T.D. 5/91
Decision released on May 3, 1991

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

ANDREW HAY

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

CAMECO-A CANADIAN MINING AND ENERGY CORPORATION

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL:

RAYMOND WILLIAM KIRZINGER - Chairman
LOIS RAE SERWA - Member
SEECH GAJADHARSINGH - Member

APPEARANCES:

PETER C. ENGELMANN
Counsel for the Human Rights Commission

A.R. GARDEN
Counsel for the Respondent

DATES AND PLACE OF HEARING:

October 16 and 17, 1990,
Saskatoon, Saskatchewan

DECISION

Facts

A complaint was filed by ANDREW HAY on April 27,1988 against KEY LAKE MINING CORPORATION (now operating as "Cameco - A Canadian Mining and Energy Corporation"). The Complainant alleged the following:

Key Lake Mining Corporation is engaging or has engaged in a discriminatory practice on or about January 11, 1988 to February 1, 1988 at Key Lake Camp, Saskatchewan on the ground of sex in contravention of the Canadian Human Rights Act. The particulars are as follows: Key Lake Mining Corporation has discriminated against me by suspending my employment as a Power Plant Operator because of my sex (male) contrary to Sections 7 and 10 of the Canadian Human Rights Act. On January 4, 1988 security guards on routine patrol found me present in the women's living quarters. I was there by invitation of a resident. For this reason, my employment was suspended from January 11, 1988 until February 1, 1988. While there is an absolute prohibition on the presence of men in women's living quarters, women are permitted unrestricted access to the men's living quarters.

The parties filed, as an exhibit, an Agreed to Statement of Fact and each called additional evidence as provided for in the Agreement. The location and layout of the camp site are of importance to this case. At the time the complaint was filed, the Respondent operated a uranium mine in a remote area of northern Saskatchewan, with the nearest community 190 kilometres away. Although the mine was accessible by road, driving times were prohibitive and the Respondent flew all of its employees to and from the mine site.

The site consisted of a mining facility and a residence or camp facility for use of the employees.

The camp facility was restricted for the use of the Respondent's employees - that is, it was not open to the general public. It was comprised of a large central area which had a lobby, dining room, library, lounge,

gymnasium, racquetball court, and whirlpool/weight room. Each of these areas was fully accessible to both male and female residents. The central

area also contained separate washrooms for males and females. Surrounding the central area were seven two-floor residential wings. Each floor had a long hallway with private rooms on either side. One end of each wing was divided into a washroom and a lounge area for use by the residents of that floor. There were no washrooms in any of the resident's rooms', nor any televisions except where a resident supplied his or her own set.

The showers in the washrooms were fitted with curtains on each stall and there were curtains to separate the shower area from the rest of the washroom.

The lower G-wing was designated "Female Only" and one other wing was set aside for catering company employees. All other wings housed male residents only, with the Complainant residing in the F-wing.

The Respondent implemented a number of rules to regulate its camp.

Apparently the rule in question arose from the alleged sexual assault of a female worker in 1982 during the construction phase of the mine when about 1,200 workers were employed.

The rules in effect at the relevant time were issued July 23, 1987 and outlined four categories of offenses: Minor Offenses (such as deliberate littering of the camp premises); Serious Offenses (such as feeding wildlife and smoking in a non-smoking area); Major Offenses (including willful damage to the Respondent's property) and Intolerable Offenses (which include the taking of illegal drugs, theft of property and, at issue in this case, "a male found present in the Women's Living Quarters").

The rules with respect to Intolerable Offenses provided that "An infraction in this category will result in the individual's camp privileges being revoked and, as a consequence, employment terminated".

An assessment of demerit points was also outlined in the rules.

Specific demerit points were assessed for the Minor, Serious and Major Offense categories, while "Camp Privileges Revoked - Employment Terminated" was prescribed for Intolerable Offenses (rather than specific demerit points).

It appears from the evidence that all employees were adequately informed of the camp rules at the outset of employment. The Complainant

specifically admitted being informed of, and well aware of, the rule prohibiting males in females living quarters and the prescribed consequences thereof. He did, however, give a brief and somewhat unconvincing indication during his examination-in-chief that he believed that, in practice, the Respondent did not strictly enforce the rule. Other evidence suggested that the rule was in fact enforced by the Respondent and that two male employees lost their jobs because they were found in the female's quarters.

All of the Respondent's four hundred or so employees, including the Complainant, worked a "tour of duty" consisting of seven consecutive 11hour days of work on-site. The tour of duty was followed by seven consecutive non-working days off-site. During a tour of duty, an employee worked and resided (and spent all of his or her time) at the mine site and camp facility.

The Complainant, a married man with two children, was employed at the time in question as a Power Plant Operator earning $18.05 per hour. On the evening of January 4, 1988, the Complainant met a female co-worker at the lounge in the central area. They had been friends for approximately three to four months. Both were off-duty and each had a

couple of drinks over the course of one to one and a half hours. The female and the Complainant then decided to meet in her room which was situated adjacent to the fire exit at one end of the lower G-wing (on the end opposite the washroom-lounge area). After making this decision, they each returned
to their own room.

Shortly thereafter, the Complainant entered the G-wing using the fire exit door and entered his friend's room where he remained for about an hour and a half. During his examination-in-chief, the Complainant said he opted to use the fire exit door as he did not want to enter from the other end (connecting to the central core) so as to avoid disturbing the other female residents. Under cross-examination, the Complainant admitted that one of the reasons he used this entrance was to escape detection. He also admitted that he was aware that a risk was involved in being in the female wing, but that it was a small risk. Specifically he said Regarding the precautions I took, I didn't expect to be discovered".

At approximately midnight, security guards on routine patrol overheard a male voice in the friend's room. They knocked on the door and called Mr.

Hay out of the room. A short discussion ensued and Mr. Hay returned to his room.

The next day the Personnel Administrator advised Mr. Hay that his camp privileges were suspended pending an investigation. The Complainant was allowed to work the rest of his tour of duty (being one or two days).

On his return to Saskatoon, the Complainant was met by his wife at the airport. They proceeded to a lounge at the top of the office building housing the Respondent's Saskatoon office. At approximately 4:30 P.M., while leaving the building, the Complainant and his wife had a chance meeting with the Respondent's Manager of Employee Relations, one Jerry Bissett, while Mr. Bissett was going home from work. The Complainant prodded Mr. Bissett for

information and Mr. Bissett eventually indicated that he was not sure what the Respondent's decision would be, but that he was leaning to termination of his employment. The Complainant also asked Mr. Bissett if the security guards would have gone into the room if the door had not been opened, to which Mr. Bissett apparently indicated: "Yes, they would, but they would have given you time to get dressed". The Complainant's wife was present at this time.

Mr. Hay indicated that he and the woman in question were involved in a platonic relationship and nothing more. They were simply engaged in conversation when the security guards arrived and were certainly not unclothed. No evidence to the contrary was presented to the Tribunal.

Mr. Hay indicated that he and his spouse encountered some marital problems at that time because of the situation in general (ie. being found in a female's room) and specifically Mr. Bissett's comments.

The Respondent made its decision with respect to the Complainant's status on January 8, 1987 and forwarded a letter on that date to the Complainant outlining its decision as follows:

Your discipline will consist of having your camp privileges (accommodation) suspended until February 1, 1988 inclusive and, as a result, you will lose two complete tours of work. This letter also serves notice that if you are found present in the women's living quarters again, your employment will be terminated.

You are now scheduled to return to work on Monday, February 8, 1988 - the date your regular tour of work will commence following the above suspension. Upon your return, you will be assessed six demerit points ... .

A similar letter was sent to the Complainant's female friend. Allan Pettigrew, who was responsible for Human Resources with the Respondent at the time in question, testified that Mr. Hay was dealt with more compassionately than he might have been because he was in the female's quarters by invitation.

Following the suspension, Mr. Hay resumed his employment and it has continued to this time without incidence. The Complainant testified that in his view he has received all promotions possible and that his chances of future promotions will not be affected by the suspension and demerit points assessed. Mr. Hay was referring to promotions which are governed by the Collective Agreement between the Respondent and its employees, where promotions are governed by an arbitrary mechanism. The evidence of Mr. Pettigrew in cross-examination, however, suggested that incidents such as these " ... might, depending on the nature of the offense ..." influence promotion of an employee to a supervisory position - that is, promotion out of the scope of the Collective Agreement.

As well, the facts disclosed that the demerit points are removed (at the rate of one point per month).

The evidence was somewhat contradictory and unclear as to whether or not a record of the infraction is kept. On cross-examination, the following question was put to Mr. Pettigrew: "Is there some record though of infractions kept by the Company?", to which Mr. Pettigrew replied: "Yes, I think the record is maintained on the employee's Personnel File". Accordingly the Tribunal finds as a matter of fact that a record of the Complainant's offense was and has been maintained by the Respondent on the Complainant's personnel file.

Mr. Hay gave evidence that there were rumors of his marriage breaking up and so on, once he returned to the mine site. Ms evidence and that of two fellow female workers confirmed that there was a continual array of rumors and gossip at the site. Indeed, Mr. Hay testified that one of the reasons he was in the room in question was that his friend had been in his room shortly prior to that time and she was concerned about the rumors that might be spread about her if she was seen there once more. The evidence

disclosed that women frequently visit the men's wings (as they are entitled to do), however, some women were sensitive about rumors and therefore rarely, if ever, visited the men's quarters.

The Respondent called two of its female employees to express their views on the "no men in women's quarters" rule. Suzanne Manley, a supervisor and chemist, indicated that if men were allowed in her wing, she would feel uncomfortable and would not appreciate the lack of privacy. It was Ms. Manley's view that if the rule was no longer in place, she would have to reconsider her employment with the Respondent. She said:

I would have to see how the situation transpired, what types of liberties the men would take in the event the rule was lifted, but should there be a lot of male traffic in the wing and should there be incidents which made me feel uncomfortable, I would be looking for work elsewhere.

Ms. Manley also purported to do an informal survey of ten or fifteen women who worked on her shift, all of whom supported the rule. The Respondent's other female employee witness, Elaine Lafleur, an industrial mechanic apprentice, also stated her preference for the rule - for the sake of safety and privacy. She however indicated that her employment would continue whether or not the rule remained in effect in its present form.

Mr. Pettigrew's evidence was that the rule was instituted in July 1982 during the construction phase of the mine - as a result of an alleged sexual assault. The rule has been kept in place because the female employees prefer the rule. His concern was whether the Respondent would be able to attract female employees to work without a "no men in women's quarters" rule.

Two other uranium mines in northern Saskatchewan (at Rabbit Lake and Cluff Lake) allow males to visit female's rooms. At Cluff Lake, the rooms are self-contained and it is in the discretion of the female employee whether

or not a male can be present. At Rabbit Lake, men are allowed in women's quarters on the invitation of a female and the consent of all other females present.

This outlines the essential facts of the case and we will now turn to the relevant law and its application to this complaint.

Law

The purpose of the Canadian Human Rights Act is set out in Section 2:

2. The purpose of this Act is to extend the laws of Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to have the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices.....

Section 3(1) of the Act outlines the proscribed grounds of discrimination as follows:

For all purposes of this Act, race, national or ethnic origin, color, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Mr. Hay's complaint was that he was discriminated against contrary to Sections 7 and 10 of the Act which we will set out:

7. It is a discriminatory practice, directly or indirectly:

(a) to refuse to employ or continue to employ an individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

10. It is a discriminatory practice for an employer, employee organization or organization of employers

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship,

transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

The Respondent's answer to the complaint is twofold. Firstly, the Respondent raised a number of technical arguments suggesting that the facts of this case did not fit within the purview of either Sections 7 or 10, one of the main reasons being that the alleged discrimination was not employmentrelated, but rather "accommodation" related. Secondly, the Respondent argued that the differentiation between males and females was justifiable as a bona fide occupational requirement.

The policy in question in this case clearly provides for different treatment of males and females. A male cannot be in a female's quarters, whether by invitation or otherwise, while there is no similar restriction on females. The rule or policy differentiates between employees on the basis of sex - a proscribed ground of discrimination under Section 3(1).

As indicated, the Respondent's position in large part is that the discriminatory behaviour occurred in respect to the Complainant's activities after working hours, affecting his camp privileges only and is not related to his employment.

The Complainant has the onus to establish a prima facie case of discrimination - that the complaint falls in the scope of both or either of Sections 7 and 10. The leading authority on the issue of onus is Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, wherein McIntyre, J. at Page 208 stated:

Once a Complainant has established a prima facie case of discrimination, in this case, proof of a mandatory retirement at age 60

as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities.

McIntyre, J.'s comments no doubt mean a prima facie case of discrimination as described in Sections 5 to 14 of this Act. That is, it is not sufficient for the Complainant in this case to simply establish discrimination, but that the discrimination is as contemplated by Section 7 or 10 or both. Only then will the onus shift to the Respondent for justification. This view is supported by the Supreme Court of Canada in Ontario Human Rights Commission and O'Malley v. Simpsons Sears Limited, [1985] S.C.R. 536 at Page 538, where prima facie case was defined as "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent..... Without proof that the complaint falls within the parameters of Section 7 or 10, no verdict could be made in favour of the Complainant. Accordingly, the Complainant bears the onus of proof on this issue.

Has the Complainant discharged its onus?

The direction of the Courts with respect to the interpretation of Sections 7 and 10 is critical. The Supreme Court of Canada is very clear that the Act must be interpreted broadly so as to extend the purpose and objectives of the Act (as set forth in Section 2). In Robichaud v. Her Majesty the Queen as Represented by the Treasury Board, [1987] 2 S.C.R. 84 at Pages 89 and 90, Mr. justice Laforest writing for the majority of the Court suggested that a broad and liberal interpretation of the Act is required and referred with approval to three other Supreme Court of Canada cases adopting the same view:

The purpose of the Act set forth in Section 2 has been to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre, J. speaking for this Court, recently explained in Ontario Human Rights Commission and O'Malley v. Simpsons Sears Ltd., [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, per Lamer, J. at pp. 157-158. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More

recently still, Dixon, C.J. in Canadian National Railway Co. v. Canada (Canadian Human Rights Commision) (the action travail des femmes case), [1987] 1 S.C.R. 1114 emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the Interpretation Act, that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

We will review the applicability of each of Sections 7(a), 7(b) and 10(a) separately. However, there is one common and essential issue with respect to the applicability of each of these sections to the alleged discrimination in this case. That is, is the discriminatory practice employment related?

The Respondent argued that the complaint should have been more properly brought pursuant to Section 5 of the Act which deals with the denial of goods, services, facilities and accommodation "customarily available to the public". If this was a Section 5 complaint, the complaint is without merit because the Respondent's camp facility is not customarily available to the public. However, the complaint was not brought pursuant to this section.

Mr. justice Laforest considered the effect of the phrase "in the course of employment" used in Section 7(b) at Pages 91 and 92 of the Robichaud decision, supra. He stated:

On this issue, counsel for the Crown placed considerable reliance on the requirement in Section 7(b) that the act complained of must have

been done in the course of employment. It is clear, however, that that limitation as developed under the doctrine of vicarious liability and tort cannot meaningfully be applied to the present statutory scheme. For in torts, what is aimed at are activities somehow done within the confines of the job a person is engaged to do, not something, like sexual-harassment, that is not really referable to what he or she was employed to do. The purpose of the legislation is to remove certain undesirable conditions, in this context in the work place, and it would seem odd if under Section 7(a) an employer would be liable for sexual harassment engaged in by an employee in the course of hiring a person, but not liable when that employee does so in the course of supervising another employee, particularly an employee on probation. It would appear more sensible and more

consonent with the purpose of the Act to interpret the phrase "in the course of employment" as meaning work-or job-related, especially when the phrase is prefaced by the words "directly or indirectly".

The Tribunal finds that the Respondent's position that the disciplinary action taken and the rule in question are not employment-related is inconceivable for a number of reasons.

The Respondent's letter to the Complainant informing him of the suspension specifically indicates that as a consequence of having his camp privileges suspended, the Complainant would miss two complete tours of work and be assessed six demerit points. The letter also indicated that if the Complainant was "found present in the women's living quarters again, your (his) employment will (would) be terminated".

The evidence of Mr. Pettigrew, who was responsible for Human Resources for the Respondent at the time in question, was that a suspension of camp privileges meant for all intents and purposes a suspension of employment privileges. Mr. Pettigrew also told of two other male employees whose employment was terminated for disobeying the no "males in female's quarters" rule.

Mr. Bissett, the Respondent's Manager of Employee Relations at the time, informed the Complainant that he was leaning towards termination of the Complainant's employment as a consequence of violating the rule.

As well, the prescribed reprimand for breach of the rule also suggests employment consequences - ie. camp privileges are revoked and as a consequence, employment is terminated.

Furthermore, the Respondent's Operating Instructions in effect at the time (which was filed as an Exhibit at the hearing) also indicated that, with respect to persons assessed twelve demerit points, they would be notified that if their camp privileges are revoked, their employment would be automatically terminated.

The evidence also clearly sets out the remoteness of the Respondent's mine site. In such a situation, the effect of suspending an employee's camp privileges would be, for example, the same as denying an employee access to a work site (although the Employer in this example may allege that the Employee is nonetheless entitled to work - by denying such access, the Employee in fact cannot work).

It seems clear on the facts that camp privileges were a condition of employment with the Respondent and the Tribunal so finds. Revocation or suspension of an employee's camp privileges had the same effect on his or her employment.

The Respondent also argues that there is a distinction between the rule or policy and the punishment. The rule may be discriminatory to males but it is not employment related. The punishment may be employment related but it is not discriminatory - in this case, both the Complainant and his female friend were given the same punishment and, for other possible cases, the prescribed punishment does not distinguish between males and females.

It is our view that making a distinction between the rule and punishment would defeat the purpose of the Act and would be contrary to this Tribunal's obligation to interpret Sections 7(a), 7(b) and 10(a) broadly and liberally so as to advance the stated purpose. The following example

illustrates how making such a distinction would defeat the purpose of the Act. Employer X could establish the following rule:

No Black, Catholic or Jewish employee shall go to the residence of any other employee after working hours and breach of this rule shall be considered an Intolerable Offense for any such employee and the other employee whose residence is attended unless the other employee has not consented to the attendance.

Employer X's prescribed punishment could be "Any employee who commits an Intolerable Offense shall have his or her employment terminated immediately".

In this example, the rule or policy is clearly discriminatory on the basis of race and religion but its restriction applies only after work hours. The punishment on the other hand affects employment but it is the same for all employees.

It seems that if a distinction is made between a discriminatory rule or policy and a punishment, the rule in this example would be valid and numerous other discriminatory policies could be designed to circumvent the Act. This is completely unacceptable and contrary to the purposes of the Canadian Human Rights Act. Accordingly, this Tribunal is not prepared to make a distinction between the rule or policy in this case and the punishment meted out. The two are intertwined and the total effect of the

two must be looked at to determine whether or not there has been a discriminatory practice pursuant to Sections 7 or 10.

In view of the foregoing and given the broad and liberal interpretation that the Tribunal must give to Sections 7(a), 7(b) and 10(a), it is clear to the Tribunal that the rule and the punishment in question were employmentrelated. With respect to Section 7(a), this means that the Respondent refused to continue to "employ", as contemplated therein, by handing out the suspension (we will discuss whether or not there was a disruption of

continuous employment later). With respect to Section 7(b), this means that the discriminatory practice occurred "in the course of employment". With respect to Section 10(a), it means that the discriminatory practice deprived the Complainant of an "employment" as opposed to a "non-employment" opportunity (a discussion as to whether or not the same amounted to an "opportunity" will also be canvassed later).

The Tribunal's decision that suspension of camp privileges means suspension of employment (and a revocation of camp privileges means termination of employment), does not mean that each of the relevant sections are applicable. Further analysis is required.

The other issue with respect to Section 7(a) is whether or not the twoweek suspension amounts to a refusal "to continue to employ". It is the view of the Tribunal that the suspension is indeed a discontinuance of employment albeit on a temporary basis. The Act does not indicate that the discontinuance be permanent (ie. employment be terminated) and given the Court's direction to interpret the statute broadly, it seems only reasonable that by suspending Mr. Hay's employment for two tours of work, the Respondent has refused to continue to employ him for that period of time. Accordingly, the Tribunal finds that the Complainant has established a prima facie case of discrimination under Section 7(a).

It is our view that Section 7(b) is also applicable to the case at hand. The Respondent's position with respect to Section 7(b) is that it did not differentiate adversely in relation to an employee. The Respondent argues that, with respect to the punishment, both the Complainant and his female friend were treated identically. Therefore, there has been no differentiation.

This argument is based upon a distinction between the rule and the punishment which we have just discussed. As we have determined, this is

too restrictive and confining a view of the Act and, in this case, of Section

7(b). The fact of the matter is that the suspension of camp privileges (and employment) was a direct consequence of the Complainant (a male) being present in a female's living quarters. Had the Complainant been a female (and gone to his or any other employee's room) no action would have been taken by the Respondent. That is, the Complainant was treated differently than a female employee in his position. It is the view of the Tribunal that in this manner the Respondent differentiated adversely between the Complainant and its female employees. The fact that the Complainant's female friend was given the same punishment cannot redeem the Respondent for denying the Complainant, a male, the same privilege as a female employee.

Accordingly, the Tribunal finds that the Complainant has also established a Prima facie case of discrimination under Section 7(b). We will now consider the applicability of Section 10(a).

One of the Respondent's arguments was that Section 10(a) was not applicable as the alleged discriminatory practice did not deprive the Respondent of an "employment opportunity", this being a requirement of a valid Section 10(a) complaint.

In this case we must determine whether or not the Respondent established or pursued a policy or practice that deprived or tended to deprive an individual (ie. the Complainant) or class of individuals (ie. the Respondent's male employees) of an employment opportunity on the basis of sex. Two matters must be considered to determine this issue; actual discrimination and potential discrimination. A June 29, 1990 Federal Court of Appeal decision, Attorney General of Canada and Brian Mossop considered Section 10. The case dealt with the loss of a paid day of bereavement leave under a Collective Agreement which had been denied to an employee on a prohibited ground of discrimination. Marceau, J., in obiter , said "... Section

10, unlike Sections 7 and 9, is not only concerned with actual discrimination but reaches into possible or eventual discrimination". This Tribunal concurs with justice Marceau's comment and therefore will consider

both aspects of the "no men in women's quarters" rule - that is its effect on the Complainant and its possible effect on other male employees.

Mr. justice Marceau made a further comment in obiter in Mossop supra as follows:

Was the intention that every employment benefit be seen as an employment opportunity? I seriously doubt that it was so; certainly the French and even English version, I venture to add, suggest a narrow meaning, namely that essentially hiring and promotion were considered.

The justice indicates that because Section 10 deals with both actual and possible discrimination, a limitation on the definition of employment opportunities is reasonable.

This Tribunal's view is that by indicating "essentially hiring and promotion" (note that Mr. justice Marceau does not say exclusively or words of like effect), continued and uninterrupted employment are also included by necessary implication. If this was not Mr. justice Marceau's intention, then, with respect, such comments were made in obiter and we are not prepared to adopt such a narrow definition. The loss of continued and uninterrupted employment, in this Tribunal's view, is a lost employment opportunity, particularly when the interruption resulted in the loss of two tours of duty.

The possibility or potential of a lost employment opportunity if the rule remains in effect is unquestionable based on the prescribed punishment ie. "camp privileges revoked and, as a consequence, employment terminated". Therefore, it is our view that there was an actual lost employment opportunity in this case and that the rule provides for a possible or eventual lost employment opportunity.

The Respondent also argued that the Complaint form, on its face, did not suggest that the rule was being challenged (ie. dealing with future or potential discriminatory effects under Section 10) but rather that the complaint was with respect to the Complainant's suspension. That is, the rule itself is not mentioned on the complaint form as being a problem - only the punishment granted pursuant to it in this particular case. Firstly, the Complaint form does refer to the rule or policy, though not directly. The complaint provides "while there is an absolute prohibition on the presence of men in the women's living quarters, women are permitted unrestricted access to the men's living quarters". Secondly,

the view of the Courts is that the complaint form in administrative matters is not to be considered in the form of an Indictment or an Information in a criminal matter (see Cousens v. The Canadian Nurses Association, [1988], 2 C.H.R.R. D/78 and Bernard v. Fort Francis Board of Police Commissioners, 7 C.H.R.R. D/3167). If a Respondent, of course, raises a matter for which it was not reasonably notified, the Tribunal should accommodate any reasonable request by the Respondent to ensure that it suffers no prejudice and is afforded a fair hearing. In the case at hand, the Respondent did not indicate to the Tribunal any matters of which it was not notified. Its position was simply that a specific complaint with respect to the rule was not set out on the complaint form and consequently the complaint should be dismissed as it related to the rule. No other request was made by the Respondent in this connection. In short, the Respondent wanted the complaint dismissed on technical deficiency. As set out in the above cases, such an argument is not acceptable in an administrative law hearing. Even if prejudice is demonstrated, a request by the Respondent for an adjournment, etc. should be accommodated rather than dismissing the complaint.

Accordingly, for the reasons stated, we find that in the case at hand the Complainant was, in effect, deprived of continued employment for two weeks and therefore was in fact deprived of an employment opportunity.

As well, the policy or rule in question provides for revocation of camp privileges and consequently termination of employment for a breach thereof. This has the possible effect of discrimination for all the Respondent's male employees and denies or tends to deny all male employees of an employment opportunity. In the words of Mr. justice Marceau referred to previously, Section 10 " ... is not only concerned with actual discrimination but reaches into possible or eventual discrimination".

Therefore there is a prima facie case of discrimination under Section 10(a) with respect to both treatment of the Complainant and with respect to the rule or policy.

Now that we have dealt with the interpretative arguments in relation to Sections 7 and 10, the Tribunal is of the view that the Complainant has discharged the onus on it and has established a prima facie case of discrimination under Sections 7(a), 7(b) and 10(a). The necessary facts have been established for a prima facie case. In general terms, the discriminatory rule and action were clearly set forth and for the most part uncontradicted. The case was straight-forward in this respect and the Complainant's onus quite easily discharged.

Once a prima facie case is established, Section 15(a) sets out a statutory exception or defense. The section provides:

15. It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement (a "BFOR");

The leading case on the BFOR defense is the Etobicoke case supra. The onus now lies upon the Respondent to establish such a defense. McIntyre, J. at Page 208 outlined the applicable test as follows:

To be a bona fide occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in a sincerely held belief that such limitation is imposed in the best interests of 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 economical performance of the job without endangering the employee, his fellow employees and the general public.

With respect to this subjective element of the test, the Tribunal is satisfied that the Respondent set out the rule and imposed the punishment in this case, both honestly and in good faith. The rule was established as a result of an apparent sexual assault many years ago. Mr. Pettigrew, spokesman for the Respondent, was convincing in his evidence that the Respondent believed the rule would help satisfy and protect female employees. The Respondent appears to have acted in good faith.

The Etobicoke case, supra also suggests that the evidence to satisfy the ob ective part of the test must be something more than impressionistic.

Scientific or emperical evidence is certainly preferable and always more persuasive, though it is not required in every case. Mr. Justice McIntyre, at Pages 212 and 213, gives an indication of the type of evidence required:

It would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of 65 under the provisions of Section 4(6) of the Code. In the final analysis, the Board of Inquiry, subject always to the rights of appeal under Section 14(d) of the Code, must be the judge of such matters.....

I am by no means entirely certain what may be characterized as scientific evidence". I am far from saying that in all cases some

"scientific evidence" will be necessary. It seems to me, however, that in cases such as this, statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, would certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is "a young man's game".

My view of the evidence leads me to agree with the Board of Inquiry. While the evidence given and the views expressed were, I am sure, honestly advanced, they were in my view properly described as "impressionistic" and were of insufficient weight.

The Respondent called two of its female employees to give evidence on the objective element of this test. The employees indicated their concern for privacy and safety. One employee was more concerned and suggested that she might not continue her employment if the "no men in women's quarters" rule was not in effect, while the other said her employment would not be affected. Mr. Pettigrew also indicated that he was concerned about the Respondent's ability to hire, and maintain employment of, female employees without the rule.

The Respondent's evidence simply falls short of that which is required to establish a BFOR defense.

Safety concerns no doubt can form the basis of a BFOR defense. In this case, the premise underlying the concern is apparently that a male in a female's living quarters present more of a safety concern than a female being present in male's living quarters or simply any other person (male or female) being present in another's quarters. Clearly something more than two female employees indicating a concern about safety is required. It is the view of the Tribunal that the evidence of an expert, some statistics and the like would have been required to establish that males in females'

quarters poses an increased safety risk. Without establishing such a premise, there is no reason to exclude only males on the basis of a safety concern. The indication that a male sexually assaulted a female in 1982 is of little value - that is too remote and isolated an occurence (at a time when 1200 workers were on-site) to be of assistance to the Respondent. In our view, even if the assault had occurred

recently, more scientific evidence would have been required indicating increased safety risks and the benefits of a "no men in women's quarters" rule.

Privacy concerns of prison inmates and nursing home residents have been considered the basis of valid BFOR defenses in Maline Stanley et ai v. Royal Canadian Mounted Police, [1987], 8 C.H.R.R. D/605 and Annie McKale v. Lamont Auxiliary Hospital and Nursing Home District No. 23 [1988], 8 C.H.R.R. D/638 (Alta. Q.B.). In each case, considerable expert evidence was presented to the Tribunal. Some of the experts dealt with the typical reactions and concerns of the affected individuals - the type of evidence which would have been of assistance to the Tribunal in this case. See also The City of Saskatoon and the Saskatoon Professional Firefighters Union Local 80 v. The Saskatchewan Human Rights Commission and Len Craig, [1989], 2 SCR 1297, for further example of the extensive evidence requirements.

The Tribunal notes that females were allowed in the males living quarters and there was no evidence to suggest that males have less privacy concerns than females. Privacy concerns may be as much an individual concern as a gender-related concern, or they may not be. However, the Tribunal had no evidence before it on this issue and others of a similar nature.

The Tribunal notes, as well, that the layout of the residences in the Respondent's facility seems to provide a reasonable degree of privacy to residents when members of the opposite sex are present (eg. private rooms, curtains in the washroom, etc.). Structural changes to provide a reasonable degree of accommodation for privacy concerns appear unnecessary.

The Respondent also brought forth evidence of employee preference (or at least female employee preference) for the retention of the rule in question. Employee preference is quite simply not adequate. For example,

employees may wish that their employer not hire other employees of a certain race or religion. The employee's preference cannot provide the employer with a defense to a discriminatory hiring practice and likewise does not enable the Respondent to maintain its "no men in women's quarters" rule.

The result of the foregoing is that the Tribunal finds the Respondent's evidence on the BFOR defense impressionistic at best and as such, inadequate. Accordingly we find that the Section 15(a) exception is not applicable in this case.

A recent Supreme Court of Canada case has made it clear what the Tribunal must do with respect to the rule in question. This is a case of direct discrimination since the rule in question discriminates against all males on its face. Madam justice Wilson in the September 13, 1990 Supreme Court of Canada case, Alberta Human Rights Commission v. Central Alberta Dairy Pool, in writing for the majority said "where the rule established by the employer fits into the category of "direct discrimination" and is not saved by any statutory justification, it is simply struck down".

Ruling

We therefore find that the complaint in question is substantiated in that the Respondent discriminated against the Complainant pursuant to Sections 7(a), 7(b) and 10(a) and furthermore that the "no males in female's quarters" rule is a discriminatory practice pursuant to Section 10(a).

Accordingly, the Tribunal orders, pursuant to Section 53(2)(a) that the Respondent forthwith revoke the no male (to be) found present in women's living quarters rule and that it not reinstate any rule of a like effect hereafter. Although no further order is made with respect to any replacement rule which the Respondent may establish, it is strongly urged that any such rule be

made in consultation with the Canadian Human Rights Commission so as to avoid the need for any further hearings on this issue and consequent burden to the public purse.

It is also ordered pursuant to Section 53(2)(a) that all records of the incident in question be removed from all employee, personnel and other

records which the Respondent has or maintains with respect to the Complainant.

Pursuant to Section 53 (2)(c), it is further ordered that the Respondent shall forthwith pay to the Complainant the sum of $2,779.70, as compensation for lost wages, together with interest thereon at the prevailing rate for Canada Savings Bonds from time to time, compounded annually, from and including February 1, 1988 to and including the date of payment to the Complainant.

It should be noted that the parties agreed to the amount the Complainant lost with respect to wages. As well, the Respondent did not take issue with respect to the payment of interest or the rate thereof.

The Complainant has also claimed special compensation under Section 53(3)(b) for hurt feelings. The Tribunal heard evidence of the Complainant suffering marital problems, anxiety and stress in not knowing if he would have a job as a result of the suspension, the rumors at work and the possibility that the incident may have an impact on promotions outside the scope of the Collective Agreement. Notwithstanding these factors, on the evidence before it, the Tribunal finds that the Complainant was well aware of the rule in question and the risks of violating it. He chose to take a chance and was caught. The misfortunes of which he spoke could have been avoided had he met with his female friend in his quarters or in the common area of the camp facility. Although we are of the view that this has no bearing on whether or not there was a discriminatory practice, the

Complainant's conduct is relevant with respect to the issue of compensation for hurt feelings and a nominal award only is appropriate. Accordingly, the Tribunal orders that the Respondent pay the Complainant the sum of $1.00 as compensation for hurt feelings, pursuant to Section53(3)(b).

The Complainant is also requesting an apology, but the Tribunal is not prepared to require the Respondent to provide an apology. As indicated, the Complainant was in large part the author of his own misfortune.

Furthermore, the Respondent established the rule in good faith (though mistakenly) and dealt with the Complainant reasonably and compassionately given its prescribed punishment (which was termination of employment). It should also be noted that as of the date of hearing in this matter, the Complainant was still working for the Respondent, he had received all promotions he had been entitled to and he appeared to be treated favorably by the Respondent and had no intentions of seeking employment elsewhere.

We do not think an apology is appropriate.

SIGNED AND DATED this 3rd day of March, 1991.

WILLIAM KURR
Chairman

SIGNED AND DATED this 3rd day of March, 1991.

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Member

SIGNED AND DATED this 3rd day of March, 1991.

SEECH GAJADARSINGH
Member