

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN
DES DROITS DE LA PERSONNE**

BRUNO BOUDREAU

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

GREAT CIRCLE MARINE SERVICES INC.

Respondent

REASONS FOR DECISION

2004 CHRT 21
2004/06/30

MEMBER: Roger Doyon

[TRANSLATION]

[I. INTRODUCTION 1](#)

[II. THE EVIDENCE 1](#)

[A. Complainant's evidence 1](#)

[\(i\) Bruno Boudreau 1](#)

[B. Respondent's evidence 5](#)

[\(i\) Robert Bélanger 5](#)

- [\(ii\) Andrée Viger 10](#)
- [\(iii\) Édouard Nadeau 12](#)
- [\(iv\) Georges Tousignant 14](#)
- [\(v\) Marcel Éthier 16](#)

[III. THE LAW 16](#)

[IV. ANALYSIS 18](#)

- [A. The *prima facie* case of discrimination 18](#)
- [B. *Bona fide* occupational requirement 20](#)
- [C. Was the standard adopted for a purpose that is rationally connected to the performance of the job? 20](#)
- [D. Was the standard adopted in good faith? 20](#)

[V. REMEDIES 24](#)

- [A. Reinstatement 24](#)
- [B. Damages for financial loss 25](#)
- [C. Expenses 26](#)
 - [\(i\) Clothing purchases 26](#)
 - [\(ii\) Legal fees 27](#)
 - [\(iii\) Pain and suffering 28](#)
 - [\(iv\) Compensation for reckless and wilful conduct 28](#)
 - [\(v\) Interest 28](#)

I. INTRODUCTION

[1] Bruno Boudreault alleged that he was discriminated against on the basis of his disability (problem with his left knee) when Great Circle Marine Services Inc., the Respondent, terminated his employment because his physical condition prevented him from meeting the requirements of the helmsman and longshoreman duties. The Complainant claimed that the Respondent failed to comply with the provisions of section 7 of the *Canadian Human Rights Act* (the "Act").

[2] Bruno Boudreault also alleged that the Respondent had a discriminatory hiring policy contrary to section 10 of the *Act* by requiring that all crew members on a ship, without exception, be in suitable physical condition, with the assessment of that condition left to the judgement of the ship's captain.

II. THE EVIDENCE

A. Complainant's evidence

(i) Bruno Boudreault

[3] Bruno Boudreault lives in Île-aux-Coudres. In 1998, he worked as a day labourer at the Groupe Océan shipyard in Île-aux-Coudres. In July 1998, he had surgery on his left knee. In the spring of 1999, he was hired by Croisières A.M.L. as a day labourer assigned to preparing boats for the tourist season. He then worked as a maintenance employee and recreation leader at Hôtel Cap-aux-Pierres in Île-aux-Coudres until September 1999. In March 2000, he obtained a job as a seaman and helmsman on the cruise ship *Cavalier Maxime*, owned by Croisières A.M.L.

[4] During the winter of 2001, at a friend's suggestion, he contacted Andrée Viger who, according to his information, was working for Logistec Navigation in order to seek work as a seaman on board a ship that was to travel to the far north during the summer. Andrée Viger asked him to send her his curriculum vitae (C.V.) and a medical certificate. He sent her his C.V. and his certificate in marine emergency duties (M.E.D.).

[5] The Complainant said that, on February 13, 2001, he went to meet Dr. Marcel Éthier in Île-aux-Coudres, who was designated by Transport Canada to conduct medical assessments. Dr. Éthier conducted a medical examination. The Complainant stated that he informed the physician about the operation on his left knee. Dr. Éthier issued the required medical certificate (Exhibit P-11), which the Complainant forwarded to Andrée Viger.

[6] Andrée Viger contacted the Complainant again to point out that, if he held a bridge watchman or helmsman certificate, he would improve his chances of being hired. The Complainant obtained his helmsman certificate on May 9, 2001 (Exhibit P-14). Upon receipt of this document, Andrée Viger informed him that he had obtained employment as a helmsman/longshoreman and that Édouard Nadeau, the personnel manager, would contact him to provide him with the terms of employment.

[7] The witness said that he received a call from Édouard Nadeau confirming his employment as a helmsman/longshoreman. Édouard Nadeau asked him whether he was familiar with longshoreman work. He stated that he had replied having seen longshoremen work but had no experience himself. Édouard Nadeau asked him to board the *Umiavut* at Valleyfield harbour on June 16, 2001 and that he would meet him there personally. At the Complainant's request, Édouard Nadeau

agreed to postpone his arrival until the following day, Sunday, June 17, 2001. The witness recalled that when he arrived he met Édouard Nadeau to sign his employment contract (Exhibit P-1). Édouard Nadeau gave him a tour of the ship. He issued him his seaman's book for it to be conveyed to the captain in accordance with the standards in effect.

[8] The witness stated that he had not been told about the work he would be doing when the ship was in port. The crew commander, however, did mention to him that there was the possibility he would be assigned to operating a tug.

[9] The witness recalled that, at the request of the chief petty officer, he started his watch shift from 8:00 p.m. to midnight. He had a four-hour shift and an eight-hour rest period followed by a four-hour shift. On Tuesday or Wednesday, he was in bed after his shift, which ended at 8:00 a.m., when he was wakened by the chief petty officer, who told him he was to go to the captain's office.

[10] He went to Captain Robert Bélanger's office where he met the captain and Andrée Viger who was also at the meeting. The captain informed him that it had been brought to his attention that he was putting ice on his knee and that he was concerned that he had been injured on board the ship. The witness informed the Captain that that was not the case and that he had had surgery on his knee in 1998 and that he would sometimes put ice on his knee whenever it felt stiff, but that the situation did not prevent him from doing his work.

[11] Since Captain Bélanger seemed concerned about his physical condition, the witness stated that he had suggested he contact his orthopedic physician whose telephone number he provided to him. He also offered to undergo a medical examination by the orthopedic physician of his choice. Captain Bélanger told him that he would review the situation and would speak to him again later in the day. Approximately one half an hour after he returned to his cabin, he was again summoned to Captain Bélanger's office.

[12] When he arrived at the office, he asked whether his orthopedic physician had been contacted. Andrée Viger replied that she had two options: contact his physician and keep him employed or not contact his physician and terminate his employment. The witness stated that he suggested leaving the ship to go to his physician's office in Quebec and obtain his medical record. This suggestion was not pursued. Captain Bélanger told him that he had to terminate his employment because the condition of his knee did not allow him to take the risk of retaining his services for a voyage to the north. At the Complainant's request, Captain Bélanger issued him a letter attesting to the termination of his employment due to problems with his left knee (Exhibit P-2).

[13] Bruno Boudreault immediately left the ship to return home. He stopped in Quebec. The following day, through his lawyer, he sent a formal demand letter to Logistec Navigation ordering it to reinstate him in his job (Exhibit P-3) before the ship's departure scheduled for the end of June 2001. However, since the formal demand letter did not refer to the employer stated in the contract, a second demand was sent to the employer/Respondent on July 19, 2001 challenging the validity of the termination and demanding reinstatement.

[14] The Complainant said that, to his knowledge, the ship left Valleyfield harbour on June 26 or 27, 2001. He stated that he had contacted Andrée Viger to convince her to allow him to be reinstated in his job. On June 26, 2001, he faxed her a report from his orthopedist (Exhibit P-4) indicating that, as of June 14, 1999, he was fit to return to work after surgery on his left knee in July 1998 (Exhibit P-4). Andrée Viger informed him that someone else had been hired and that she could do nothing for him. The Complainant also produced a letter from the orthopedist who treated him (Exhibit P-6), dated October 4, 2001, confirming that the medical status of his knee did not result in any functional limitations for any type of work.

[15] The Respondent sent the Complainant an initial record of employment dated June 29, 2001, with no comments in the "Observations" section (Exhibit P-1). On July 16, 2001, the Respondent issued a second record of employment where it stated the following in the "Observations" section: "According to the captain, unfit for work for medical and safety reasons." [translation]

[16] The witness stated that after arriving home again he was very shaken by losing his job. As a result, it was several weeks before he took steps to look for work. He then went to the employment insurance office and the seafarers' union office to find work, but was unsuccessful. He also sought work at the Groupe Océan shipyard and on the Coast Guard ships. He was rehired on July 31, 2001 as a seaman/helmsman on the *Écho des Mers* until October 12, 2001. From May 13, 2002 to September 21, 2003, he was employed as first mate on the *Famille Dufour II* and performed the same work in 2003.

[17] The witness added that in January 2003 he took a radar simulator course. He intends to take a course in radiotelephony, which would allow him to take the exam for obtaining his Minor Waters Master certificate.

B. Respondent's evidence

(i) Robert Bélanger

[18] The witness began his maritime career as a seaman in 1975. Starting in 1980, he moved up through the officer ranks and in 1995 obtained a Master Mariner certificate. As a deck officer, he often had occasion to sail in the Canadian Arctic, particularly on the *Lucien Paquin*. This ship's activities focused on transporting all types of goods to posts and villages in the Arctic. It would also carry goods between villages and return goods south, namely to Montreal.

[19] In 2001, Transport Nanuk engaged his services as a captain on the *Umiavut*, which had the same mission as the *Lucien Paquin*. The crew of the *Umiavut* consisted of personnel assigned to the navigation department. It included the captain, who was responsible for supervising all shipping activity. He had to ensure that the *Canada Shipping Act* and Transport Canada's regulations were respected, particularly regarding the safety of the crew, the ship itself and everything carried on board the ship. He had to be able to take the required steps in emergencies such as fire or a situation requiring abandonment of ship. He stayed in constant contact with the owner to provide current information about the ship's progress. There was also the senior ship's officer in charge of activities relating specifically to the cargo. Then there were three navigation officers whose responsibilities involved the ship's progress on the water. They performed eight-hour watches per day divided into four-hour periods of work according to a schedule that began at midnight. The navigation department also included three helmsmen. Each one was assigned to and worked with an officer.

[20] The helmsman was responsible for steering the vessel in a specific direction according to instructions from the navigation officer. Conditions permitting, the automatic pilot system was turned on. At that point, the helmsman would be assigned to watch duty to ensure that the ship progressed safely.

[21] The personnel on board the *Umiavut* also included five day-labourer/seamen and one master seaman. The crew also included the engineering department personnel, specifically the chief engineer and two mechanics. Finally, there was the food department personnel, namely the head chef and one cook.

[22] The delivery of goods to northern Quebec begins as soon as the ice breaks up, usually between July 1 and 15, and ends when the water freezes up again at the beginning of November. Captain Bélanger explained the importance of meeting the scheduled delivery dates.

[23] In addition to carrying goods, ships heading to northern Quebec must also supply longshoreman services because the destinations do not provide port facilities.

[24] Captain Bélanger described the goods unloading operations. Once the ship arrives at the delivery point, it is safely anchored as close to the pier as possible. Using cranes on the ship, the transit equipment, namely two tugs and two barges, are placed in the water. Tractors and unloading equipment for handling the goods on the pier are then placed on the barges. The tugs pull the barges to the pier and the handling equipment is unloaded there. The tugs and barges then return to the ship to proceed with unloading the goods. When these operations are complete, goods may be brought to the vessel for transportation to another destination, or the equipment is brought back on board the ship, as well as the barges and tugs. The ship then heads towards another delivery point.

[25] Longshoring operations are assigned to crew members other than officers, mechanics and cooks. Captain Bélanger explained that, for unloading goods, slings manoeuvred by crew members are placed around the goods and attached to the crane for removing them from the ship and depositing them on the barges.

[26] There is also the beachmaster. This person is not assigned to navigation. While the ship is at sea, the beachmaster looks after the maintenance of all equipment used for unloading goods and plans the unloading process for when the ship arrives at the delivery point. During unloading, the beachmaster goes on to the pier to ensure that the unloading operations go smoothly. The beachmaster is accompanied by a tractor operator, and they both drive the tractors. A seaman goes on to the pier and performs the role of inspector. He looks after the administrative aspect of the goods delivery with the appropriate people.

[27] The tugs are operated by a tug master. Because of his maritime knowledge, this is usually the helmsman's responsibility. In addition to steering the tug, he is also responsible, with the help of a seaman, for handling the lashings used to pull the barges to the pier.

[28] On the ship there is a crane operator and a senior officer crane signaller who must ensure that the barges are loaded safely and in accordance with the requirements arranged with the beachmaster. In the ship's hold, a fork-lift truck operator and two seamen manoeuvre the goods for unloading.

[29] Captain Bélanger testified that crew members must be able to respond to emergencies on the ship, such as an onboard fire or the extreme situation of abandonment of ship. There is potential for fire in the engine room where there are quantities of fuel. The smallest leak can cause a fire. There is also the potential for fire with the goods on board the ship. Crew members must always be prepared to work together to fight fires using Transport Canada procedures, which set out the tasks to be carried out by crew members in such circumstances. Officers have supervisory duties, and seamen including the helmsmen must fight

the fire. There may be the need to abandon ship in the event of fire or collision with ice or another ship, which requires the lifeboats to be put into the water.

[30] After he was hired, Captain Bélanger boarded the *Umiavut* at Trois-Rivières and travelled to Valleyfield harbour where he arrived on June 17, 2001. The ship normally was to put out to sea immediately after the loading was finished. During the day, the crew members began to board the ship. Édouard Nadeau from Great Circle Marine Services Inc., who was a supplier of personnel for the *Umiavut*, except for the captain and chief engineer, was on board to greet personnel. The loading operations began on Monday, June 18, 2001 and ended as usual the following Friday.

[31] Captain Bélanger said that the voyage was originally planned for Canadian waters. However, since it had to go to Thule, Greenland, it became a foreign voyage. For shipboard personnel, Transport Canada regulations differ depending on whether it is a voyage in Canadian waters or a foreign voyage. For example, the witness indicated that Transport Canada regulations require every crew member to furnish a medical certificate in accordance with its standards and to have passed the marine emergency duties (M.E.D.) course. As to the Complainant, he had to hold a bridge watchman certificate. For a minor waters voyage, the regulations do not require seamen to hold a medical certificate.

[32] The witness acknowledged that Bruno Boudreault met all Transport Canada requirements for performing the helmsman duties for a foreign voyage. Moreover, the work that the Complainant was to carry out during the goods unloading operations had not been determined, but he believed that he would have held the position of tug master.

[33] He recalled that, on Tuesday, June 19, 2001, a crew member informed him that he had seen the Complainant put ice on his knee. He took the opportunity during Andrée Viger's visit the next day, June 20, 2001, to tell her about the situation. He said the following to her (page 303 of the transcripts of proceedings):

"I would like us to meet with the person in question. This way, number one, I would not be the only one passing judgement and, number two, you would be able to ask questions too, if necessary."

[translation]

[34] The witness summoned the Complainant to his office and told him about the information he had received. He claimed that the Complainant acknowledged that he was putting ice on his knee because it would be painful at the end of his work day. He was unable to provide more detail about that discussion, which was 15 or

20 minutes long, aside from the fact that the Complainant had stated that the discomfort in his knee was from a situation that happened previously. The witness said that he thanked him for the explanations and that the meeting ended on that note.

[35] After speaking with Andrée Viger, Captain Bélanger made the decision to terminate Bruno Boudreault's employment because he felt that the Complainant's knee would not heal with the workload that he would be assigned on board the ship, which required regular attendance. He explained that it was his duty on the ship to ensure the safety of the crew members, including the Complainant himself, and that it would have been irresponsible of him to retain the Complainant.

[36] Captain Bélanger states that he therefore summoned the Complainant to his office again and informed him that his employment was terminated immediately. He told him the following (page 309 of the transcripts of proceedings):

"...given the situation with his knee, which I believed was a certain amount of difficulty that started after two days of work, I believed that it was not safe for him or for the rest of the crew to have to require him to be on the Arctic voyage for an entire season."
[translation]

[37] The witness acknowledged that the possibility of the Complainant undergoing a medical examination had been considered, but not pursued. He explained that he did not need a medical opinion to tell him what he already knew, namely that the Complainant had pain in his knee. He felt that it was unwise to allow a person with knee pains to go to the Arctic. Also, at the Complainant's request, he agreed to issue him a letter of termination (Exhibit P-2). He recalled that the Complainant was replaced by a seaman with a bridge watchman certificate and that an extra seaman was hired and came aboard at Quebec.

[38] When questioned about whether he had considered taking accommodation measures that would have enabled the Complainant to keep his job, Captain Bélanger, without answering the question directly, first maintained that the living accommodation facilities on the ship did not allow extra staff to be hired to fill in for the Complainant's potential absences. Second, the constant work during the unloading operations did not allow staff to be replaced to prevent a potential loss of effectiveness and a delay in delivery times.

(ii) Andrée Viger

[39] In 2001, Andrée Viger was a human resources coordinator with Transport Nanuk. She was in charge of hiring office staff as well as navigation personnel on board the *Aivik* and the captain and chief engineer on the *Umiavut* rented by Transport Nanuk. Since the Respondent had to hire navigation personnel for the *Umiavut*, it called on the Respondent. She assisted Édouard Nadeau, a representative of the Respondent, by sending him seamen's C.V.s. She anticipated that Édouard Nadeau would have difficulties finding crew members to fill the helmsman and longshoreman positions.

[40] Andrée Viger recalled that, in the spring of 2001, Bruno Boudreault contacted her by telephone to seek work as a seaman. She asked him to send her his C.V. Upon receipt of that document, she contacted him to determine whether he held a bridge watchman certificate. The Complainant replied that he did not, but that he could take the exam to obtain it because he had the prerequisites for it. After obtaining his bridge watchman certificate, the Complainant notified the witness, and she asked him to fax her the document. She then verbally notified the Complainant that she had forwarded the information to Édouard Nadeau, who would probably contact him to offer him a job.

[41] The witness said that on June 20, 2001 she went to Valleyfield harbour to meet with Captain Bélanger, who was on board the *Umiavut*. During that visit, Captain Bélanger told her that the Complainant was putting ice on his knee, that he wanted her to attend a meeting with the Complainant and she agreed.

[42] When the Complainant came to his office, Captain Bélanger told him that it had been brought to his attention that he was putting ice on his left knee. The Complainant conceded to that fact and said that he had had an operation on his left knee, that it was not completely healed, but that it was well on the way to being healed. He added that he had arthritis in his knee and that the ice soothed the pain. The Captain asked him to go and said that he would let him know about his decision.

[43] The witness revealed that, after reviewing everything, the Captain decided that for safety reasons he could not keep a person on staff who did not have all his physical capabilities. Captain Bélanger summoned the Complainant to his office again and informed him that, for his own safety and that of the crew, he had to terminate his employment.

[44] The witness recalled that the Complainant maintained that he could do his work. The Complainant also suggested calling his physician and arranging for his medical record to be supplied. The witness stated that she did not take these suggestions on the grounds that June 20, 2001 was a Wednesday and, with the ship leaving on Friday, June 22, 2001, she did not have time to contact the Complainant's attending physician. Because he insisted on providing his medical

record, Andrée Viger told him to have it sent to her and received from the witness on June 26, 2001 a faxed copy of the letter from the orthopedist François Marquis.

[45] When questioned about the possibility of the Complainant's undergoing a medical examination by an orthopedist, the witness recalled that it was impossible for her to arrange an appointment in two days with the Groupe Santé Médicis, a firm of medical experts that she had been doing business with for several years.

[46] When the Complainant realized that Captain Bélanger's decision was irrevocable, he requested a letter attesting to his termination of employment (Exhibit I-2), and the witness faxed it to Édouard Nadeau.

[47] The witness recalled that, to remedy Bruno Boudreault's departure, the seaman Dave Cossette was promoted to helmsman and his position was filled by hiring a seaman.

[48] The witness mentioned that the *Umiavut* was to clear Valleyfield harbour on June 22, 2001. However, most of the seamen on board did not hold the medical certificate required by Transport Canada, which had become mandatory because the ship was to make a foreign voyage in international waters. The witness revealed that she had arranged for a physician designated by Transport Canada to board the ship on Sunday, June 24, 2001 to conduct the medical examinations and issue the required medical certificates.

[49] The witness stated that the *Umiavut* cleared Valleyfield harbour on Tuesday, June 26, 2001 for its first voyage to the far north. It returned on August 28, 2001. During that voyage, Dave Cossette, the Complainant's replacement, was paid \$17,320.07: \$10,296.74 as a helmsman and \$7,023.33 as a longshoreman. During the second voyage from September 3, 2001 to November 4, 2001, the helmsman Stéphane Lavoie, who replaced Dave Cossette, was paid \$17,358.35: \$9,524.01 as a helmsman and \$7,834.34 as a longshoreman.

[50] The witness stated that, when the decision was made to terminate the Complainant's employment, the possibility of limiting the Complainant's work as a helmsman and a longshoreman was not considered because the Complainant had been hired to perform both helmsman and longshoreman duties. In addition, limiting the duties would have required paying overtime hours.

(iii) Édouard Nadeau

[51] Édouard Nadeau is the president of the Respondent, Great Circle Marine Services Inc. It is a company that supplies personnel to work on ships. In 2001,

the Respondent signed an agreement with Transport Umialarik for managing the *Umiavut*'s crew except for the captain and the chief engineer. Umialarik's representative, Andrée Viger, informed the witness of the personnel required on board the ship. She sent him Bruno Boudreault's C.V., the medical certificate and the bridge watchman certificate.

[52] He contacted the Complainant to offer him employment as a helmsman/longshoreman on the *Umiavut*. Because he was not familiar with longshoreman work, the witness asked the Complainant whether he was familiar with this type of work. The Complainant informed him that he had never done that type of work, but that, according to the description that his friends had given him, he claimed that he would be able to perform the duties. Édouard Nadeau told the Complainant to bring warm clothes with him without specifying those that he would provide him with and that appeared in the employment contract signed on board the ship.

[53] The witness provided his client with the required personnel. He acknowledged that for some crew members, such as the Complainant, this was their first work experience on a ship travelling to the Arctic.

[54] The witness said that with his permission the Complainant boarded the ship on June 17, 2001 at Valleyfield harbour. He had him sign the employment contract (Exhibit P-1). After hiring all personnel, the witness left the ship on June 19, 2001 and returned to Shédiac (New Brunswick), where his residence and the Respondent's head office were located.

[55] Édouard Nadeau said that, on June 20 or 21, 2001, Andrée Viger informed him that Captain Bélanger had terminated the Complainant's employment for safety reasons, and she sent him a letter from the Captain (Exhibit P-2). He revealed that he did not question the Captain's decision, for the following reason (page 389 of the transcripts of proceedings):

"I did not challenge Mr. Boudreault's termination. I have 15 years experience as a seaman, as an officer, and the captain's decision is final. That meant that there was no discussing it with him."
[translation]

[56] Arrangements were made to replace the Complainant. A seaman already on board the ship, who had never travelled to the north, held a bridge watchman certificate and was promoted to helmsman. The witness then hired another seaman, who boarded the ship at Quebec.

[57] After returning to his residence, Édouard Nadeau received a telephone call from the Complainant notifying him of his termination because of putting ice on his knee. He told the Complainant that he deferred to the decision of the ship's captain and that he would try to find him another job. He tried to do so, but was unsuccessful. However, after receiving the Complainant's formal demand letter (Exhibit P-5) he stopped the employment search. He acknowledged that it was difficult to find a seaman with a bridge watchman or helmsman certificate.

(iv) Georges Tousignant

[58] In 2001, Georges Tousignant had been Director of Operations for Transport Nanuk since 1994. He was responsible for ship-related operations, namely ship supply, transportation of goods and ship maintenance operations. After completing his studies at the École de Marine, he obtained an initial officer's certificate in 1978. Starting in 1979, he worked as a navigation officer on cargo ships. He sailed primarily on the Great Lakes and in the Canadian Arctic. In 1992, he obtained a Master Mariner certificate.

[59] The witness explained that in 2001 the *Umiavut* went to northern Quebec twice during the navigation period to deliver goods in wooden containers or crates or even in bundles such as building materials, and rolling equipment like trucks.

[60] Georges Tousignant explained that the navigation season usually runs from the beginning of July to mid-November.

[61] He said that the *Umiavut* arrived in Valleyfield harbour on June 17, 2001. The loading was to be done during the week so the ship could leave on Friday, June 22, 2001 for a foreign voyage because it had to stop at Thule, Greenland. However, because all the staff on board were to have undergone a medical examination in accordance with Transport Canada requirements and because some seamen did not hold a medical certificate, the departure was delayed until June 26, 2001 to allow them to undergo a medical examination by a physician designated by Transport Canada. A physician boarded the ship on June 24, 2001 to conduct the examinations of the seamen and issue medical certificates.

[62] The witness stated that he was on board and that he himself had a medical examination that lasted about 15 minutes. The physician took blood pressure and performed a summary hearing and vision examination. Finally, the witness answered a questionnaire.

[63] The witness explained that the *Umiavut* could carry a load of 3,000 tonnes and that the shipping and delivery charges were approximately \$200 per tonne. He explained that the ship's operating costs while waiting at the pier were around

\$15,000 per day and, when sailing, between \$18,000 and \$19,000 per day. He mentioned that, when the ship was delayed due to the client, the carrier absorbed the costs incurred because of the delay.

[64] Georges Tousignant acknowledged that, even when the carrier would do everything possible to meet delivery times, delays frequently occurred, particularly due to problems during navigation.

[65] Georges Tousignant mentioned that during the goods unloading operations, crew members were assigned to longshoring. On the *Umiavut*, the longshore team consisted of ten crew members. He maintained that a missing longshoreman would result in a 10% loss in longshoring productivity.

[66] The witness explained that, in the event that a crew member could not perform his longshoreman duties, he would be sent home and replaced by someone else. He conceded that the voyage could proceed without the replacement, but he thought that this was not a desirable course of action because, if a further crew member were to become unable to do the work, productivity would be even more impacted.

[67] The witness explained the duties of a helmsman. This person steers the ship from a location called the "wheelhouse." He receives his instructions for steering the ship from the navigation officer or from the captain. Formerly, the helmsman would steer the ship using a wheel; hence the designation "wheelsman". With the advent of technology, this work was reduced through the use of an automatic pilot. The helmsman is assigned to watch duty. He keeps watch and brings to the navigation officer's attention any obstacles or situations that can impede navigation. His daily work schedule is eight hours, on a rotating schedule of four hours of work and eight hours of rest.

[68] The witness stated that the wheelhouse contains seats used exclusively by the captain. A seat is also provided, on request, for the specialized pilot who boards the ship for several hours in a row. The witness mentioned that he does not see any reason for a seat to be provided for the helmsman. According to him, the established, recognized custom is for the helmsman to remain standing to do his work, except during his 15-minute rest break during his shift.

(v) Marcel Éthier

[69] Marcel Éthier is a physician designated by Transport Canada to issue medical certificates in accordance with the organization's regulations. He has his practice in Île-aux-Coudres. With reference to the medical record, he stated that he had met with Bruno Boudreault in 1997 as an attending physician. He saw the

Complainant again on February 13, 2001 for an examination required by Transport Canada.

[70] Dr. Éthier said that he conducted a complete medical examination including blood pressure, pulse, weight and blood sugar level. He also conducted a general physical examination of his head, lungs, heart, abdomen and extremities, and everything was normal. He noticed that his record contained no mention of the Complainant having a knee problem.

III. THE LAW

[71] Bruno Boudreault filed a complaint against the Respondent alleging a contravention of the provisions of section 7 of the *Act*. Under this section, it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ an individual or, in the course of employment, to differentiate adversely in relation to an employee. The discriminatory practice must be based on a prohibited ground. Section 3 of the *Act* specifies that disability is a prohibited ground. He also alleged that the Respondent failed to comply with the provisions of section 10 of the *Act* in that it engaged in a discriminatory practice by requiring all crew members of a ship, without exception, to be in suitable physical condition, with the assessment of that condition left to the judgement of the ship's captain.

Finally, paragraph 15 (1) (a) of the *Act* states that:

"It is not a discriminatory practice if 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."

Paragraph 15 (2) of the *Act* specifies that:

"For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."

[72] In 1999, the Federal Court issued two major decisions referred to as "*Meiorin*" ¹ and "*Grismer*." ² In these two cases, the Supreme Court set out the rules for the adjudication of human rights complaints. First, the onus is on the complainant to establish a *prima facie* case of discrimination. A *prima facie* case of discrimination must cover the allegations made and which, if believed, is complete and sufficient to justify a verdict in favour of the complainant, in the absence of an answer from the respondent.

[73] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on a balance of probabilities, that the challenged standard or policy is *bona fide*. To do so, it must demonstrate that:

- (1) it adopted the standard for a purpose that is rationally connected to the performance of the job. It is necessary to consider whether the standard was adopted for the purpose of ensuring that the job is performed safely and effectively;
- (2) that it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of that legitimate work-related purpose;
- (3) that the standard is reasonably necessary to the accomplishment of that purpose, namely the safe and effective performance of the job.

[74] To show that the standard is reasonably necessary, the respondent must prove that it is impossible to accommodate the specific needs of an individual employee sharing the characteristics of the complainant without imposing undue hardship on the respondent.

IV. ANALYSIS

A. The *prima facie* case of discrimination

[75] The evidence showed that Bruno Boudreault was hired by the Respondent for the period from June 15, 2001 to October 31, 2001 to perform helmsman and longshoreman duties on board the *Umiavut*, which was to carry and deliver goods to various posts and villages during two voyages to the far north. The ship's captain was Robert Bélanger.

[76] The Complainant had been required to board the ship anchored in Valleyfield harbour on June 17, 2001. Since the helmsman duties would be performed when the ship was at sea and the longshoreman duties at the time of unloading the goods, he was assigned to ship's watch. He performed four-hour watch periods separated by an eight-hour rest period.

[77] On Wednesday, June 20, 2001, shortly after his watchkeeping shift ended at 8:00 a.m., he was summoned to the office of the Captain, who wanted to confirm the information he had received about him putting ice on his left knee. The Complainant confirmed this information. He explained that he had had an operation on his left knee in 1998, that he sometimes had stiffness or pain in his knee, which he soothed with ice. According to Andrée Viger's version, the Complainant had mentioned that he had arthritis, which he denied. However, contrary to the statement made by counsel for the Respondent, neither the Captain nor Andrée Viger mentioned that there had been any swelling in the left knee.

[78] After receiving this information, the Captain asked the Complainant to return to his cabin and told him that he would inform him of his decision later in the day. The Captain spoke with Andrée Viger and then summoned the Complainant to his office again about one half an hour later.

[79] The Captain informed Bruno Boudreault that he had decided to terminate his employment because of the problems with his left knee. He felt that the Complainant's disability would prevent him from performing the helmsman and longshoreman work during the upcoming voyages because of the demanding nature of the duties. In addition, the Captain felt that the Complainant's knee problems were likely to jeopardize his and the crew members' health and safety.

[80] In my view, the Complainant has successfully established a *prima facie* case of discrimination based on an real or perceived disability in the way the Captain handled it. I also believe that the Complainant's knee problems may constitute a disability and a discriminatory practice based on a prohibited ground within the meaning of section 7 of the *Act*. Moreover, there is no doubt that this discrimination prevented the Complainant from continuing his employment with the Respondent.

[81] I also believe that the Complainant demonstrated *prima facie* that the Respondent contravened the provisions of section 10 of the *Act* by leaving it up to the Captain alone to assess an employee's physical condition. The Respondent should rely on the expertise of medical personnel who are qualified to shed light on the physical condition required of seamen, given the duties they would be called upon to perform. However, since Captain Bélanger's employer is not a party to Bruno Boudreault's complaint, the Tribunal will not discuss measures for rectifying this situation.

B. *Bona fide* occupational requirement

[82] Once a *prima facie* case of discrimination is established, it is necessary to determine whether the discrimination is based upon a *bona fide* occupational requirement using the method suggested in the Supreme Court's jurisprudence.

C. Was the standard adopted for a purpose that is rationally connected to the performance of the job?

[83] To demonstrate the existence of a *bona fide* occupational requirement, the onus is on the Respondent to prove that requiring seamen, such as helmsmen or longshoremen, to be in suitable physical condition is rationally connected to the positions they hold. The focus at this stage is not on the validity of the standard in issue, but rather on the validity of its more general purpose². I believe that the general purpose of the standard in this instance is to ensure the safe and effective performance of the work. Therefore, I believe that suitable physical condition is rationally connected to the duties of seamen such as helmsmen and the longshoremen.

D. Was the standard adopted in good faith?

[84] At this stage, the onus is on the Respondent to demonstrate that the standard requiring suitable physical condition was adopted in good faith, in the belief that it was necessary for the fulfilment of a legitimate work-related purpose. However, if the requirement for suitable physical condition is not deemed reasonably necessary or is motivated by discriminatory reasons, it will not be considered justified.

[85] The Respondent did not submit any evidence describing the suitable physical condition it requires of hired personnel on board the ship. In her list of authorities, counsel for the Respondent submitted the Crewing Regulations (Regulations) in force as of October 2003, which is subsequent to the start of this case, and she directed the Tribunal to part 8 of said Regulations, which deals with medical examinations of seafarers, which I will return to later. Counsel for the Respondent stated that part 8 of said Regulations had not been amended in October 2001 and that it applied in the present case. Neither did Captain Bélanger shed any light for the Tribunal on the definition of this standard; he simply explained the objectives of the requirement for suitable physical condition of crew members.

[86] The evidence showed that neither Andrée Viger nor Édouard Nadeau ever informed Bruno Boudreault, during the telephone conversations prior to his being hired, about the importance of suitable physical condition for performing helmsman and longshoreman duties.

[87] They were satisfied with the medical certificate issued by Dr. Éthier, which brings me to the discussion of the need for medical examinations of seafarers. When required, medical examinations of seafarers are conducted by a physician who is knowledgeable about the work of seafarers and is designated by the minister. It is mandatory for seafaring personnel holding the positions of captain, officer and helmsman to hold a medical certificate issued by a designated physician.

[88] In addition, all seafaring personnel on board a ship making a foreign voyage must also hold a medical certificate. However, this is not the case for ships making a voyage in minor waters, for which the seamen do not require a medical certificate.

[89] Section 66 of part 8 of said Regulations deals with the nature of the examination that the designated physician must conduct. It reads as follows:

"66 (1) The physician conducting a medical examination under this part shall ensure that the seafarer does not have any of the following disabilities:

- a) an impairment that could cause a sudden loss of consciousness and cannot be controlled through medication;
- b) a disorder that could prevent the seafarer from reacting effectively, while on duty, in an emergency;
- c) a condition that could endanger the security of others, in light of the confined conditions on board ship;
- d) a condition that is likely to require emergency medical care and that cannot be controlled through medication;
- e) an untreated psychiatric disorder.

(2) The physician conducting a medical examination under this part shall ensure that the seafarer has:

- a) adequate muscle strength to carry a mass of 22 kg;
- b) the physical capacity to wear breathing apparatus and life-saving equipment;

- c) adequate vision and hearing and the agility and strength to perform the duties of fire fighting, first-aid administration and ship abandonment in an emergency."

[90] The testimony of Dr. Éthier, the designated physician, clearly shows that the Complainant's examination on February 13, 2001 was not conducted thoroughly enough to enable him to meet the requirements of section 66 of said Regulations, and the medical certificate issued does not meet them either. Dr. Éthier mentioned that he had conducted a summary general examination of the Complainant.

[91] The evidence showed that, when the Complainant was hired on June 17, 2001 as a helmsman/longshoreman on board the *Umiavut*, the voyage as it was then planned was to be made in minor waters. The Regulations did not require medical certificates for the seamen. The evidence is that several of the seamen hired did not hold a medical certificate, and the Respondent in no way required it. It was only when the voyage became a foreign voyage that the medical certificate was expected from the seamen, not from the desire to check the seamen's physical condition, even summarily, but only because the Regulations required it.

[92] From what sufficiently serious and convincing data did Captain Bélanger conclude that Bruno Boudreault was not in suitable physical condition to meet the requirements of the helmsman and longshoreman duties? It bears emphasis that the longshoreman duties that the Complainant would have had to perform were not determined. The evidence showed that he would probably have been the tug operator, specifically the tug master.

[93] The first piece of information that Captain Bélanger received was that the Complainant had placed ice on his knee. There was nothing during the previous days indicating that the Complainant was unable to fulfil the watch duties he was assigned to and which, incidentally, are inherent in the helmsman duties. The second piece of information that Captain Bélanger received came from the Complainant, who told him about the operation on his left knee three years earlier and that he had some stiffness and sometimes pain in his left knee, warranting putting ice on it. The Complainant assured him that he was capable of doing his work.

[94] This information alone guided Captain Bélanger's decision to terminate the Complainant's employment. Why was the Complainant's suggestion not taken regarding contacting his orthopedic physician or going to the hospital to obtain his medical record? Andrée Viger's response was that there was no time since it was a Wednesday and that the ship was to clear the harbour that Friday. In reality, the ship put out to sea the following Tuesday. The evidence also showed that the Complainant suggested he undergo a medical examination by a physician of the Respondent's choice. It should be recalled that the evidence is that seamen

holding a bridge watchman certificate were a very rare commodity. Yet Andrée Viger still did not take the Complainant's suggestion, pretexting to having no time to do so. Andrée Viger explained that she had been doing business with a firm of medical experts for several years. As such, her claim that it would have been impossible for her to obtain an appointment within two days leaves me very sceptical. However, it *was* possible for her to engage the services of a physician, who boarded the ship on Sunday, June 24, 2002 to conduct medical examinations of the seamen not holding the required medical certificate.

[95] The information that Captain Bélanger had at hand did not in itself justify his finding regarding the Complainant's physical condition. Moreover, the content of the Complainant's medical certificate, even if Captain Bélanger had read it, would not have led him to a more well-informed decision. To properly determine whether the problems with the Complainant's knee resulted in his physical condition being unsuitable for performing the helmsman and longshoreman duties safely and effectively, he should have obtained a medical assessment that met the requirements of section 66 of the Regulations.

[96] Once the standard regarding suitable physical condition was adopted, every candidate should have been officially informed of its existence and importance prior to being hired, which was not done. In addition, even though they stated they were satisfied with the medical certificate from the physician designated by Transport Canada to confirm a candidate's physical condition, the evidence showed that the certificate was not an initial employment condition for all seamen. Finally, if suitable physical condition was essential, a thorough medical assessment meeting the requirements of section 66 (1) of the Regulations should have been mandatory to ensure that the standard was met.

[97] I conclude that the standard regarding suitable physical condition for employees was not reasonably necessary and does not constitute a *bona fide* occupational requirement. Thus, the Respondent engaged in a discriminatory practice by terminating the Complainant's employment due to his unsuitable physical condition, namely the problems with his left knee.

[98] Therefore, Bruno Boudreault's complaint is substantiated.

V. REMEDIES

A. Reinstatement

[99] After concluding that the complaint is substantiated it is incumbent on the Tribunal to restore the Complainant to the situation he would have been in, had it not been for the discrimination, namely his termination on June 20, 2001.

[100] The evidence showed that the Complainant was hired under a term contract of employment, specifically from June 15, 2001 to October 31, 2001. Therefore, even though the Complainant stated that the Respondent should have informed him of the possibility of another employment contract, I do not believe reinstatement to be well founded.

B. Damages for financial loss

[101] Bruno Boudreault claims lost wages due to his termination. The evidence revealed that, during the ship's first voyage, namely from June 26, 2001 to August 28, 2001, the Complainant's job was done by another helmsman and longshoreman, who was paid \$17,320.07. In her argument, counsel for the Respondent maintained that \$447.09 should be subtracted from that sum, which is the amount that the Respondent paid the Complainant for his work from June 17, 2001 to June 20, 2001. She submitted that the Complainant's replacement was also working from June 17 to June 20, 2001 and that he received the same amount as the Complainant did. However, nothing in the evidence indicated that the Complainant's replacement was working during that time. I conclude from this that the Complainant's financial loss from June 21, 2001 to August 28, 2001 was \$17,320.07.

[102] For the ship's second voyage, the parties agreed that the Complainant's financial loss was \$17,358.35. Overall, the Complainant's lost income for the duration of the employment contract was \$34,678.42. However, from July 31, 2001 to October 12, 2001 he earned \$5,616.00, so his actual lost income was \$29,062.42.

[103] I therefore order the Respondent to pay to the Complainant the sum of \$29,062.42. Since this lump sum awarded to the Complainant could potentially impose a greater tax liability on him, which would penalize him for no reason, I order the Respondent to pay to the Complainant an additional sum to cover the extra tax obligations that may be imposed on him upon receiving the ordered payment, and taking into account his other income and the accompanying compulsory deductions.

[104] The Complainant was also claiming lost employment insurance income due to his termination. He justified this financial claim by the fact that working for the Respondent would have earned him a much higher income during his employment contract than what he received at another job. As a result, the

employment insurance benefits were much lower than those he would have received if he had remained employed with the Respondent. However, the Complainant was unable to quantify the amount of employment insurance benefits that he lost, so this lost income cannot be accepted.

[105] The Complainant was also claiming an amount of \$7,000 on the grounds that his termination prevented him from accumulating hours as a helmsman for eventually becoming eligible for a Master Mariner certificate. The Complainant acknowledged that the amount he was claiming was completely arbitrary, with no data to establish the validity of it. Nothing in the evidence indicated that the Complainant had made any effort after his termination to continue working towards eventually meeting the requirements of a Master Mariner certificate. As a result, the evidence does not justify awarding the amount claimed for lost career advancement.

C. Expenses

(i) Clothing purchases

[106] The evidence showed that during a telephone conversation Édouard Nadeau informed the Complainant that, since he was to go to the far north, he would need suitable clothing. The Complainant purchased thermal underwear, a sleeping bag, outerwear and winter boots, which cost him a total of \$700.

[107] I order the Respondent to pay to the Complainant the sum of \$700.

(ii) Legal fees

[108] After the Complainant lost his job, he hired a lawyer to represent him throughout his case from the filing of the complaint with the *Canadian Human Rights Commission* to the end of the hearing before the Tribunal.

[109] Counsel for the Complainant submitted a lawyer's bill to the Tribunal for \$6,377.46. Counsel for the Respondent acknowledged that the fees claimed are directly connected with the complaint, except for an amount of \$360. Counsel for the Respondent is correct on that point because that \$360 is connected with a civil claim that the Complainant brought against the Respondent.

[110] The Complainant requested that the Respondent be ordered to compensate him in an amount of \$6,377.46 to pay his legal fees, but I feel that the amount of \$6,017.46 should be considered instead.

[111] The provisions of section 53 (1) of the *Act* confer on the Tribunal the power to award the Complainant any or all of the wages that he was deprived of and any expenses incurred as a result of the discriminatory practice.

[112] The analyses in *Stevenson* ⁴ and *Nkwazi* ⁵ lead me to conclude that the legal fees claimed by the Complainant are part of the expenses incurred as a result of the discriminatory practice. Therefore, I order the Respondent to pay to the Complainant an amount of \$6,017.46 for his legal fees.

(iii) Pain and suffering

[113] Under the provisions of section 53 (2) (e) of the *Act*, the Tribunal can order the Respondent to compensate the victim by an amount not exceeding \$20,000 for any pain and suffering that the victim experienced as a result of the discriminatory practice.

[114] The evidence revealed that the Complainant was upset by the sudden loss of his job. He lost his hope of pursuing his helmsman career and eventually obtaining his Master Mariner certificate. This sudden loss of employment impacted his morale. In light of these facts, I order the Respondent to pay to the Complainant an amount of \$3,000 for pain and suffering.

(iv) Compensation for reckless and wilful conduct

[115] With reference to subsection 53 (3) of the *Act*, the Complainant requested that the Respondent be ordered to pay him \$20,000 in compensation due to the fact that the discriminatory practice of which he was the victim was recklessly and wilfully engaged in.

[116] There is nothing in the evidence demonstrating the validity of this request, and it is dismissed.

(v) Interest

[117] I order the Respondent to pay to the Complainant simple interest on all the foregoing sums awarded. This simple interest shall be calculated on a yearly basis at a rate equivalent to the Bank Rate set by the Bank of Canada (Monthly Series).

[118] The interest on the amounts payable for pain and suffering and expenses shall run from the date of the termination to the date of the final payment. It shall

be likewise for the amount payable for lost income. However, the interest shall be calculated as the wages would have become payable to the Complainant.

Roger Doyon

OTTAWA, Ontario
June 30, 2004

PARTIES OF RECORD

TRIBUNAL FILE:	T818/6803
STYLE OF CAUSE:	Bruno Boudreault v. Great Circle Marine Service Inc.
DATE AND PLACE OF HEARING:	February 17, 18, 19 and 20, 2004 Montréal, Quebec
DECISION OF THE TRIBUNAL DATED:	June 30, 2004
APPEARANCES:	
Kathleen Dufour	On behalf of the Complainant
Alain R. Pilote and Isabelle Pillet	On behalf of the Respondent

¹British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3

[1] ²British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868

³*Meiorin*, *supra*, para. 59

⁴Attorney General of Canada v. Stevenson and the C.H.R.C.
2003 FCT 341

⁵Beryl Nkwazi v. Correctional Service Canada Decision 3
C.H.R.T. 2001-03-29

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