Decision rendered on August 2, 1991
T.D. 13/91

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CLARENCE LEVAC

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION OF THE TRIBUNAL

Tribunal:
William I. Miller, Q.C., Chairman
Jacques Chiasson, Member
Goldie Hershon, Member

Appearance:
Rend Duval,
Counsel for Canadian Human Rights Commission

Alain Prefontaine
Maj. Suzanne Gouin Boudreau,
Counsel for Canadian Armed Forces

Dates and Location of Hearing: February 20, 21, 22, 1990, Montreal, Quebec
June 7, 1990, Ottawa, Ontario

I. INTRODUCTION:

The President of the Human Rights Tribunal Panel, Mr. Sidney N. Lederman, Q.C., appointed the undersigned, William I. Miller, Q.C., Jacques Chiasson and Goldie Hershon, on March 16, 1989, as a Tribunal to examine the complaint filed by Mr. Clarence Levac ("Levac") on December 7, 1984, and amended July 10, 1987, against the Canadian Armed Forces ("Respondent");

Mr. Levac's complaint alleges that in having forcibly released him from the Armed Forces on or about February 26, 1984, on medical grounds, that the Respondent carried out a discriminatory practice against him on a prohibited ground of discrimination, namely, physical disability, thereby contravening section 7(a) of the Canadian Human Rights Act ("Act");

The text of the complaint, as it appears in the Complaint form filed under HR-3, alleges as follows:

"I was released from the Armed Forces on medical ground effective February 26, 1984. I held the position of Engineering Chief Technical Inspector and Chief Warrant Officer. I consider

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myself physically fit to carry out my duties notwithstanding my alleged deficiency (heart condition). I have reason to believe that my release constitutes a discriminatory practice contravening section 7(a) of the Canadian Human Rights Act."

II. BACKGROUND:

Over the past few years there have been a large number of complaints laid by both former and/or present members of the Canadian Armed Forces ("CAF") charging discrimination on various grounds of disability which have produced varying results, largely because although the law and legal principles applicable to these cases are the same, the material facts of each case primarily as regards the nature of the employment or the particular nature of the disability invoked, differed or were distinguishable which accounted for what at first glance would appear to be conflicting decisions but which, in reality, were a manifestation of the principle that it is dangerous to generalize in matters of this kind. It is important to bear in mind that each case is, as we say in French, "une cause d'espece".

The Tribunal therefore took the steps which it deemed necessary in order to conduct an "on the spot" investigation by visiting and spending an entire day aboard a CAF destroyer, the HMCS Margaree, stationed in Halifax, with the purpose of observing the ship's handling and operations during times of peace and war; inspected the medical facilities available; observed the usual working conditions and lifestyle of the crew, all with a view to simulating the conditions which existed aboard a CAF destroyer in which complainant served while he was engaged in performing his job with Responder.-L- . Clearly, serving aboard a destroyer, in the combined capacities of a military service man and a tradesperson, is carried out in very confined quarters and under somewhat rigid conditions.

The Complainant having served aboard a destroyer, both in the capacity of a Chief Petty Officer First Class (his general military duty and rank) and as Chief Marine Engineer Artificer (his trade), necessitated that the Tribunal inspect not only the Naval Operation's aspect of the ship but, as well, the Engine room, Boiler room and other facilities aboard the ship, Fire Fighting Exercises and the simulation of casualty occurrence emergency treatments from the Engine room, where the Complainant primarily carried out his duties, to sickbay.

The Tribunal is satisfied that in dealing with the present complaint, it is fully cognizant and aware of the exact nature and functions of Complainant's employment and military duties which were incumbent upon him while so employed as well as the environment in which these duties were to be carried out.

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III. GUIDING PRINCIPLES:

The complaint in the present case was laid under the provisions of the ("Act"), the preamble of which declares:

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

race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted."

and it is in accordance with the principles inherent in the foregoing preamble that the complaint must be dealt with.

IV. FACTS:

The Complainant was born on February 27, 1938, and joined the Canadian Armed Forces, (Navy) in 1955 as an ordinary seaman and began his service as a Stoker-Mechanic. At the time of his release from his employment in 1984, Complainant had attained the rank of Chief Petty officer First Class, the highest rank available to him as a non-commissioned officer. In terms of his trade qualifications, Complainant was a Chief Marine Engineer Artificer having attained the C-l/ER4 classification which was also the highest qualification attainable in his trade. At the date of his termination, he was stationed at CFB (Canadian Forces Base), Montreal.

Essentially, as a Chief Marine Engineer Artificer, Complainant apart from his general military duty, manages the operation and maintenance of the various power systems and equipment aboard the Respondent's ships. In other words, Complainant

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was responsible for keeping the Engines "running" primarily those of a Destroyer on which he served. The exact nature and specifications of the Marine Engineering Artificer's duties were fully described in the Book of Documents produced by Respondent's witness Captain Metro Macknie as Exhibit R-7 under tab 8.

However, according to the evidence, although Complainant's primary responsibility was to maintain the ship's engines running and the various other systems involved, he did not necessarily have to do so personally but rather was responsible for seeing that such duties were being carried out. In this respect, the evidence of Captain Macknie, Specifications' staff officer of the Department of National Defence, confirmed that Complainant's duties were primarily those of a Supervisor.

"Q. Now, sir, I won't take you through all this book again. I just want you to confirm that the higher is the rank of the person that the more his or her job is supervisory.

A. That's correct.

Q. Let's phrase it in another way then. Isn't it a fact that most of the requirements which are expected from a Chief Warrant officer, being a Marine Engineer qualified job, is mostly and mainly supervisory?

A. Yes, providing advice, supervising his personnel, assessing his personnel."

(Deposition p. 227)

And, again at page 225 of his evidence:

"He supervises and gives directions to his subordinates."

During his own evidence, Complainant testified as follows:

"Q. Is this to say, sir, that the job was mainly supervisory?

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A. That's correct."

(Dep. p. 31)

The occupation of Chief Marine Engineer Artificer was generally referred to in the forces as a "hard sea trade" because the pattern of scheduling of his employment required that its members serve both at sea and on shore. The system of rotation is known as the Sea/Shore ratio and gives rise to one of the critical issues raised in the present Complaint.

Respondent's evidence generally was to the effect that the sea/shore ratio rotation was vital to maintain the effectiveness of the Marine command of Respondent. Respondent's witness Lt. Cmdr. Luc R. Tetrau.1t, a Sub-Section Head in the Directorate of Personnel Career which is responsible for the career management of all non-commissioned members in the Canadian Forces and who supervised careers management for marine engineers testified that failure to respect sea/shore ratio leads to lack

of morale among members who continue to serve at sea when they expected to be posted on shore according to the Respondent's sea/shore ratio policy. Respondent's concerns are that the disgruntled members' performance are affected which in turn leads to a greater number of members of the forces seeking early release from the forces than would otherwise be the case.

According to Complainant's Re-engagement contract dated June 22, 1978 produced as Exhibit HR-2, Complainant undertook to serve a final 15 year term of service until February 27, 1993, until age 55. Up to that point in time, Complainant had alternated between Sea and Shore duties as follows:

Sept. 1970 to Dec. 1972 - at Sea;
Dec. 1972 to Feb. 1975 - on Shore;
Feb. 1975 to Jul. 1978 - at Sea;
Jul. 1978 to Aug. 1983 - on Shore;

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The following Sea/Shore rotation was projected for Complainant by Respondent at or about the time that Complainant was released:

Aug. 1983 to Aug. 1985 - at Sea;
Aug. 1985 to Aug. 1987 - on Shore;
Aug. 1987 to Aug. 1989 - at Sea;
Aug. 1989 to retirement - on shore;

However, a series of events occurred commencing in the summer of 1979 which interfered with this projection and led to the complaint being laid in the present case.

During a routine over-40, ElectroCardiogram (ECG) of Complainant carried out in early 1979, Complainant was diagnosed as having a "heart problem" in the nature of Coronary Artery Disease which, according to Respondent's Principal medical expert witness, Lt. Col. Henryk P. Kafka, a Cardiologist, places him at a 8-10% risk of having a heart attack within 5 years. (Dep. p.356) Dr. Kafka then acknowledged the obvious when he testified, at p. 373 that:

"There is a 90% chance that he won't have a heart attack."

He then added, "But 10% obviously, in our opinion, is considered too high a risk."

During the ensuing 4@ years until at least August 9, 1983, Complainant was subjected to a continual series of medical consultations, diagnosis, treadmill tests (in 1979 and again in 1982), angiography, weight test, x-rays, lab tests, glucose tolerance tests, liver function tests and the like with varying results and prognosis. For example, although as a result of treadmill test carried out by Dr. Gratton in 1987, Complainant was noted to have developed a conduction abnormality problem called "left bundle branch block". Dr. Kafka testified that since no one had carried out a Thallium test, "there is no other information for me..... I can't turn around

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and say well, that means that he has zero risk of a heart attack".

Dr. Kafka added:

"He's got good exercise tolerance, which puts him into what people call the good prognosis category when it comes to people with heart disease, but you know, that's still at a significantly higher risk than someone who is completely normal."

(Dep. p. 380)

In his report submitted to the Tribunal as Exhibit R-11, p.31, Dr. Kafka declared: "other than for the obvious heart rhythm disturbance, there were no other abnormal findings on physical examination."

It is important to note from the evidence that the Complainant denied ever having any symptoms of any disease whatsoever. Nor was he ever hospitalized except for the tests and diagnosis to which he was subjected.

Although Complainant had a family history of heart disease had had a high cholesterol count, and had also had a problem with increased alcohol intake, all of which required treatment and follow-up, over the next 4h years of Respondent's monitoring of Complainant's medical condition, during all of which time Complainant continued to perform his duties for Respondent, the Complainnant's medical status improved in many respects in that:

"i) Complainant had stopped smoking which was no longer a problem;

ii) although it was usual to follow-up patients who had been tested at the Cardio-Pulmonary Unit in Ottawa at 6 month intervals, Complainant was told to return only in a year;

iii) Complainant had reduced his alcohol intake considerably which was reflected in his liver function test being normal;

iv) Complainant's high-blood cholesterol level had been brought under control;

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v) Complainant underwent a further 9 or 10 minute treadmill testing without any chest discomfort.

The medical evidence produced by Respondent which comprised oral, documentary and photographic proof and which was quite voluminous, taken as a whole, resulted in Complainant being classified with a G4 03 Category by Respondent's Career Medical Review Board (CMRB) which meant that he was declared unfit to continue in his service with Respondent. Complainant's evidence on this development was to the following effect:

"A. I was told to loose some weight and reduce alcohol consumption and..... take the pills."

(Dep. p. 18)

In fact, official notification of his Release was sent to the Complainant on March 18, 1982 by means of a confidential written message which was produced as Exhibit HR-1. Headed "Warning of Release" the 2 page document addressed to Complainant at Canadian Forces based at Vickers in Montreal, where he was then engaged as a Quality Control Inspector and Chief of the Detachment of Technical Services, declared the Complainant to be "unfit for further service in his current trade which rendered him not advantageously employable under present service policy". (underlined by Tribunal)

Although Complainant was - ordered to be released effective August 8, 1983, (when he was placed on rehabilitation leave) "or earlier if Complainant so desires", in fact, the Complainant was retained in his then current Shore employment at Vickers as a member of the Armed Forces until February 26, 1984.

V. MEDICAL EVIDENCE:

As already noted, the medical evidence presented to the Tribunal was voluminous. Respondent's medical expert Lt. Col. Kafka, a specialist in cardiology, did not at any time

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examine the Complainant personally but rather based his evidence on an examination and review of Complainant's medical record which comprised the documents contained and listed in Appendix "B" of Exhibit R-10.

The evidence replete with illustrations, statistics and articles, some co-authored by Dr. Kafka, were all in support of his opinion that "the Respondent was justifiable in having excluded the Complainant from Sea duty" because of his heart disease. Having estimated an 8 to 10% risk of Complainant suffering a Myocardial Infarction over the next 5 years (which may be contrasted with the result of another study using the CASS criteria which, if applied to Complainant, would estimate the risk in the range of 6 to 9% over the next 3 years, Dr. Kafka concluded that:

"Mr. Levac's coronary artery disease, although free of symptoms and well tolerated by him, posed too high risk of myocardial infarction and necessitated a G4 medical category. This excluded posting to sea or to any station or base without adequate medical facilities."

(Report of Dr. Kafka, p.44, Exhibit R-11)

Medical evidence produced on behalf of the Complainant consisted of the testimony of Dr. Jean D. Gratton, a cardiology specialist in practice since 1954 and who examined the Complainant on November 12, 1986. His Expertise Report dated January 5, 1987, has been produced as Exhibit R-2 and forms part of an exchange of correspondence between Dr. Gratton and Mr. Andre Dumaine, a representative of the Human Rights Commission, concerning the Complainant's medical status, which were also produced as Exhibits R-1, R-3 and R-4.

While the essential parts of Dr. Gratton's evidence as regards the Complainant's overall medical status and condition appeared to be in conflict with that of Dr. Kafka in only certain limited respects, it was with respect to their

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final opinions drawn as regards Complainant's ability or inability to perform his duties for "a Sea posting or to any station or base without adequate medical facilities" in which the two doctors reached diametrically opposed conclusions.

Otherwise put, the two experts drew different conclusions from the same evidence. For example, Dr. Gratton's Expert's Report (Exhibit R-2) offered the opinion that the lesions which appeared to exist on the Complainant's cardiogram were only minimal and were reflected in the majority of men over 40 years of age. Dr. Kafka, on the other hand, suggested that with the narrowings of his coronary arteries Complainant faced a "risk of some sudden unpredictable event".

While Dr. Kafka took the position that Complainant's overall condition made him an unacceptable risk to serve at Sea or at any station or base without adequate medical facilities, Dr. Gratton was of the opinion that Complainant could fulfill all of the conditions of his employment with Respondent for a long period of time.

Among the essential facts noted and testified to by Dr. Gratton as a result of his examination of Complainant and his examination of Respondent's file on the Complainant were the following:

"i) that Complainant was at all times completely asymptomatic;

ii) that his final ECG examination held in August 1983 was considered negative;

iii) that Complainant was working regularly at Vickers at the time unaffected by any disability;

iv) that, provided Complainant abstained from alcohol intake, it was altogether likely that the Complainant could tolerate a regular work schedule and discharge all of the conditions of his employment with Respondent."

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The Tribunal has noted from Mr. Dumaine's letter of October 20, 1986, produced as Exhibit R-1, that Dr. Gratton had been provided with a 4 page detailed description of the duties and responsibilities which Complainant was obliged to perform while employed with Respondent and that Dr. Gratton's conclusion and opinion as regards Complainant's ability to continue to perform his duties were evidently made in full knowledge of these facts.

"Dr. Gratton testified as follows (at page 103):

Q. When you arrived at your opinion regarding the individual, did you know that this individual had been a member of the Armed Forces, namely a marine engineer?

A. Yes.

Q. Did you know at that time that it was a position that could involve being at sea on board a boat?

A. Yes, that's rights.

Q. Did you know whether the position entailed physical effort?

A. I think so, but . . .

Q. Then what was your opinion when you saw him and after reviewing his medical history and making him undergo the tests you mentioned earlier? What was your opinion with respect to his ability to carry out his military duties in the Armed Forces, as a marine engineer with, of course, the possibility of having to go out to sea?

A. Based primarily on his performance and the results of the various tests, including the treadmill tests which he performed for a minimum of nine or ten minutes, I felt that he was capable of performing his duties normally, given that he was asymptomatic, as I mentioned earlier, and that he was at no greater risk than someone who smokes twenty-five cigarettes a day, for example.

Q. Now, you mentioned performance on the treadmill for nine or ten minutes. Would you qualify it as poor, good, average what term would you wish to use?

A. After nine minutes, it was excellent.

(Dep. pp. 103-104)

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When asked by Mr. Dumaine during their exchange of correspondence whether his final conclusions and opinion as to the Complainant's medical condition and his ability to discharge his duties would apply equally to the time frame of February 26, 1984 when he was released (in light of the fact that Dr. Gratton's evidence was being given in 1987, 3 years after Complainant's release) Dr. Gratton replied in the affirmative.

VI. SEA/SHORE ROTATION:

The essence of Respondent's defence is that Complainant's medical condition of coronary artery disease precludes him not only from being posted to sea but to any station or base without adequate medical facilities. However, Respondent took the position that since Complainant was at the time of his discharge "scheduled" to be posted at sea for his next tour of duty in the normal Sea/Shore rotation system, Complainant's medical condition posed too high a risk of myocardial infarction which necessitated that he be classified in a G4 category.

In fact, the bulk of Respondent's evidence, particularly its medical evidence dwelled on the risk factor as regards Complainant serving at sea and, to a much lesser degree, on his ability or inability to perform his duties on shore. This necessarily requires the Tribunal to address the entire question of Sea/Shore ratio in order to determine its role and impact with respect to the decision to be rendered in the present case.

Although it appeared to be Respondent's contention that Shore duty was much more desirable and sought after by the majority of its service people in the Navy than was duty at

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sea, this was evidently not the case as it concerned the Complainant who testified as follows:

"Q. Tell me. Which of the postings did you find easier to live with, the sea postings or the shore postings?

A. The sea postings.

Q. You preferred the sea postings?

A. That's right."
(Dep. p. 63)

There are many different aspects from which the issue of sea/shore rotation may be considered but the Tribunal will deal with only 2 of them. First, how flexible or rigid in its implementation was the system and, second, how did the sea/shore rotation system impact upon the Complainant at the time of his dismissal?

From the Respondent's perspective the importance of maintaining the sea/shore ratio was, as already pointed out, its morale implications, since it considers a sea duty job to be more demanding compared to the relatively easier shore duty and therefore if the rotation is not uniformally applied, it would tend to create favoritism leading to disenchantment among the ranks and ultimately to a retention problem in the Armed Forces.

However, there was considerable testimony given to the effect that Respondent's sea/shore rotation policy was subject to various exceptions and to some flexibility when affected by service reasons such as numbers and/or service shortages, special circumstances, compassionate problems, personal or family problems and the like which would result in the sea/shore rotation policy not always being applied uniformly or being strictly adhered to.

The evidence of Lt. Cmdr. Tetrault, in particular, dealt with various instances where the sea/shore rotation

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system while generally applicable was rendered flexible in order to accommodate particular situations which arose such as:

i) a large availability of junior ranks compared to senior ranks being put out to sea;
(Dep. pp. 256-257)

ii) a compassionate problem arises which results in skipping sea duty;
(Dep. p. 258)

iii) in the case of a severe shortage of personnel, the Sea/Shore rotation would be disrupted;
(Dep. p. 277)

The degree of flexibility of the sea/shore rotation policy as it related to Complainant is best illustrated by the following testimony of Lt. Cmdr. Tetrault in answer to a question from the Tribunal Chairman:

"THE CHAIRMAN:

Q. In the context of Mr. Levac's situation in 1983, the evidence appears to indicate that he was scheduled for rotation to go to sea.

A. Correct, sir.

Q. So I have the impression there that there were extensions at times which we haven't been able to account for in the case of Mr. Levac.

So what I'm really getting at is are there provisions for exceptions?

A. Yes, sir, there are provisions for exceptions. However, we must look very carefully because an exception always means doing somebody a favor.

If somebody is done a favor, somebody will pay for it.

Q. Yes, you've made reference to the factor of favoritism or the perception of favoritism that would be an element that would be taken into account in making a decision as to whether an exception can be made, is that what you're saying?

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A. Yes, and also the exception is we've got to look at how big is this exception. This case here, basically what we would have

to do is excuse him from sea duties for ten years, because Levac could have served until 93 I believe, whenever he goes out.

So sometimes we can make an exception. Like if this would have been his last posting, let's say he had two years. Two years -- but now when you look at excusing a person for ten years, our trade just cannot do this.

This is why at times it appears that the Navy is a lot harder than other trades, but because of the very few number of people that we have, excusing one person always makes a lot more trouble for the other person because it has to carry the load." (Dep. pp. 293-295)

Although as already pointed out the Complainant was scheduled by the rotation policy to go to sea at the time Respondent declared him to be unfit, the evidence appears to indicate that it was not altogether certain, for a number of reasons outside of Complainant's control and entirely unrelated to his medical condition, that such sea posting was about to occur. Nor was the evidence to such effect contradicted.

Complainant testified that although he was aware that his next tour of duty after having served 5 years ashore was to go to sea and that, as already noted, Complainant preferred such sea duty, there appeared to. be no sea posting (Ship) available for him.

"Q. Now, from what you understood of the situation about postings at the time you left the Forces, what was the likelihood that an officer of your rank be posted at sea at this point in time of your career with the Forces?

A. Prior to 1984 there wasn't much chance ..or after late 1983 or prior ... at the beginning of 84 after my release there wasn't much chance being posted at sea because the personnel of my rank and trade had been removed from going to sea. We were replaced by a junior rank.

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Q. How did you learn that, sir?

A. I had a couple of . . first of all, it started of as a rumor in about 81/82 that there would be cutbacks on board

ships, removing Cl ER4s and being replaced by a C2 ER4, of course with a charge ticket.

Q. Was this rumor confirmed at all?

A. It was confirmed in December 83, the beginning of December 83 by a letter from Captain Moore.

Q. Now that was a letter bearing on the reduction of the work force. What about your former statement that from then or roughly from then on people of your rank will no longer be likely posted at sea? Did you see documents or whatever?

A. Yes, I did get documents as such. This was also a follow-up from Captain Moore's letter and it was called the MORPS Program.

Q. Now...

A. That indicated the reduction of Cl ERs in the Navy.

Q. So from what you knew at the time, you were released, what were your.. and I'm not asking you to put a figure on that, but what was the likelihood of you being posted at sea again?

A. Very grim."
(Dep. pp. 26-27)

The additional testimony of Complainant to the ef f ect that the new policy of placing CPO! s Second Class aboard ship made it impossible in late 1983 and in 1984 for CPO's First Class, such as himself, to obtain a ship posting, corroborated this point further.

"Q. So that from January the 1st, 1984 to January the 1st, 1989 Chief Petty Officers First Class of the Marine Engineering Artificer occupation had to serve their tours at sea?

A. In 1984, in late 1983, as a Cl ERA you couldn't get a ship to go to sea on.

Q. And why is that?

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A. Because they had already been replaced. The majority of the ships had Chief Petty Officers Second Class on board ships and you couldn't, as a Cl ER it was impossible in 1983 to request ship or even ask for one, you weren't getting one.

Q. Okay. What is the basis of your information for that, sir?

A. I went down to Halifax to find out exactly what was going on in the beginning of 83 and I met some of my colleagues and we discussed it and one was begging for a ship and he just couldn't get one.

It was just impossible to get one.

Q. Who were those persons, sir? Do you remember who you spoke to?

A. Yes.

Q. Who were they?

A. One was Chief Petty officer First Class Baker.

That's the one that I happened to meet, that he had just finished going to a ship and tried to get it because he heard the Chief ERA was getting of f and he wanted to replace him and they told him no.

Q. And did he tell you why he was told no?

A. Because there was a Chief Petty Officer Second Class coming on board.

Q. And he was Chief Petty Officer Second Class, he was qualified as a Chief Engineering Artificer, was he?

A. Definitely, because otherwise he wouldn't have the position."
(Dep. pp. 72-73)

VII. OTHER FACTORS:

The evidence of Respondent's witness, Rene Maurice Bélanger, a Medical Doctor and presently Director of Medical Treatment Services at National Defence Headquarters and at the date of Complainant's termination

Commandant of CAF Medical Services School is enlightening with respect to Complainant's continued employment up to the point of his forcible release and departure.

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Dr. Belanger testified that although Complainant was ordered on March 18, 1982 to be released commencing August 8, 1983, notwithstanding that he was scheduled to go to sea, he was given a year extension because, "...you see, even though he was scheduled to go to sea, the Forces needed someone to f ill his shoes at the Vickers ... because at the Vickers, you see, he was doing 100% of his duties" (Dep. p. 507)

Dr. Belanger made reference to a Departmental memo which dealt with Complainant's extension in the service beyond the date set for his release, which read as follows:

"The initial recommendation to CMRB for release was based on the fact that CPO Levac has been ashore for going on four years and now is unfit sea. He is however filling a CPOl billet in Montreal which is extremely hard to fill. In fact, there are no volunteers for the position and I'm afraid we will be forced at least one and maybe two.. we will be forced at least one and maybe two Cls only if we post him to Montreal this Summer. In view of the fact that we are losing at least nine Cls this year and we only have eight qualified C2s to promote behind them, I don't feel we can afford to release CPO Levac at this time. Request CMRB review the case and, if possible, extend the release date to APS 83."
(Dep. pp. 510-511)

Dr. Belanger further made reference to the factors aside of Complainant's coronary heart disease which had led to classifying him G4 03 category. He testified as follows:

A. Now, if I may be permitted, to try to explain to the Tribunal why Mr. Levac was given a G4 03 which led to his release.

The G4 03 was not given only on account of his coronary heart disease. If it would have been given only on that thing that would be totally unfair because then we would throw out somebody on account of a possible risk.....

That is not sufficient, that is not reasonable.

The decision was based on what was on his document in

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1980 and confirmed in 1981 because it is from then that the processus really started."
(Dep. p.515)

Dr. Belanger then alluded to the fact that Complainant had been "a very difficult patient, who had difficulty in compliance, who didn't always take his drugs, did not follow the diet and had not increased his activity". With respect to the potential problems that might arise in connection with consumption of medication as between a posting at sea as compared to a posting at shore, Dr. Belanger added:

That's why I was trying to tell you on a ship, not only you are limited by the qualification of the people, but also by the pharmacy that is there. On a base, on a shore billet, no problem. I've got a huge pharmacy on base and what I don't have on base there is on civilian street, unless you're in an isolated posting. He was unfit for isolated posting for this reason. So the thing is not just the risk of his coronary artery disease, but the fact that he had many other problems. It is the total of the problems that we had to face, and we had to justify his medical category based on the total of the problem.'
(Dep. pp. 516-517)

Based in part upon the foregoing evidence, the Tribunal has concluded that while the bulk of Respondent's evidence and its case is predicated upon Complainant's heart condition which, in its opinion, renders Complainant an unacceptable risk if he were to continue with his employment at sea, there was considerable uncontradicted evidence presented to the effect that the Complainant was in any event fit and able to perform his duties at a shore posting such as the one he was fulfilling at the date of his release.

The Tribunal is not here dealing with the type of situation which arose in the case of David Galbraith vs Canadian Armed Forces, T.D. 13/89 (Decision rendered August 23, 1989) in which it was established to the Tribunal's

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satisfaction that an artilleryman who was affected by a medical condition known as a continent ileostomy presented a real and not merely a hypothetical risk which would jeopardise the safety of himself and others if he continued to serve in the CAF. In that case, it was clearly established that the Complainant, who underwent a major bowel resection would be subjected to such duties and stress of a strenuous and physically demanding nature that the Tribunal could and did conclude that there was sufficient risk of employee failure which justified the blanket exclusion of any individual who had undergone a gastric or bowel resection from serving as an artilleryman in the Forces.

In the present case, the Tribunal is not persuaded that, based on the evidence as a whole, that a real risk of sufficient proportions has been demonstrated to exist which would justify the outright exclusion of Complainant or others like him from continuing his employment in the Canadian Armed Forces simply because his medical condition was determined by Respondent to be less than in perfect health.

VIII. PRINCIPAL ISSUES:

There are 4 principal issues to be decided by the Tribunal in the disposition of the present Complaint, namely:

1) Did the Respondent's decision to forcibly release the Complainant on medical grounds constitute a discriminatory practice on a prohibited ground of discrimination, namely, physical disability, in violation of section 7(a) of the Act?

2) If answered in the affirmative, did the Respondent nevertheless exculpate itself by successfully invoking the BFOR Defence available to it under section 15(a) of the Act?

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3) Was there, in any event, a legal obligation upon the Respondent to reasonably accommodate the Complainant in the face of the alleged adverse discriminatory effects upon him as a

result of Respondent's decision to terminate him, without or up to the point of undue hardship?

4) Did the Respondent discharge such obligation?

IX. THE LAW:

The submissions of law presented by legal counsel to the Tribunal on the final day of hearing on June 7, 1990 covered all aspects of the law as it then existed. Of course, the usual and oft-cited authorities including Etobicoke, Bhinder, O'Malley, Mahon, Brossard, Carson, Saskatoon, Gauthier, Rivard and Baker were included.

The recently rendered landmark decision of the Supreme Court of Canada in the case of Alberta Human Rights Commission vs Central Alberta Dairy Pool, Case No: 20850 had not yet become public until September 13, 1990, some 3 months after the present case had been taken under deliberation. Since the latter decision impacts greatly upon the issues in the present case, it is unfortunate that legal counsel were not able or in a position because of the time sequence. to deal with this latest decision in their respective presentations of argument which took place at the completion of the hearing.

The pertinent sections of the Act applicable to the present case are as follows:

"3(1). For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

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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.

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;"

ISSUE I:

With respect to the first issue to be decided by the Tribunal, it is apparent from an exhaustive study of all of the oral and documentary evidence produced that the Complainant has made out a prima facie case of discrimination against the Respondent, Canadian Armed Forces under section 7(a) of the Act. In our opinion, Mr. Levac was illegally removed from the Canadian Armed Forces for a reason based on a prohibited ground of discrimination, namely, physical disability and there is no doubt that a discriminatory practice within the meaning of sections 3 and 7 of the Act, was committed against him.

There was clear evidence presented to the effect that Complainant had been deemed by the Respondent to be fit and able to carry out his duties on a continuous basis from 1955 until 1984, particu larly as regards his most recent Trade Classification as a Marine Engineer Artificer as well as in his capacity of a Chief Petty Officer First Class. We therefore have concluded that his forcible release which appears to have been motivated by the results of a series of medical examinations and diagnosis which were carried out by Respondent over a period of approximately 4 1/2 years before his actual release constituted a discriminatory practice.

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ISSUE II:

Section 15(a) of the Act however provides Respondent with an opportunity, the burden of which lies upon itself, to defend against the complaint by establishing in accordance with "the ordinary civil standards of proof, that is upon a balance of probabilities", that the discrimination was justified by a bona fide occupational requirementas set out in that section. (Ontario Human Rights Commission vs Borough of Etobicoke) 1982, 1 S.C.R. 202.

The test for a bona fide occupational requirement (BFOR) is set out at page 208 in the Etobicoke Judgment where Mr. Justice McIntyre laid down the now oft-cited criteria:

"To be a bona fide occupational qualification and requirement, a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in 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 to the subjective test, the requirement must meet the objective test which was described as follows:

"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."

Additional criteria and guidelines for a successful defense based on the BFOR were also laid down by the Courts in City of Saskatoon vs Saskatchewan Human Rights Commission, 1989 2 S.C.R. 1297 ("Practical alternatives to the adoption of a discriminatory rule"); Air Canada vs Carson, 1985 1 F.C. 209 ("Onus upon employer to provide evidence that there is a rational basis for its belief that it diminishes the risk of harm");

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As already noted, Respondent saw fit to extend Complainant's employment for a year (actually 2 years if counted f rom the date of the warning of release produced as Exhibit HR-1) beyond the date of the decision of the CMRB which determined Complainant to be unfit, because it suited Respondent and was in the latter's interest to do so. Moreover, while the crux of Respondent's position was to the effect that Complainant was expected to go to sea on his next Sea/Shore rotation at the time of his dismissal, the Tribunal expresses some doubt that such sea posting would have become a reality when one considers the evidence on that issue.

The Tribunal is unable to accept the proposition that the Respondent on the one hand could and did unilaterally decide to prolong

Complainant's employment well beyond the date that it would otherwise have released him notwithstanding that it considered Complainant to be not medically f it because it was convenient for it to do so, while at the same time dispute Complainant's right to remain in its employ on the ground that Complainant's medical condition represented a real risk to himself , his co-workers or the public, generally. To repeat the well known maxim, "you can't have your cake and eat it too".

Respondent's proposition is even less tenable when one considers the evidence which establishes that during the course of the nearly 4 1/2 years that Complainant was being subjected to a wide range of tests, examinations and diagnosis, Complainant's medical condition and overall health status actually improved as time went along, which is consistent with Dr. Kafka's testimony when he conceded that the Complainant had "a good prognosis".

It is also noted that at no time did Complainant absent himself from his employment for any reason attributable to his medical status or condition. Nor was there any proof adduced

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to the effect that the Complainant was unable at any time to fulfill or perform his duties either at shore or at sea, up to the point of his release. As already noted, his medical condition was first observed during a routine examination and not as a result of any failure on the part of Complainant to perform his job either before or following such examination.

The Tribunal accepts that there was an element of risk that would be attached to sending the Complainant with a "heart condition" out to sea, if indeed that were to occur, as compared to a person in excellent health. However, the Tribunal does not consider, on the basis of the medical evidence as a whole, that the prediction of a risk of a heart attack of between 8 to 10% within 5 years (or 6 to 9% within 3 years based upon CASS criteria) when balanced against the substance of the other medical evidence as to Complainant's medical condition and his prognosis, is real or of sufficient weight to legally justify the application of a discriminatory rule or practice which is abhorrent and offends against the Act.

The Tribunal is convinced that the projection of a risk of heart attack is still only one of the factors to be taken into account in determining whether the Respondent has established that the Complainant cannot perform or be expected to perform his job either at sea or on shore

given such dire prediction. Furthermore, it must be stressed that a risk factor in and by itself is not a disease or disability. Many other factors which have already been noted above mitigate in favour of Complainant and lead the Tribunal to the conclusion that the Respondent has not established that it was reasonably necessary for it to have excluded and released Complainant from its employ and service in order to eliminate or avoid a real risk of serious damage to Complainant, his co-workers or the public at large.

The Tribunal finds that the Respondent has not established that Complainant cannot perform or be expected to per-

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form the job of Chief Petty officer First Class or Marine Engineer Artificer whether at sea or on shore or that being free from any degree of coronary artery disease and projection or prediction of a heart attack associated with this disease constitutes a bona fide occupational requirement.

The Tribunal declares that to decide otherwise would be tantamount to opening the flood gates to employers to embark upon routine or not so routine examinations with a view to establishing the existence of degrees of disability, slight or otherwise, in their employees in the hope of circumventing the main purpose of the Act which is to eliminate illegal discrimination. we are a nation of generally healthy people but to suggest that we are all perfectly healthy specimens and that the law countenances discriminatory acts or practices against those persons shown to be less than perfectly healthy would violate the Canadian Human Rights Act and the principles upon which it stands.

In arriving at its decision, the Tribunal has had to ask itself at what point is the line to be drawn in cases where a person such as the Complainant and others in like situation is considered to be sufficiently affected by a disability, however slight, but which would nevertheless justify the application of a discriminatory rule with its consequent discriminatory adverse effects. Is a nominal 2% or 4% or 12% or lesser or greater percentage to be deemed sufficient to allow a discriminatory rule to be invoked? Clearly, the percentage of projection of risk is merely a single criteria as far as determining whether a risk is real or probable rather than potential or merely speculative, since at a given point the line between fact and possibility begins to blur. obviously, many other

factors must be taken into consideration in deciding the reality of the projected risk which the Tribunal has done in the present case.

The Tribunal therefore concludes that the Respondent has failed to discharge its burden of establishing a valid BFOR

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defense in that it has not satisfied the bona fide occupational requirement to the satisfaction of the Tribunal. We are not persuaded that Complainant could not serve at sea, if that were to occur, without danger or real risk to himself, his co-workers or his employer the Respondent and the general public which it represents. Nor, as we have already made clear, are we persuaded that Complainant could not perform his duties on Shore.

ISSUE III:

Notwithstanding the foregoing, in light of the most recent Supreme Court Decision as it affects this case, Alberta Human Rights Commission vs Central Alberta Dairy Pool, (Supra) as yet unreported, there is, in any event, a legal obligation imposed upon Respondent to take appropriate reasonable steps to accommodate the Complainant, who was adversely affected by Respondent's discriminatory practice, up to the point of undue hardship. Moreover, it was encumbent upon Respondent, the onus of which was upon it, to establish that it made efforts to accommodate the Complainant's medical condition without undue hardship.

The Tribunal considers the Respondent to have failed to discharge either of such legal obligations.

Justice Wilson declared at page 20 of the Central Alberta Dairy Pool Decision, as follows:

"Dickson C.J., in effect, focussed upon the bona fide aspect of the BFOR and found that an occupational requirement could not be imposed bona fide unless the employer had exercised its duty to accommodate those on whom the requirement would have an adverse impact. The purpose of the Canadian Human Rights Act, S.C. 1976-77, c. 33, he stressed, was to prevent discrimination, and discrimination resulting from adverse impact could only be prevented by importing into the BFOR a duty to accommodate. Quoting from his Judgment at p. 571:

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The words "occupational requirement" mean that the requirement must be manifestly related to the occupation in which the individual complainant is engaged. Once it is established that a requirement is "occupational", however, it must further be established that it is "bona fide". A requirement which is prima facie discriminatory against an individual, even if it is in fact "occupational", is no bona fide for the purpose of s. 14(a) if its application to the individual is not reasonably necessary in the sense that undue hardship on the part of the employer would result if an exception or substitution for the requirement were allowed in the case of the individual. In short, while it is untrue the words "occupational requirement" refer to a requirement manifest to the occupation as a whole, the qualifying words "bona fide" require an employer to justify the imposition of an occupational requirement on a particular individual when such imposition has discriminatory effects on the individual."

(pp. 20-21)

ISSUE IV:

The Tribunal is convinced that the Respondent was in a position to accommodate the Complainant vis-A-vis the impact of the adverse discriminatory effects sustained by him in a number of ways without undue hardship but failed to do so.

The Tribunal is of the view that the sea/shore rotation policy as practised by Respondent' was sufficiently flexible to allow for exceptions such as Complainant to fulfill his remaining tours of duty on shore in lieu of at sea in light of his condition considering his rank, trade, age and other pertinent factors noted in the evidence. It was acknowledged by Respondent's witness Tetrault that exceptions to the Sea/Shore rotation policy were always available. The fact that problems of morale or jealousy would have to be dealt with when exceptions were made to the Sea/Shore rotation system, fell well short of the threshold of "undue hardship" laid down by the Supreme Court.

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As Justice Wilson stated in the Central Alberta Dairy Pool Decision, (at pages 34, 35):

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In the case at bar the Board of Inqu
fact that concerns of cost, disruption of a collective agreement, employee morale and interchangeability of work force did not pose serious obstacles to accommodating the complainant's religious needs by permitting him to be absent on Monday, April 4, 1983.

Indeed, it would be very difficult to conclude otherwise in light of the existence of a contingency plan for dealing with sporadic Monday absences. If the employer could cope with an employee's being sick or away on vacation on Mondays, it could surely accommodate a similarly isolated absence of an employee due to religious obligation. I emphasize once again that there is nothing in the evidence to suggest that Monday absences of the complainant would have become routine or that the general attendance record of the complainant was a subject of concern.

The ability of the respondent to accommodate the complainant on this occasion was, on the evidence, obvious and, to my mind, incontrovertible. I therefore find that the respondent has failed to discharge its burden of proving that it accommodated the complainant up to the point of undue hardship."

Applying the foregoing principle to the facts of the present case, the Tribunal declares that since the Respondent has on various occasions waived or relaxed its sea/shore rotation policy rules in situations which have already been noted and which justified or required it to do so, that the ability of Respondent to accommodate the Complainant on this occasion was similarly, on the evidence, obvious and incontrovertible.

Although Respondent's witness testified that it was obliged to adhere to its policy of Sea/Shore rotation system in the interest of maintaining morale, the Tribunal suggests that a modified, flexible and more humane application of such rotation system in order to accommodate persons such as Complainant and others in special and similar circumstances would in the end result enhance and boost morale rather than reduce it since the junior ranks could then look upon a modified, flexible and more humane Sea/Shore rotation system as applied

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to the elder or senior ranks as being a desirable concept to look forward to when they attained senior rank themselves.

In any event, as already stated the Tribunal views such an undertaking as falling well within the guidelines set by the Supreme Court of Canada which declared that such accommodation ought to be made to the point of undue hardship.

We therefore hold that Respondent has failed to discharge its burden of establishing that it accommodated the Complainant, up to the point of undue hardship. In fact, it is our finding that Respondent failed to accommodate the Complainant at all.

In arriving at its conclusions, the Tribunal is of the opinion that the continued employment of Complainant in the Canadian Armed Forces would not jeopardize Complainant's safety, those of his co-workers or the public at large, nor would it compromise the Canadian Armed Forces in its ability to defend Canada's security.

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DECISION:

For all of the above reasons, the Tribunal declares the Complaint in the present case to be well founded and concludes that Respondent, though not willfully or recklessly, has nevertheless engaged in a discriminatory practice in contravention of Section 7(a) of the Canadian Human Rights Act;

Since at the opening of the hearing it was agreed by all parties that the Complaint would be dealt with in two stages, namely: first, to determine whether the Complaint would be maintained and secondly, in the event it was maintained, that the parties would return for the purpose of representations and proof with respect to the issuance of such orders as may be necessary pursuant to Section 53 of the Act;

The parties are therefore ordered upon the expiry of 30 days from the date of the release of the present decision, to appear before a

Canadian Human Rights Tribunal for the purpose of making the necessary submissions regarding remedy if no agreement is reached.

DATED at Montreal, Quebec, this 17th day of June, 1991.

WILLIAM I. MILLER,
Chairman

JACQUES CHIASSON,
Member

GOLDIE HERSHON,
Member