

T.D. 6/91
Decision rendered on May 17, 1991

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

HUMAN RIGHTS TRIBUNAL

IN THE MATTER OF a hearing before a Human Rights Tribunal
appointed under subsection 49(1.1) of the Canadian Human Rights
Act.

BETWEEN:

FRANK NILES
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Commission

- and -

CANADIAN NATIONAL RAILWAY COMPANY
Respondent

DECISION OF THE TRIBUNAL

HEARD BEFORE: J. Gordon Petrie, Q.C., Chairman
Maureen E. Shebib and Paula Tippett,
Tribunal Members.

APPEARANCES: René Duval, Counsel for the Canadian
Human Rights Commission

John Schiller and Myer Rabin,
Counsels for the Canadian National
Railway Company

DATES and February 5, 6, 7, 1990 and April 17, 1990
LOCATION: in Moncton, New Brunswick

PART 1 - FACTS

The hearing before this tribunal arose from a complaint filed by Frank Niles against Canadian National Railway Company. The complaint filed February 27, 1986 states that Mr. Niles was terminated from his position as an Industrial Development Officer due to a disability which, in Mr. Niles' case, was dependence on alcohol. The complaint states that the termination was contrary to section 7(a) of the Canadian Human Rights Act, R.S.C. 1985, C. H-6 Section 7 of the Act provides as follows:

- "7. It is a discriminatory practice, directly or indirectly;
- a) to refuse to employ or continue to employ any individual, or
 - b) in the course of employment, to differentiate adversely in relation to an employee

on a prohibited ground of discrimination."

Subsection 3(1) of the Act provides that a prohibited ground of discrimination includes discrimination based on a disability, a term further defined in section 25 as follows: 'a prior or existing dependence on alcohol'. In essence, the complaint rests on the proposition that Mr. Niles was terminated by C.N. because of his disability arising from his dependence on alcohol.

Mr. Niles began his employment with C.N. in 1965 in Belleville. Later he was transferred to Campbellton and in 1979 when C.N. centralized some of its operations, Mr. Niles was again transferred this time to Moncton. At the

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time of his suspension Mr. Niles held the position of Industrial Development Officer (hereinafter sometimes referred to as an "I.D.O.").

An Industrial Development Officer is responsible for assisting in the development of contracts with customers of the Respondent. The job as set out in the job description is demanding, requiring a great deal of travel and direct contact with customers. It necessitates that the incumbent be a person highly motivated, organized and responsible since the incumbent carries out their duties with little or no direct supervision.

Generally, the employee is required to provide a late model car of their own that is used for the frequent travel and transporting customers. However, Mr. Niles had been facing some financial difficulties in the early 1980's and he asked that C.N. provide him with a vehicle for this purpose and

they complied. In return, Mr. Niles was to pay a fee to C.N. for the amount of time the vehicle was used on personal activities. The position also required that an I.D.O. entertain customers on a regular basis. This type of lifestyle often includes dinners and parties where alcohol is present.

Unfortunately, the experience of Mr. Niles had not been a happy one. As he now freely admits, his life had become trapped by the abuse of alcohol. It affected his family life and his employment with the respondent. Alcoholism is a destructive disease and it certainly took its toll on Mr. Niles and his family. Fortunately, it is a problem he believes that he has learned to control.

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Precisely when Mr. Niles' dependence on alcohol began effecting his performance on the job is unclear. What is clear is that during the mid 1980's there were signs that Mr. Niles could not function with the same reliability that he had in the past. There were difficulties at home, as well as financial and legal problems that were having an effect on his ability to properly perform his duties. As Mr. Niles admitted at the hearing, these problems were caused by his dependence on alcohol and by the time he was suspended in August of 1984, to use his own words, "it was certainly out of control - way out of control".

Mr. Niles' conduct, in particular his increasing rate of absenteeism, became a concern to his superiors in 1983. Mr. Carreau, Senior Industrial Development Officer during the relevant period believed Mr. Niles to be in the Campbellton area in the course of his employment duties. Mr. Carreau attempted unsuccessfully to contact Mr. Niles in Campbellton. As a result of the inability to make contact with Mr. Niles, a policy was issued that required before a person was to go out on the road they were to provide a detailed itinerary of their travel plans and to make daily contact with the office.

Early in 1984, Mr. Carreau had again attempted to contact Mr. Niles, who was out of the office on business. On four consecutive days from January 16-19, Mr. Niles was absent from work. Mr. Carreau attempted to contact Mr. Niles at his residence and was told by Mrs. Niles that Mr. Niles had been out of town and was expected home that night. The following day, Mr. Niles called his office to say he was home, sick with the flu and would not be coming into the office. Following receipt of the call, Mr. Carreau called

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the Niles' residence and was told that Mr. Niles was in fact not in and that he had gone to work. Mr. Niles failed to show up at work that day.

Following this incident, Mr. Carreau met with Mr. Niles in an attempt to get reasons for his four day absence. The reasons given did not satisfy Mr. Carreau and Mr. Niles was then informed of the intention to strictly enforce the check-in policies for Mr. Niles whenever he was on the road. Also, Mr. Niles was informed that he would be subject to consequences for not following these instructions closely. By this time, Mr. Niles' superiors were becoming increasingly concerned and were attempting to get these problems of Mr. Niles' under control.

Mr. Niles again, from February 10-13, 1984, was absent from work without notice or satisfactory explanation to the Respondent. On the 14th of February, Mr. Niles called his office to inform them that he was taking the day off because of illness. In a memo dated February 14, 1984, Mr. Carreau records the substance of a meeting held at Mr. Niles' residence that same day where the matter was discussed. He was informed by Mr. Niles that indeed there were personal problems that interfered with Mr. Niles' ability to perform his job duties. Mr. Niles informed Mr. Carreau that he was considering checking himself into a detoxification program offered in Saint John. It was suggested by Mr. Carreau that Mr. Niles avail himself of the Employees Assistance Program offered by C.N. and was directed to contact a counsellor.

The evidence shows that C.N. was aware of the nature of Mr. Niles' difficulties. Attempts were made by

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C.N. to get Mr. Niles the type of help he needed. In this regard, the Employee Assistance Program was described as one option Mr. Niles might make use of. It was a program that was designed to assist employees with the type of problem facing Mr. Niles. It is clear from the evidence that the attempts to force Mr. Niles to seek help were based on a genuine desire to see him conquer his disability. Mr. Niles was seen by the Respondent to be a valued employee and it appears that the welfare of its business was not the only concern of the Respondent, but that Mr. Niles' well being was also of great concern.

During the late winter and early spring Mr. Niles sought assistance from the Employee Assistance Program. It seems from the evidence of C.N.'s witness that Mr. Niles lacked motivation to devote himself to the program with the degree of dedication required to overcome his alcoholism at that time.

On June 4, 1984, Mr. Niles called his office to report off sick. This absence lasted for over two weeks. The Respondent made suggestions that Mr. Niles seasick pay benefits since they could no longer use his vacation time to cover his absences. Mr. Niles was asked to produce a medical certificate in support of his illness for the purpose of receiving sickleave benefits in order to protect his income. Mr. Niles failed to produce a medical certificate and told Mr. Carreau that the reason for this is that he was concerned that the information regarding his circumstances be kept confidential. After being assured by Mr. Carreau that indeed the information need only go directly to the medical department of C.N., Mr. Niles still did not produce the certificate. Mr. Niles had suggested that he would not

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have to produce the certificate and that he be allowed to use vacation time to cover his absence.

Also, during the month of July there were several days when Mr. Niles called the office to report that he would not be coming into work on that particular day and that he expected it to be taken as vacation time. Furthermore, it was becoming evident that Mr. Niles' job performance was suffering. As was mentioned by Mr. Carreau, Mr. Niles was not giving the same level of service to his customers as he once had.

Again from July 30, 1984 until August 2, 1984, Mr. Niles was absent from work without any explanation. In response to this Mr. Carreau and Mr. Carson, then Manager of Market, Planning and Development, attended upon Mr. Niles' residence in early August to confront Mr. Niles and deliver a letter of suspension dated August 3, 1984. The visit was also necessary to retrieve the company car Mr. Niles had in his possession. The vehicle had sustained considerable amount of damage. The headlight was broken, the bumper was damaged, the grill was in a badly damaged condition, the hood would not open, and the interior of the car was in an appalling condition. An inspection of the trunk revealed a partly filled bottle of vodka and there emanated from the trunk an odour that was described by Mr. Carreau as "overpowering". The vehicle was in no condition to be used for transporting customers which was a major part of the vehicle's purpose.

As mentioned above, Messrs. Carson and Carreau delivered to Mr. Niles on that morning, a letter of suspension. The letter states:

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"Dear Mr. Niles:

Since January 1984, you have had various discussions with your Supervisor, Mr. Carreau; also with Mr. C.L. Carson, Manager Marketing Planning and Development, and myself, regarding your unsatisfactory performance as an Industrial Development Officer. The specifics of this are the 29 days you have been absent from work since January, 1984 without medical certificates and the well-documented evidence where you have not satisfactorily handled your portfolio.

The purpose of this letter is to inform you that as a result of your unsatisfactory performance as indicated above, and because of your absences from the office from 30 July with no explanation, effective immediately, you are removed from the payroll for an undefined period. This is not a dismissal at this point, but it may ultimately lead to this unless you return to work immediately and convince your supervisors of your ability to fulfil the full responsibilities of your position.

Your reinstatement will be contingent on our being totally convinced that on your return you will be capable of handling your position to the satisfaction of your supervisors.

We want you to know that the resources of our Medical Department and Employees Assistance Program are still available to you if you desire to take advantage of them.

Yours truly,

(signed)

M. A. Blackwell

Regional Manager Operations and Marketing"

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From the testimony presented at the hearing it is clear that by, the time the letter of suspension was delivered to Mr. Niles any uncertainty as to the cause of Mr. Niles' difficulties had been removed. Dependence on alcohol was recognized to be the root of his difficulties. Although alcohol dependence is not specified in the letter of suspension, there is no doubt from the evidence that Mr. Carreau and other C.N. officials understood Mr. Niles' problems to be related to his dependence on alcohol.

The letter of suspension makes several points that need to be highlighted. Firstly, as just mentioned, no specific mention of alcohol is found in the letter. It was a suspension based on unsatisfactory job

performance. Secondly, the requirement for returning to work is that C.N. officials be totally convinced of Mr. Niles' capabilities to return to work. It is not according to the letter, sufficient that he convince them that it is likely he could return to work, but it is made clear that he be able to totally convince them that his performance will no longer be adversely effected.

Immediately following receipt of the letter of suspension, Mr. Niles admitted himself to the Ridgewood Alcohol and Drug Dependency Clinic in Saint John, New Brunswick. On August 11, 1984, Mr. Niles was released from the Ridgewood program. During discussions with his supervisors following his release, Mr. Niles indicated that he was considering entering a 28-day program in Campbellton and he was encouraged to do this by his supervisors. Mr. Niles was also told that he should contact his supervisors to discuss his progress following completion of the Campbellton program.

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Once this program was completed in early October 1984, Mr. Niles did contact his supervisors. The evidence indicates that the Respondent was not yet ready to reinstate Mr. Niles. Apparently from the Respondent's point of view, Mr. Niles' suspension had to run longer than the three months that had already passed. Testimony of Mr. Niles indicates that at each discussion he had with his supervisors, he stated that he had remained sober since he checked into the Ridgewood Clinic on August 3, 1984.

There was further evidence which suggested that Mr. Niles had shown no real desire to participate in any subsequent support program designed to assist the recovering alcoholic stay ahead of his dependence. Groups such as Alcoholics Anonymous or the support groups from various sources were, for all intents and purposes, virtually ignored by Mr. Niles as a means to assist him in recovery. His testimony was that he was better able to progress on his own rather than in a group which made him feel uncomfortable. But of the most significance was the lack of evidence to suggest that Mr. Niles was still dependent on alcohol .

During discussions with C.N. officials in February 1985, Mr. Niles was requested to provide his supervisors with letters from persons who could verify that his problem was now under control. In an attempt to satisfy this request, Mr. Niles requested letters from his counsellor, Fabien Leger who had directed him toward the Ridgewood and the Campbellton programs, Mr. Niles' wife Bernice, and the pastor of the church Mrs. Niles attended, Rev. Fernand Landry.

The letter from Mr. Leger dated February 19, 1985 to Mr. Carson did not speak directly to the issue of Mr. Niles' state of recovery at that time. It outlines the times Mr. Niles had met with Mr. Leger and concludes with concerns that Mr. Niles may not be addressing his disability with the intensity Mr. Leger might expect. In the letter, Mr. Leger expresses his concern that Mr. Niles may be having an "attitude problem". What the letter does not do is confirm or deny Mr. Niles' claims that he in fact had his alcohol dependence under control.

Curiously, Mr. Leger was not called as a witness although C.N. claimed to rely heavily on his letter.

Mrs. Niles' letter contains nothing significant in the way of support for the proposition that her husband has his problem under control. It does contain the sentiment that the family is fully behind the effort to break free from alcohol and concludes with the statement that she has difficulty writing things down and would perhaps even prefer to discuss the matter over the phone. The final words of her letter are:

"It's hard for me to write things down so if you would like to talk to me about anything, you can give me a call."

This petition to Mr. Carson fell on deaf ears. He did not attempt to contact Mrs. Niles to discuss the contents of the letter or to check on Mr. Niles' progress.

Similarly, the letter from Rev. Landry contained the suggestion to contact him in order to clarify the contents if needed. Rev. Landry had only met Mr. Niles on a few occasions and any information he had of Mr. Niles'

progress would have been through Mrs. Niles or other persons who could relate to him observations of the situation in the Niles' household. As with the request of Mrs. Niles, Mr. Carson failed to contact Rev. Landry to discuss the contents of his letter.

By early March 1985, it was clear that C.N. believed they did not have evidence to totally convince them that Mr. Niles had overcome his problem. In the result, a letter drafted March 7, 1985 by Mr. Blackwell was delivered to Mr. Niles. The contents are as follows:

"Dear Mr. Niles:

In August 1984, following several instances where you demonstrated that you no longer had the ability to perform your duties in a satisfactory manner, you were removed from your position and from the Company's payroll. You undertook at that time to embark on a program of rehabilitation whereby you would overcome your problems and, hopefully, regain the ability to perform the duties of your position.

You recently furnished us with letters of testimony written by other people on your behalf. Unfortunately, these letters do not provide evidence that you have made a serious effort in respect to your rehabilitation program.

Considering your lack of meaningful progress over the last several months, we see no justification for continuing your employee relationship with the Company. This letter will serve as notification that you are discharged from the service of C.N. Rail, effective 7 March 1985.

Yours truly,
(signed)
M. A. Blackwell"
Regional Manager Operations and Marketing"

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Mr. Niles attempted further contact with C N. but was not able to convince its officials to change the termination.

Subsequently, Mr. Niles filed the complaint with the Commission which states, in part, as follows:

"I was terminated from my position as Industrial Development Officer with CN Rail on March 7, 1985 because of my dependence on alcohol. I was not given an opportunity, from my suspension on August 2, 1984 until my termination on March 7, 1985, to prove that I was no longer dependent on alcohol and could perform the duties of my position. I allege that I was discriminated against on the basis of disability contrary to Section 7(a) of the Canadian Human Rights Act."

Since his dismissal, the Complainant Niles has worked only on a part-time basis in the fishing industry.

PART II - POSITION OF THE PARTIES

In summary, the Commission, on behalf of the Complainant, argues that this is a clear case of discrimination as Mr. Niles was dismissed due to his dependence upon alcohol or at least the Respondent C.N.'s perception of such dependence.

Therefore, Counsel argues, the only defence available to C.N. is that of "bona fide occupational requirement" as set forth in section 15(a) as follows:

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"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;"

Counsel however argues that the dismissal of the Complainant when it occurred, did not meet the tests established by the Supreme Court of Canada in *The Ontario Human Rights Commission et al v. The Borough of Etobicoke*, [1982] 1 S.C.R. 202.

Furthermore, Counsel urged on the Tribunal that C.N. had a duty to accommodate the Complainant Niles and it failed to do so.

Finally, it was submitted that Mr. Niles ought to be reinstated with full pay for the period since his termination, less any wages received during this period.

Counsel for C.N. argued that its policies and practices regarding employees encumbered by addiction to alcohol are fair and reasonable. It could have dismissed Mr. Niles at the time he was suspended, not for his dependence upon alcohol but due to his unreasonable absenteeism, damage to company property and misuse of expense accounts, etc.

Furthermore, the Respondent C.N. urges on the Tribunal that it accommodated Mr. Niles for six months in order to provide him with an opportunity to prove that he had overcome his problem. Mr. Niles, it was argued, knew the type of evidence which C.N. reasonably required and was

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entirely unresponsive to such requirements.

Finally, C.N. states that Mr. Niles had an attitude problem and an unwillingness to seek proper and ongoing professional assistance for his alcohol problem. These were clearly precipitating factors in their decision to terminate Mr. Niles but were, it was submitted, reasonable reactions to an insolvable problem.

C.N. led expert testimony which, in part, suggested that a person with alcohol problems must be prepared to recognize that the problem exists and thereafter to participate in some form of continuing assistance, whether through its Employee Assistance Programme, regular attendance at "AA" meetings or outside counsellors.

Mr. Niles, according to the evidence, after his period in Campbellton, did not participate in any continuing programme or consultative process which, C.N. argues, would be necessary to establish a truly motivated recovered alcoholic.

If Mr. Niles was not recovered, C.N. argued that, by the nature of his position, it would be unsafe for him to resume his work duties, including extensive use of an automobile.

C.N. required clear and convincing evidence that the Complainant had his alcoholism under control and that he could meet the requirement of fitness for employment. Mr. Niles' failure to provide such evidence was, C.N. submits, the ground for his dismissal.

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Finally, it was the position of the Respondent that Mr. Niles was not terminated for discriminatory reasons and the complaint ought to be dismissed.

PART III - DECISION OF THE TRIBUNAL

Although neither the letter of suspension or discharge directly addressed the issue, the Tribunal has no difficulty in finding that the dependence on alcohol displayed by Mr. Niles was the reason for both actions by the Employer.

While it is true that the dismissal occurred because C.N. was not satisfied by the Complainant of his return to good health and improved work performance, particularly as evidenced by the letters submitted to his Employer, nonetheless the Tribunal finds on the evidence that the termination results from the Complainant's previous or existing dependence on alcohol" (see Section 25 Canadian Human Rights Act).

The actions of the Respondent C.N. therefore constituted a discriminatory action contrary to section 7 of the Act. It refused to continue to employ the Complainant Niles on the basis of a disability.

However, that finding certainly does not end the matter and the Tribunal must next examine the application of the b.f.o.r. defence as contained in section 15 of the Act and as interpreted particularly by the Supreme Court of Canada.

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The Tribunal can certainly recognize that there may exist numerous situations where an employee's dependence, or perhaps even use, of alcohol or drugs could constitute a serious employment offence and provide ample basis for dismissal.

For example, destruction of company property, injury or risk of injury to the employee and others, breach of criminal laws, may give rise to dismissal of an employee.

In the matter before the Tribunal, we are satisfied that C.N. did recognize that dependence upon alcohol was a disability which required assistance and did not automatically call for dismissal. The Respondent had for many years an Employee Assistance Programme which was made known to the Complainant Niles. Although he did seek some consultation within the Programme, his involvement therewith was limited. C.N. did not insist upon further involvement by the Complainant as a condition of reinstatement.

From the evidence the Tribunal finds that the Respondent C.N. did dismiss the Complainant on the basis that it, C.N., had not been satisfied from the information provided by the Complainant that he was no longer dependent upon alcohol.

C.N. relies upon Exhibit R-12, its Policy and Authority on Problem Drinking and Alcoholism. It is important to quote from portions of this Policy:

"The Company recognizes alcoholism as a health problem. To the extent that it affects the health, performance and conduct of employees on the job, and to

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the extent that alcoholism creates unnecessary costs to the Company, it is a problem of concern to Management which requires action.

Definition

Alcoholism is a chronic disease, or disorder of behaviour, characterized by the repeated drinking of alcoholic beverages to an extent that exceeds customary dietary use or ordinary compliance with the social drinking customs of the community, and which interferes with the drinker's health, interpersonal relations or economic functioning. Any employee whose repeated or continued over-indulgence in the use of alcohol interferes with the efficient and safe performance of his assigned duties and reduces his dependability, must be considered a problem drinker. He may or may not yet be an acute or chronic alcoholic.

Accordingly, it is a Company policy:

1. to recognize that addiction to alcohol is an illness which may be treated and arrested.
2. to encourage employees concerned with problem drinking and alcoholism to voluntarily seek assistance and return to good health and improved work performance.
3. to train managers and supervisors to identify the early signs of problem drinking; to understand the attitudes and requirements of the problem drinker; and to refer such employees (who do not themselves take the initiative) to the Company Medical Officer for diagnosis and treatment programs.
4. to require affected employees to accept certain conditions related

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to the program of rehabilitation. If the employee refuses to co-operate, or if medical treatment and other measures fail, then removal from employment must be considered where there is continuing deterioration in performance. Such separation would be required, as in other circumstances, because minimum performance standards are not being met.

5. to grant sick leave, on the approval of the Company Medical Department, to the extent the employee is entitled for other illnesses.

6. to co-operate with and utilize provincial and community education and treatment organizations in order to assist employees undergoing rehabilitation and to educate supervisors toward a better understanding of alcoholic problems.
7. to inform union representatives and organizations of the policy and program, to seek active co-operation from them and to facilitate access to the same training being given Company supervisors.
8. to recognize that there will be instances in which the employee is unwilling to acknowledge his health problem. In such cases, his retention in, or removal from, Company service will be determined in accordance with the presently established procedures dealing with the control of work performance and conduct.
9. to attempt to correct deficiencies in work performance, attendance or conduct of an unsatisfactory employee, preferably before it has

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resulted in disciplinary action. However, nothing contained in this policy is intended or should be construed to limit the continuing responsibility of Management to discipline employees. Alcoholics or non-alcoholics who drink intoxicants on duty or are under the influence of intoxicants on duty will continue to be subject to disciplinary measures."

The Respondent has argued that clause 4 is ample authority for termination of the Complainant Niles and that the policy itself constitutes a fair, reasonable and lawful response to the position of the Company to employees with alcohol problems.

The problem with the position of the Respondent is that it did not, based upon the evidence, require Niles to accept certain conditions related to the program of rehabilitation. (see paragraph 4 of the Policy).

The Tribunal finds that the Complainant was suspended, told of the Employee Assistance Programme and other available services, but was not directed concerning mandatory conditions relating to rehabilitation or reinstatement.

Had the Respondent C.N. in fact followed the dictates of its Policy statement, the result would likely be different. However, this was not the case in regard particularly to clause 4 thereof.

The Tribunal is satisfied that the Respondent C.N. had reasonable policies on the matter of problem drinking and alcoholism. The difficulty in this matter was in regard

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to the implementation of such policies or the disregard by C.N. of its own policies.

Therefore, while the Tribunal recognizes that the C.N. policy, if properly implemented, might well constitute a b.f.o.r., in the instant matter the failure to properly follow its own policies, specifically in its failure to specify known and identified conditions of rehabilitation, constituted an act of discrimination against the Complainant.

The Supreme Court of Canada in the Etobicoke case has established the following criteria for a b.f.o.r.:

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

As stated by Wilson, J. in recent judgment of the Supreme Court of Canada in *Alberta Human Rights Commission v. Central Alberta Dairy Pool et. al.* (S.C.C.) at p. 25:

"The ideal of human rights legislation is that each person be accorded equal

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treatment as an individual taking into account those attributes. Thus, justification of a rule manifesting a group stereotype depends on the validity of the generalization and/or the impossibility of making individualized assessments."

Furthermore at p. 29 in dealing with the effect of adverse effect discrimination, Wilson, J. stated:

"However, where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship."

Finally, at p. 31, Justice Wilson held:

"I believe that the proposition it stands for is uncontroversial. If a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be bona fide."

Applying the above cited judgment to the present case, the Tribunal concludes that the Respondent C.N.'s policy on problem drinking and alcoholism is a fair recognition of the legitimate interests of both the employer and employee. It recognizes that alcoholism is a health problem and does not dictate that dismissal is the sole response. It provides, quite properly, a level of accommodation for the effected employee. It places burdens on the employee and the employer both to establish a rehabilitation program. It finally recognizes that persons with alcohol problems may well be capable of resuming responsible and rewarding careers.

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In the current matter, C.N. did not provide a specific program of rehabilitation. Moreover, C.N. did not make it clear to Niles what exactly would be expected of him as proof of rehabilitation. Rather it vaguely required of the Complainant Niles that he proffer letters of support.

In the words of the Complainant as contained in the complaint:

"I was not given an opportunity, from my suspension on August 2, 1984 until my termination on March 7, 1985, to prove that I was no longer dependent on alcohol and could perform the duties of my position."

Furthermore, the Tribunal finds that the Respondent C.N. did fail in this matter to make an individual assessment of the Complainant and his ability to resume the functions of his position. This was not a situation where it was impossible to make an individualized assessment. In fact C.N. could have carried out such an assessment with ease prior to terminating the Complainant's employment. Such an assessment would not only be consistent with its obligations to accommodate the Complainant but moreover been in accord with its written policy (Exhibit R-12).

In summary, the Tribunal concludes that the Complainant Niles was subject to termination of his employment by reason of his alleged dependence upon alcohol. Such action constituted a violation of section 7(a) of the Canadian Human Rights Act. The Respondent C.N. did not establish that its actions were justified by the existence of a bona fide occupational requirement. Finally, even if

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one considers the C. N. policy to constitute a b.f.o.r., the Respondent failed to comply with its terms and to accommodate the Complainant in accordance with such policy.

The Tribunal accordingly directs that Mr. Niles be reinstated to employment with the Respondent in the position held prior to his dismissal , or a comparable position in the structure of the Respondent. The parties should attempt to discuss and agree on an appropriate, comparable position.

On the issue of wages, benefits and damages, the Tribunal considers that this is an appropriate case for an Order that the Respondent pay to the Complainant any lost wages and pension benefits from the date of the complaint until reinstatement of the Complainant less any and all earnings in the interim. The Tribunal however makes no order for damages, interest or other benefits.

If the parties are unable to resolve the issue of a comparable position and/or the compensation payable, the Tribunal shall reserve jurisdiction to hear and determine these matters.

DATED this 13th day of May, 1991.

J. Gordon Petrie, Chairman

Maureen E. Shebib

Paula Tippett