T. D. 11/ 88 Decision Rendered on July 19, 1988

Decision of the Tribunal under the Canadian Human Rights Act In the Matter of a complaint filed under Section 7(a) of the Canadian Human Rights Act

BETWEEN: MARLENE MCALPINE Complainant - AND CANADIAN FORCES Respondent

DECISION OF TRIBUNAL

BEFORE: DALE BRUCE HARDER, ESQ.

APPEARANCES:

For the Complainant and the Canadian Human Rights Commission JAMES HENDRY and ANNE TROTIER

For the Respondent, Canadian Forces BRUCE RUSSELL and PETER TINSLEY

Heard in the City of Ottawa on March 22, 1988 >

THE- CANADIAN HUMAN RIGHTS ACT

HUMAN RIGHTS TRIBUNAL IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT S. C. 1 97 6- 7 7 C. 33 AND IN THE MATTER OF a complaint filed pursuant to Section 7(a) of the Canadian Human Rights Act by Marlene McAlpine against Canadian

BEFORE: DALE BRUCE HARDER, Esq.

BETWEEN:

MARLENE MCALPINE Complainant AND:

CANADIAN FORCES Respondent

DECISION OF THE TRIBUNAL

APPOINTMENT OF TRIBUNAL On April 13, 1987, the President of the Human Rights Tribunal Panel appointed the present Tribunal to inquire into the complaint lodged by Marlene McAlpine dated September 25, 1985, pursuant to Section 7(a) of the Canadian Human Rights Act against the Department of National Defence. By consent of counsel, the style of cause was amended to make CANADIAN FORCES the Respondent. The matter was heard on March 22, 1988 in Ottawa, Ontario.

> - 2 THE COMPLAINT The complaint as filed, concerns an allegation of discrimination on the grounds of sex, contrary to the provisions of the Canadian Human- Rights- Act S. C. 1976- 77 C. 33 as amended, and in particular, Section 7(a) of the Act.

The Complainant alleges in her particulars that: "I have reasonable grounds to believe that the Department of National Defence discriminated against me by refusing to employ me because of my sex (pregnancy), in violation of Section 7(a) of the Canadian Human Rights Act. I applied for a class "C" call- out act as an administration clerk. I was medically examined on May 28, 1985 and was advised by Captain Passey on May 30, 1985, that I could not be enrolled because I was pregnant. I was advised by Master Warrant Officer Gardiner on June 11, 1985 that I had failed the medical."

EVIDENCE AND SUBMISSIONS The Complainant was a member of the Canadian Forces Reserves. Among other things, she was trained as a clerk. In May 1985, she heard that some work was available at the Canadian Forces Bases, Chilliwack, British Columbia. As is noted in the letter of March 18, 1988, on May 22, 1985, an offer was made to her for employment as an administrative clerk for the period July 3, 1985 to November 28, 1985. The offer was subject to a policy of the Canadian Forces, in force at that time, to the effect that a person while pregnant could not be engaged in such employment by the Canadian Forces. It was subsequently discovered that she was pregnant and her offer of employment was withdrawn.

> - 3 The facts as are agreed by counsel are that Marlene McAlpine would have worked from July 3, 1985 to October 11, 1985 inclusive, that is fourteen weeks, and that she did not have these weeks because of the offer of employment was withdrawn as it was the Forces' policy not to hire or employ pregnant women. It was also agreed that only ten weeks were necessary to qualify her for unemployment insurance benefits. It was agreed by counsel

that but for the fact that she did not have any insurable weeks, she would have filed her claim for unemployment insurance benefits on January 27, 1986, and that she would have paid premiums for unemployment insurance as required by all employers in Canada, and it is further agreed that she would have received unemployment insurance for the week commencing Sunday, January 26, 1985 to the week ending and including June 7, 1986. It is also agreed that the Complainant took reasonable steps to mitigate her losses.

It is also agreed that prior to her offer of employment, Marlene McAlpine expressed a hope that there would be enough weeks in this term contract for her to qualify for unemployment insurance benefits.

All aspects of this case have been settled by a Consent Order, except whether or not there is an entitlement to damages as a

> - 4 - result of her failure to receive her unemployment insurance benefits. Counsel are to be praised for narrowing the issues.

To determine entitlement to damages, it is necessary to: a) firstly, set out the purpose of the Canadian- Human Rights Act ; b) secondly, to review the recent decisions of the Supreme Court of

Canada; c) thirdly, to review a relevant decision of the Canadian Human Rights

Act Review Tribunal; d) finally, to incorporate certain definitions relied on by other

Canadian Human Rights Tribunals as this tribunal applies the principles gleaned from the above noted cases.

Section 2 of the Canadian Human Rights Act states: "2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada 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."

Further, in Robichaud v. Canada, (1987) 2 S. C. R. at page 89, LaForest, J. states:

"The purpose of the Act is set forth in s. 2, as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained

in Ontario Human Rights Commission and O'Malley v. Simpson- Sears Ltd., (1985) 2 S. C. R. 53b, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion, but in a manner befitting the special nature of the legislation, which he described as 'not quite constitutional".

In Robichaud at page 89, LaForest, J. states further: "This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the 'almost constitutional' nature of the rights protected. '

Continuing further at page 91, LaForest, J. continues: "The interpretative principles I have set forth seem to me to be largely dispositive of this case. To begin with, they dispose of the argument that one should have reference to theories of employer liability developed in the context of criminal or quasi- criminal conduct. These are complete beside the point as being fault oriented, for, as we saw, the central purpose of a Human Rights Act is remedial --- to eradicate anti- social conditions without regard to the motives or intention of those who cause them."

Continuing at page 91, again, LaForest J. states: "It is clear, however, that the limitation, as developed under the doctrine of vicarious liability in tort cannot meaningfully be applied to the present statutory scheme. For in torts what is aimed at are activities somehow done within the confines of the job a person is engaged to do, not something, like sexual harrassment, that is not really referable to what he or she was employed to do. The purpose of the legislation is to

remove certain undesirable conditions, in this context in the workplace, and it would seem odd if under S. 7(a) an employer would be liabile for sexual harassment engaged in by an employee in the course of hiring a person, but not be liabile when another employee, particularly an employee on probation. it would appear more sensible and more consonant with the purpose of the Act to interpret the phrase "in the course of employment"

> - 6 as meaning work or job- related, especially when that phrase is prefaced by the words "directly or indirectly". Interestingly, in adding "physical handicap" as a prohibited ground of discrimination in the workplace (S. 3), the phrase used is "in matters related to employment."

In the case of Travail des Femmes (1987) S. C. R. 1134, Chief Justice Dickson states: "Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognitition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act, R. S. C. 1970, c. 1- 23, as amended. As Elmer Driedger in Construction of Statutes (2nd e. 1983), at p. 87 has written:

'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. '"

The question remains then, What are the principles of awarding damages in human rights cases brought under this Act?

In the interim decision of the Review Tribunal in the case of Butterill, Foreman and Wolfman v. Via Rail Canada Inc. C. H. R. R. Decision 44, Paragraph 2031- 2064, December 20, 1980, it is stated:

"In any event, we are confident that the Canadian Human Rights Act is not open to such an interpretation. In our view the use

> - 7 of the language of "compensation" by the Canadian Act implies that tribunals are to apply the principles employed by courts when awarding compensatory damages in civil litigation. The root principle of the civil law of damages is "restitution integrum": the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred., to the extent that money is capable of doing so, subject to the injured party's obligation to take reasonable steps to mitigate his or her losses.

In the case of Jack Cewe Ltd. v. Jorgenson (1981) 1 S. C. R. 818, Justice Pigeon states: "Turning now to the unemployment insurance benefits, I find the Company's contention untenable. The payment of unemployment insurance contributions by the employer was an obligation incurred

by reason of respondent's employment, therefore, to the extent that the payment of those contributions resulted in the provision of unemployment benefits, these are a consequence of the contract of employment and, consequently, cannot be deducted from damages for wrongful dismissal."

In continuing on the same page, Mr. Justice Pigeon states: "Furthermore, it appears that damages for wrongful dismissal are "earnings" for unemployment insurance purposes, being defined by the Unemployment Insurance Regulations as income "arising out of employment."

The following are definitions which have been applied in Human Rights Act cases, and these definitions will be utilized in this case:

Compensation: Payment of damages; That which is necessary to restore an injured party to his former position. Equivalent in money for a loss sustained; an act which a court orders to be done, or money which a court or other tribunal orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person

damnified may receive equal value for his loss, or be made whole in respect of his injury.

> - 8 Wages : A compensation given to a hired person for his or her services. Compensation of employees based on time worked or output of production.

As counsel agreed on the preliminary issues, the sole issue to be decided was whether or not Marlene McAlpine should be compensated for her loss of right to claim insurable weeks. This loss, by agreement, has been agreed at $4,692.00.

Marlene McAlpine discussed with the agent of the Respondent, the number of weeks of employment. She expressed her concern that she needed a specific number of weeks to receive benefits. Correctly, the Warrant Officer said he could express no opinion on her eligibility for unemployment benefits. But he specified that the job was for 14 weeks. As the evidence shows, Mrs. McAlpine had an offer of employment, which she accepted, for more than 10 weeks. Ten weeks for Marlene McAlpine is the minimum number of weeks she requires to qualify for unemployment insurance benefits.

Marlene McAlpine would have been paid her wages, had she worked, and she would have been entitled to unemployment insurance benefits as her employer would have made the appropriate deductions. But for the discrimination, Marlene McAlpine would have had unemployment insurance benefits. The Supreme Court of Canada stresses that the Canadian Human Rights Act is designed to extend the present laws of Canada to provide remedies in

> - 9 cases of discrimination against certain enumerated grounds. Marlene McAlpine has a claim for compensation. Here, compensation must be payment of damages . The appropriate remedy is to award unemployment insurance benefits that would have been available to the complainant had she not been a victim of discrimination. The loss to Marlene McAlpine flows directly from the discriminatory employment practice. As this loss is direct and the Act is essentially remedial, it follows that to be consonant with the latest cases from the Supreme Court of Canada, this

tribunal must direct the Respondent to compensate McAlpine for her losses suffered as a result of the discriminatory practices by the Respondent.

ORDER For the reasons given above the Tribunal: 1. DECLARES that the Respondent engaged in discriminatory practices against McAlpine and that the actions of the Respondent deprived McAlpine of employment opportunities on a prohibited ground of discrimination.

2. ORDERS that Marlene McAlpine be compensated for the loss of her right to unemployment insurance benefits that she would have been -able to receive had she been able to work the stipulated insurable weeks of employment.

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- 10 3. ORDERS that the Respondent pay to Marlene McAlpine the sum of $4,692.00 in compensation for loss of unemployment insurance benefits.

DATED at the City of Kelowna, Province of British Columbia, this 20th day of June, 1988.

DALE BRUCE HARDER, Chairman