T.D. 3/91
Decision rendered on April 25, 1991

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

ROBERT ST. THOMAS

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

CANADIAN ARMED FORCES

Respondent

DECISION

BEFORE: Mr. Michael G. Baker, Chairman
Mr. Peter A. Ross, Member
Dr. Paula Tippett, Member

APPEARANCES: Mr. René Duval Counsel for the Canadian Human Rights Commission

Lieutenant Colonel Arthur McDonald, Mr. Donald J. Rennie & Ms. Susan Clarke — Counsel for the Canadian Armed Forces

Mr. Robert St. Thomas — unrepresented

DATES AND PLACES
OF HEARINGS: Halifax, Nova Scotia, June 5th to 6th, 1989
Halifax, Nova Scotia, November 1st to 2nd, 1989

This case involves a complaint filed by Mr. Robert St. Thomas dated December 10th, 1986, wherein Mr. St. Thomas alleges that the Canadian Armed Forces has engaged in a discriminatory practice on the ground of disability as defined by Section 7 and Section 10 of the Canadian Human Rights-Act. On December 19th, 1988, Mr. Sidney Lederman, President of the Human Rights Tribunal Panel, appointed the present panel to hear this case.

Mr. St. Thomas enrolled in the Canadian Armed Forces as an Air Traffic Controller Assistant on March 15th, 1973. At the time he enrolled he met the air crew standards for medical fitness. He underwent basic training at St. Jean, Quebec, and further training at Cold Lake, Alberta, and Borden, Ontario. Mr. St. Thomas testified that he was first posted to Gagetown, New Brunswick, in 1974. Following that, he was posted to Trenton, Ontario, where he worked at his trade as an Air Traffic Controller Assistant, while taking courses. It was while in Trenton that he first suffered from an allergy problem. This appears to have occurred in 1976 or 1977. At approximately this time he was advised by his physician that he had bronchial asthma, and prescribed a Ventolin inhaler. During this period to 1980, there does not seem to have been any serious problems, and he had no difficulty in doing his work. Indeed, Mr. St. Thomas maintained his private pilots license, glider pilots license and his air crew medical status.

In 1980, Mr. St. Thomas changed his career occupation to that of a Construction Engineering Procedures Technician (CEP Tech). At that time, he was posted from his previous posting in Bagotville, Quebec, to Halifax, Nova Scotia, for on-the-job training prior to going on his CEP Tech course. Following his completing his training for the CEP Tech trade, Mr. St. Thomas returned to Halifax, Nova Scotia, where he worked as a contracts clerk and scheduler, both jobs within his trade.

On October 25th, 1984, Mr. St. Thomas underwent a routine physical examination prior to his being posted to Alert in the Northwest Territories. As a result of this examination, he underwent a temporary medical reclassification from G-1, 0-1 to a temporary G-4, 0-3. What this medical classification means, is that he was classified as temporarily unfit to be transferred to field, sea, United Nations, Europe Forces, or other isolated postings. This classification of G-4, 0-3 was made permanent in June, 1985. Since the minimum medical classification for the CEP Tech trade is G-3, 0-3, Mr. St. Thomas' case was referred to the Medical Career Review Board. This Board recommended that Mr. St. Thomas be discharged "On medical grounds,

being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable."

Mr. St. Thomas chose to be released from the Canadian Armed Forces sooner than the recommended release date since

he hoped to take a retraining course and, consequently, left the Canadian Armed Forces on December 15, 1985. It is clear from his subsequent bankruptcy and other personal financial difficulties, that the loss of his chosen career has caused much personal hardship.

There is no doubt in the opinion of the Tribunal that the Commission has established a prima facie case of discrimination. There is clear evidence that Mr. St. Thomas was qualified for the job he was doing and that the Canadian Armed Forces refused to continue to employ him, which would be a discriminatory practice contrary to Section 7 (a) of the Canadian Human Rights Act. Furthermore, the Canadian Armed Forces by determining that because of his disability (bronchial asthma) he could not be transferred to medically remote locations, a prerequisite to further promotion, and to continue as a member of the Canadian Armed Forces, prima facie committed a discriminatory practice contrary to Section 7 (b) of the Canadian Human Rights Act. Lastly, it is manifestly clear that the policy of the Canadian Armed Forces towards those persons diagnosed as having bronchial asthma prima facie constitutes a discriminatory practice contrary to Section 10 (a) of the Canadian Human Rights Act.

Furthermore, the Tribunal agrees with the Commission's contention that the duty is on the Respondent to establish that there is a bona fide occupational requirement, which is defined as follows in the Section 15 (a) of the Canadian Human Rights Act:

> 15. It is not a discriminatory practive 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;

The burden of proof on the Respondent to establish a bona-fide occupational requirement is, according to the decision of the Supreme Court of Canada in the case of Ontario Human Rights Commission v Borough of

Etobicoke [1982] 1 S.C.R. 202 at 208, "the ordinary civil standard of proof, that is upon a balance of probabilities."

In order to satisfy the Tribunal that the Canadian Armed Forces' medical standard is not a discriminatory practice, the Respondent must satisfy the Tribunal that it is subjectively believed by those creating the Canadian Armed Forces medical standards that the requirement is necessary for the adequate performance of the job.

As the Supreme Court of Canada settled in the case of Ontario Human Rights Commission v Borough of Etobicoke at page 208:

> 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 ail 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 set out in the case of Ontario Human Rights Commission v Borough of Etobicoke which was

described by the Supreme Court of Canada at P. 208 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.

It has further been established that an employer must demonstrate that "the requirement, although it cannot necessarily be justified with respect to each individual, is reasonably justified in general application." (See City of Saskatoon et al v. Saskatchewan Human Rights Commission et al December 21, 1989) unreported.

Indeed, in the case of City of Saskatoon et al v. Saskatchewan Human Rights Commission et al the court emphasized at page 16 that:

> While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of the requirement if he fails to deal satisfactorily

with the question as to why it was not possible to deal with employees on an individual basis by, inter alia, individual testing.

As well, the case of Carson v Air Canada demonstrates that the onus of proof on the employer requires that the employer provide evidence with respect to the requirement that there is a "rational basis in fact for his belief that it diminishes the risk of harm." (See Carson v Air Canada [1985] 1 F.C. 209 at p. 234). This evidence must go beyond the purely speculative so that the Tribunal can determine the reality of the risk of harm claimed.

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However, once it has been established that there is a real risk of harm or danger then there is no duty to accommodate that risk or danger. As Mr. Justice Marceau said in Canadian Pacific Limited v Canadian Human Rights Commission and Mahon [1988] 1 F.C. 209, at page 221:

> The decision under attack, it seems to me, is based on the generous idea that the employers and the public have the duty to accept and assume some risks of damage in order to enable disabled persons to find work. In my view, the law does not impose any such duty on anyone.
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> Once it had been found that the applicant's policy not to employ insulin dependent diabetics as trackmen was reasonably necessary to eliminate a real risk of serious damage for the applicant, its employees and the public, there was only one decision that the Tribunal could legally make, namely, that the applicant's refusal to engage the respondent Wayne Mahon was based on a bona-fide occupational requirement and, as a consequence, was not a discriminatory practice.

The cases of Gaetz v Canadian Armed Forces, TD 14/88, Galbraith v Canadian Armed Forces, TD 13/89, and Sequin and Tuskovich v Royal Canadian Mounted Police, TD 1/89, all confirm that other Tribunals have found that health related medical standards are bona-fide occupational requirements where it has been shown that they are designed to prevent a real risk of harm or danger.

Of course, the case of Bhinder v Canadian National Railway Company [1985] 2 S.C. R. 561 had established that there is no duty to accommodate the individual employee once-an employer has established a bona-fide occupational

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requirement. However, the case of Alberta Human Rights Commission v Central

Alberta Dairy Pool et al (September 13, 1990), (S.C.C.) has modified the decision in the case of Bhinder v Canadian National Railway Company so that there is no duty to accommodate in cases of direct discrimination. However, the case of Alberta Human Rights Commission v Central Alberta Dairy Pool et al establishes the proposition that there is a duty to accommodate in cases of adverse effect discrimination. In the opinion of the Tribunal, the rule which the Canadian Armed Forces had established declaring asthmatics unfit for military service is direct discrimination. It is not a rule or standard which is on its face neutral. The rule applies to every asthmatic and can only be saved if it is a bona fide occupational requirement.

The Respondent has suggested that the Commission has not alleged that the medical standards established for CEP Tech trade are anything but bona fide. On the contrary, it appears that one of the main suggestions made by the Commission is that the motivation behind the establishment of the medical standard in question is mainly economic.

The Tribunal feels that the evidence does establish that the way in which the medical standards are administered is in a substantial way influenced by economic realities. Dr. Fisher's evidence establishes that the more valuable a member is to the Forces, the more likely he or she is to be retained pursuant to a recommendation from the Medical Standards Review Board. As well, the evidence of Dr. Jacques

Roy in the case of Galbraith v Canadian Armed Forces establishes that the Common Enrollment Standard is sometimes waived if the Forces economic or operational requirements dictate.

Nevertheless, there is also evidence which establishes that there are other motivations for the medical standards established for CEP Tech trade. This evidence establishes that members of the CEP Tech trade like Mr. St. Thomas are first and foremost soldiers, sailors or air crewman and hence must be able to accomplish their military duties. A CEP Tech tradesperson must also be able to carry out arduous tasks in extreme climates as required by their trade.

Consequently, the Tribunal is satisfied that the Respondent has met the subjective test as set out in the case of Ontario Human Rights Commission v Borough of Etobicoke.

Dr. Fisher testified that she felt that there was some risk to an asthmatic in not having ready access to a tertiary care type of hospital such as found in southern Canada. Furthermore, Dr. Fisher testified that because

there is always a risk that an asthmatic could have an attack which would require hospital care that this might increase the risk to any air crew which might have to fly the asthmatic out to medical care, if the asthmatic were to be working in an area where tertiary care hospitals were not located. She also testified that the dusty and dry conditions of the Golan Heights and Namibia, smoke and fumes, or strenuous exercise would pose a risk to an asthmatic because it tends to trigger an attack of broncial asthma.

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Dr. Warren indicated in his written report and oral evidence that Mr. St. Thomas has active asthma and that there is a possible risk of a fatal asthma attack, although in the case of asthma such an attack cannot be predicted with any certainty. He also testified that it could be reasonably expected that an asthmatic would have difficulty carrying out his military responsibilities.

Based on the evidence of Dr. Fisher and Dr. Warren, the Tribunal has concluded that there is sufficient evidence to establish that having asthmatics on active service in the Canadian Armed Forces could pose a possible risk to the asthmatic or other members of the Canadian Armed Forces. It also appears to the Tribunal that while the Canadian Armed Forces does in fact accommodate some people who do not meet the minimum medical standards for economic or operational reasons, there is in our opinion, no legal requirement to accommodate Mr. St. Thomas as was established in Bhinder v Canadian National Railway Company. and was confirmed in Alberta Human Rights Commission v Central Alberta Dairy Pool.

The Tribunal has also concluded that the evidence of Dr. Michaels concerning Mr. St. Thomas' particular medical condition tends to confirm the evidence of Dr. Fisher and Dr. Warren in that Dr. Michaels agrees that there is a risk to Mr. St. Thomas. Dr. Michaels, however, describes the risk as "potential" as opposed to "real". This is in fact the central difficulty faced by the Respondent, for it

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outlines the fact that no individual testing was conducted by the Respondent on Mr. St. Thomas to determine whether or not Mr. St. Thomas was able to safely do his job.

There is no doubt that there is a potential risk posed to some individuals having asthma by reason of the rigours of the duties of a member of the Canadian Armed Forces. The Tribunal does not feel that the evidence

is sufficient to demonstrate that there is a real risk posed to the safety of every member of the Canadian Armed Forces having asthma or other members of the Canadian Armed Forces simply by virtue of having asthma. The Tribunal feels that it is necessary to do individual testing in order to determine whether there is a real risk to the particular individual or the safety of others.

In the case of Alberta Human Rights Commission v Central Alberta Dairy Pool, at pages 30 to 31, the Supreme Madam Justice Wilson says as follows:

> The second branch of the Brossard test addresses the availability of alternatives to the employer's rule. In my opinion, this is not designed to be a discrete test for determining the existence of a BFOQ but rather a factor that must be taken into account in determining whether the rule is "reasonably necessary" under the first branch. The fact that this Court had not explicitly drawn attention to it before may help explain its being singled out in Brossard. 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."

It is the opinion of the Tribunal that there is a reasonable alternative to declaring that every person who has asthma

is unfit to be a member of the Canadian Armed Forces. That reasonable alternative is for the Canadian Armed Forces to do individual testing of the particular member to determine whether or not that particular member's asthma prevents he/she from safely carrying out his/her duties. Unfortunately, individual testing was not done in this particular case. Nevertheless, Mr. St. Thomas was in the control of the Canadian Armed Forces and testing was possible.

I believe that the Tribunal is supported by the decision of the Supreme Court of Canada in the case of City of Saskatoon et al v. Saskatchewan Human Rights Commission et al where Mr. Justice Sopinka stated at page 16 and 17 as follows:

> If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it.

Based on the foregoing, it is the decision of the Tribunal that the complaint related to a discriminatory practice is substantiated. This is not

because the Canadian Armed Forces bore any ill will towards Mr. St. Thomas, but simply as a result of a policy which stereo-typed Mr. St. Thomas as unfit to be a member of the Canadian Armed Forces without any regard to individual testing.

It is the order of the Tribunal that the Canadian Armed Forces compensate Mr. St. Thomas for any loss of income (wages) that he has suffered during the period since he left ,the Canadian Armed Forces and that Mr. St. Thomas be reinstated in the Canadian Armed Forces at his former rank with all of the benefits which would have occured to him

had he remainded a member of the Canadian Armed Forces, if he wishes. However, it is of course open to the Canadian Armed Forces to do testing of Mr. St. Thomas to determine whether his asthma prevents him from carrying out the duties of a member of the Canadian Armed Forces safely, after he has been reinstated.

Furthermore, the Tribunal orders the Canadian Armed Forces to pay compensation to Mr. St. Thomas in the amount of $5,000.00 with respect to injury with respect to feelings of his self respect. If the parties have any difficulty in reaching an agreement as to the amount of compensation Mr. St. Thomas is entitled to receive for loss of income (wages), they may apply to the Tribunal for determination of the amount of income lost by Mr. St. Thomas.

DATED at Mahone Bay, Nova Scotia, this 25th day of March, 1991.

MICHAEL G. BAKER

PETER A. ROSS

DR. PAULA TIPPETT

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