intended that there be a formal hearing preliminary to the decision as to whether to appoint the Tribunal rather the process moves from the investigatory stage to the judicial or quasi-judicial stage if the test described in Section 36(3)(a) is met. Accordingly, I conclude from the foregoing that in view of the nature of the Commission's function in giving effect to the

statutory provisions referred to it was not intended that the Commission comply with the formal rules of national justice. In accordance with the principles in Nicholson, supra, however I would supplement the statutory provisions by requiring the Commission to comply with the rules of procedural fairness. "

The Tribunal was then directed to the case of Canadian Human Rights Commission and Canadian Armed Forces and Donald Douglas Gaetz. This was a case where two complaints had been filed a personal complaint under Section 7 and a policy complaint under Section 10. One of the grounds of the appeal filed by the appellant to the Review Tribunal was that the Tribunal at first instance erred in not dealing with the Section 10 allegation contained in the complaint form. The Review Tribunal remarked that the findings of the first Tribunal conclude that the complainant had established a prima facie case of discrimination under the Act but that the respondent had established a bona fide occupational requirement under Section 14(a) of the Act. The Review Tribunal concluded therefore that the Tribunal of the first instance found a prima facie violation of both Sections 7 and 10. However, such violations were answered by the finding of the existence of a BFOR under Section 14(a)". Mr. Prefontaine argued that the Gaetz case supports the principle that where two complaints deal with the same matter as between the same parties, if one is expressly dismissed because of the existence of a BFOR the second must also be dismissed. The Tribunal submits that that may be a point to be argued when the Tribunal is asked to consider whether the BFOR defense should apply to all of the complaints, but the Gaetz case is of no guidance to this Tribunal and cannot be relied on to support a proposition that a Tribunal is justified in examining the actions of the Commission in deciding to direct a complaint to the Tribunal.

Mr. Prefontaine also argued that Section 15(e) of the Act provides another reason why the Commission could not request the appointment of a Tribunal. The thrust of Mr. Prefontaine's submission is that the Commission when it dismissed the first complaint under Section 10 exercised its power under Section 27(2) even though the letter dismissing the complaint did not bear the title "guideline". He argued further that as a result of the letter dismissing the Section 10 complaint, it was impossible for the Commission to be satisfied that a further inquiry be held. I do not accept the respondent's argument that the Commissioner's letter dismissing the Section 10 complaint can

be considered a guideline which would prevent the Section 7 complaint from being directed to a Tribunal, nor do I consider the letter from Mr. Fairweather to construe a guideline as contemplated under Section 27.

Mr. Bertshi, counsel for the complainant referred to the case of Local 916 Chemical Workers v. Atomic Energy of Canada Limited, supra, a case which involved a decision on preliminary matters raised by Atomic Energy of Canada Limited. In the Local 916 case the Commission took the position that the Human Rights Tribunal has no jurisdiction whatsoever to either sit on appeal of the Commission or to second guess or otherwise review the Commission's decision to appoint a Tribunal. The Tribunal after considering the case of Ward v. Canadian National Express and The Canadian Human Rights Commission (1981) 1 CHRR D/415 and the case of CHRC v. Bell Canada 1981 1 CHRR D/265 concluded that:

"the issue in the (Bell) case dealt with the denial of natural justice which is not the situation here. In both Ward and Bell the Tribunal's review of the Commission's exercise of its discretion dealt directly with the jurisdiction of the Tribunal to hear the matter, as in this case, a finding that the Commission had erred in exercising its discretion would affect our own jurisdiction. In cases such as those cited in such as the present case it cannot be said that the Commission's discretion is absolute. However, the evidence before us does not point to an improper exercise of discretion by the Commission in not suggesting that the union exhaust other avenues. "

The reference to the matter of improper exercise of discretion by the Commission is a significant point for this Tribunal to consider in deciding whether it has jurisdiction in the Section 7 complaint. I harken back to the words of Mr. Justice Sopinka in the Syndicat des Employés du Productions du Quebec et de l'Acadie case in which he stated that there is a requirement for the Commission to comply with the rules of procedural fairness.

In the matter at hand the respondent has not argued that the Commission demonstrated bad faith or failed to comply with the

rules of procedural fairness. The essence of the respondent's argument is that logically if the Section 10 complaint was dismissed by the Commission as a result of a finding of a BFOR then the Section 7 complaint should have been given similar treatment. The Tribunal submits that had the Commission intended to dismiss the Section 7 complaint as a result of a finding of a BFOR it could certainly have made that clear at the time of writing the letter and it is not the role of the Tribunal to question or to speculate why the Section 7 complaint was given different treatment from the Section 10.

Complaint

The Tribunal agrees with the submission of Mr. Duval, the Commission Counsel, that the Tribunal's jurisdiction is a limited one based on the authority conferred under the Human Rights Act specifically, Sections 49, 50 and 53. Section 49(1) reads as follows:

"The Commission may, at any stage of the filing of the complaint, request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal, in this part referred to as a "Tribunal", to inquire into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted."

"1. 1On receipt of a request under subsection (1), the President of the Human Rights Tribunal panel shall appoint a Tribunal to inquire into the complaint to which the requests relates."

Under Section 50(1)

"A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to

appear before the Tribunal, present evidence and make representations to it."

Conclusion

The Tribunal's mandate is quite clear in accordance with Section 50(1). It shall inquire into the complaint and give all parties full and ample opportunity to appear, present evidence and make representations to it. A Tribunal can only be appointed where the Commission has made a determination that an inquiry into the complaint is warranted. The Tribunal once appointed can justifiably carry out its inquiries with the assurance that the Commission has made a determination that the inquiry into the complaint was warranted. Section 53 states that if at the conclusion of its inquiry a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint.

This Tribunal finds therefore that in the absence of evidence

indicating that this matter was brought to the Tribunal when the Commission was not satisfied that an inquiry into the complaint was warranted, the Tribunal must exercise its duties as prescribed in the Act. The Tribunal finds therefore that it has the jurisdiction to hear the complaint made under Section 7 of the Act and is now

prepared to hear evidence regarding the complaint as soon as the parties are able to make themselves available.

DATED at Ottawa this 3rd day of December, 1990.

Hugh L. Fraser
Chairman