

T. D. 9/ 88 DECISION RENDERED ON MAY 20, 1988

Decision of the Tribunal under the Canadian Human Rights Act IN THE MATTER OF a complaint filed under Sections 7(b) and 10 of the Canadian Human Rights Act

BETWEEN: Gail O'Connell, Anne Chirka, and Patricia Oxendale Complainants AND: Canadian Broadcasting Corporation Respondent

DECISION OF THE TRIBUNAL

BEFORE: John McLaren, Chairman

APPEARANCES:

For the Complainant and the Canadian Human Rights Commission Rene Duval and Esther Savard

For the Respondent, Canadian Broadcasting Corporation Barbara MacIsaac

Heard in the City of CALGARY on August 18th and 19th, October 14th, 15th and 16th and November 19th, 1987.

> 1 A. The Nature of the Complaint This tribunal was appointed pursuant to section 39(1.1) of the Canadian Human Rights Act to inquire into the complaints of Gail O'Connell dated January 20, 1984, amended January 4, 1987, Anne Chirka dated January 6, 1984 amended February 22, 1985 and Patricia Oxendale dated December 28, 1983. The complaints were joined together in accordance with Section 32(4) of the Act.

The wording of the complaints is the same and reads

I am employed as technician with the Canadian Broadcasting Corporation in Calgary, Alberta. I have been denied assignments to mobile units and various other assignments in and out of the studio. The aforementioned assignments broaden technical knowledge and experience and generate a considerable amount of overtime wages, therefore, the denial of these assignments has resulted in limited employment opportunities. I believe I am fully qualified for these assignments and I allege that I have been adversely differentiated against because of my sex (female) which is discriminatory and contrary to s. 7(b) of the Canadian Human Rights Act. Furthermore, I allege that the above reflects a discriminatory practice pursued by my employer which is contrary to s. 10 of the Canadian Human Rights Act.

Section 7(b) of the Canadian Human Rights Act provides that It is a discriminatory practice, directly or indirectly,

..... (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination

Section 10 of the Act reads It is a discriminatory practice for an employer ...

(a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer, or any other matter relating to employment or prospective employment,

> 2 That deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

The term "prohibited ground of discrimination" which appears in both sections 7 and 10 is defined in section 3 of the Act. It includes discrimination on the grounds of "sex". Mrs Chirka included in her complaint an allegation of discrimination on the basis of "family status", on the ground that the discriminatory treatment accorded to her reflected her status as a married person with a spouse who also works for C. B. C., Calgary. Discrimination on the basis of "family status" is also a prohibited ground under section 3 of the Act.

## B. The Employment Policies and Practices of the Canadian Broadcasting Corporation.

1. The N. A. B. E. T. Agreement and Job Descriptions. It is important that the employment context in which these complaints arose be clarified as a prelude to examining the complaints in detail. Each of the complainants was and still is a technician working for the C. B. C. station in Calgary (CBRT). Since shortly after she was hired in 1980 Ms. O'Connell has been a VTR Operator (classified as a Group IV Technician). From 1980 to early in 1984 Mrs. Chirka was also a VTR operator (similarly classified as a Group IV Technician). Since 1984 she has worked in the ENG department (Electronic News Gathering). In August 1985 she became an ENG editor and is currently classified as a Group VI Technician. Ms. Oxendale was hired in 1982 as a

Video Control Technician in the studio at CBRT, a position which she still holds. She too is classified as a Group IV Technician.

Mr. Robert Service who since 1986 has held the position Manager, Television Network Operations described in his evidence the nature and relevance of the positions and the classifications, as well as the general character of the conditions of employment of the technical staff at C. B. C. Mr Service has responsibility at a national level for industrial relations within the Corporation, including those with N. A. B. E. T. (the National Association of Broadcast Employees and Technicians), the bargaining unit to which each of the complainants belongs.

Under the collective agreement between the C. B. C and N. A. B. E. T. the > 3 seniority of staff is gauged from the date when each individual joined the Corporation. The job description for the classification of Group IV Technician (Job Title 6433) (Exhibit R- 4) sets out the general function of the classification and twelve common duties which are required of anyone in this category, whatever their more specialized functions. The specific responsibilities of the Video Tape Recordist or Editor, the job performed by both Ms. O'Connell and Mrs. Chirka, are as follows

1. Prepares, sets up, loads and operates videotape machines for recording, playback, assembly and editing of videotapes.

2. Ensures that videotapes are available and ensures that all feeds are set up and switched as required, for recording, playback and editing.

3. Evaluates videotapes and reports on technical quality. 4. Tests and performs minor maintenance on VTR equipment. 5. Performs, as required, other duties related to the above. For the job of Video Control Technician which Ms. Oxendale carries out the description mentions the following specific functions

1. Prepares, installs, sets up and operates the video equipment and aligns the camera( s).

2. Operates the video control facilities of one or more cameras during rehearsal and productions, maintaining desired quality and transmission level.

3. May technically evaluate films or slides and prepare reports on suitability.

4. Performs, as required, other duties related to the above. 2. Management and Employee Rights under the N. A. B. E. T. Agreement. In his evidence on the collective agreement between the C. B. C. and N. A. B. E. T. (Exhibit R- 5) Mr. Service noted that under Article 3 (Management Rights) management has the responsibility for "the determination of

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4 operating schedules" (3.2). Unlike the collective agreement with C. U. P. E. relating to production staff (Exhibit R- 6), there is no provision in the N. A. B. E. T. agreement which requires the Corporation to consider an employee's wishes and to use its best efforts to equalize opportunities for employees within a group to work specific shifts, or to use its best efforts to equalize the opportunity to perform overtime work among the group usually performing such work. (see C. B. C./C. U. P. E. Agreement, Articles 23.1.3 and 30.7). Mr. Service explained that the difference in the two agreements reflects the fact that many of the positions covered by the C. U. P. E. agreement, unlike the N. A. B. E. T. positions, are interchangeable which makes equalization an obtainable objective. Article 5 sets the standard workweek for N. A. B. E. T. employees at 36 3/4 hours, and provides for two consecutive days off. Mr. Service explained that an individual's days off may vary, because of the need to provide coverage to a station 7 days a week. Under Article 8 (Tour of Duty) the normal work day is 7 3/4 hours. Article 7 (Overtime and Unexpected Hours) defines "overtime" as "those hours added to the minimum seven and three- quarter (7 3/4) hour work day". It is paid at 1 1/2 times the basic hourly rate. By virtue of Article 16 (Work on Day Off), work which is performed on a day of is paid at from 1 1/2 to 2 1/2 the basic hourly rate depending on the number of days and hours worked. Mr. Service made it clear that technicians working for the C. B. C. can expect to be called on for overtime.

Article 72 of the collective agreement with N. A. B. E. T. deals with training. Under that article there are two kinds of training contemplated. The first is that required to update the knowledge

and experience of an employee in a particular job category, for example where new equipment is introduced. In these cases the Corporation is required to provide upgrading. The second relates to individual career development. Here the initiative lies with the employee. The Corporation, while encouraging such initiatives, has the power to grant or withhold approval depending on its interests and priorities. Under Article 40 (Non-discrimination) it is provided that "the Corporation will not discriminate against employees with respect to sex, colour, age ....., religion, creed, racial, ethnic or national origin, marital or parental status, sexual orientation or political affiliation".

3. The Role and Powers of Producers within the C. B. C. Mr. Service also addressed the agreement between the C. B. C. and the Canadian Television Producers and Directors Association (Exhibit R- 7). He drew particular attention to Article 9.3 of that agreement which provides,

> 5 The producer has the right to make his preferences known to the production service departments as to the make up of the production team, it being understood that the production service departments will endeavour to satisfy these preferences. In the event that his preferences are unable to be met, the Producer may request and will receive a written explanation. The production team, once assigned, will be responsible to the Producer and in no case will a change be made without prior consultation with him, except where conditions of a special and urgent nature make such consultation impractical.

The relationship between management, producers and production teams was also addressed by Mr. Lawrence Kimber, currently employed by the C. B. C. as the Executive Producer of the program, "Sportsweekend". Mr. Kimber gave his

evidence by affidavit on September 3, 1987 and was cross examined by Mr. Duval for the Human Right Commission on September 14, 1987. He has held a number of senior production positions since 1977 and described himself as "thoroughly familiar with the procedures involved in preparing for and putting 'on the air' all types of television programming" (Exhibit R- 2, p. 1)

In dealing with the requirements of producers in planning for network productions, Mr. Kimber stressed the creative nature of the production process and the need to secure the services of the best people available in each of the job categories within the team. In his view this means those individuals who have developed a reputation for good work, and who have worked well as members of a team in the past. The members of a team can be and are often drawn from a number of C. B. C. stations, especially in the case of international or national programs. Moreover, the make-up of a team and the collective experience it represents will necessarily be related to the type of event being televised, whether it is a sporting event, political convention, variety show or dramatic production. In the course of cross-examination Mr. Kimber indicated that producers at the network level will typically know the identities and record of technicians at the local level as the basis for making their selections. In some instances (he used the example of Canadian Football League telecasts) the network producers will travel to the various centres and organize the production teams for the season in consultation with local producers. He

> 6 agreed that network producers have to rely in some instances on recommendations made by local producer, including technical producers, in particular when a majority of local staff are being used or substitutions have to be made, although he added that it is in within the power of a producer to reject a recommendation.

Mr. Kimber conceded that the emphasis on track record means that those who lack experience can be left out of consideration, although he have examples of how previously unknown and untried technicians have got their chance, have impressed producers and so have received recognition. Despite this problem, it was his view, shared he believed, by other producers both within and outside the C. B. C., "that a producer must have creative control over any program assigned to him or her". There are no guarantees, he suggested, that any particular individual will achieve fame and fortune in the C. B. C. Although he did not make the point explicit in his evidence, it was implicit that there is an important correlation in the minds of both producers and technicians between career advancement and job satisfaction on the one hand and assignment to network mobile productions on the other.

4. The Organization of Technical Work at C. B. C. Calgary. The organization and allocation of technical work at the C. B. C. station in Calgary was dealt with in the evidence of Mr. Marty Raine the Manager of TV Technical Services between April, 1980 and August 1986. Mr. Raine indicated that the Calgary station has to balance the important demands of local programming, and especially the daily news features, with the requests from the network for support for its programs, be they sportscastes, variety superspecials, political conventions, international or national congresses and so on. Responsible to the Manager of TV Technical Services for the day-to-day supervision of technical staff are two Technical Producers who cover off the Studio and the Mobile Facilities respectively. Since 1977 the Calgary station has operated a so called "maxi-mobile" facility, a 40 feet long tractor trailer which contains a mobile studio and allows a production

team to go out and broadcaste live on location. The maxi- mobile requires a team of nine (9) persons, including one VTR operator. The latter, he stated, could be any one of the four people with that classification at the station. This facility, while used for local programing, is an important element in network outside- broadcasting. Up to 1985 there was a second mobile facility, the "mini- mobile", a much smaller truck with two technicians operating it. This facility was

> 7 sometimes attached to its larger counterpart, especially in the case of hockey broadcastes, to provide extra capacity. The latter had been phased out in 1985 as an outdated and technically unreliable unit.

The formal scheduling of weekly assignments for the technical staff is carried out by a scheduling clerk in the TV Operations Centre. The substance of that schedule, however, is the product of the joint effort of the two Technical Producers who consult with the Content Producers to determine program requirements. Included within the scheduling process will be requests from the network for assistance with its productions. Mr. Raine spent sometime explaining the system for assigning technical staff. There are certain units, for example the on-air booth technicians at the station, whose pattern of work is predictable and who work on a

rotational basis in which scheduling is straight forward and varies little from week to week. With the "operational technicians" the scheduling is more of challenge because it is from this group that individuals are taken to go on mobile assignment. Mr. Raine suggested that, although rotational scheduling is used to a certain extent with the VTR operators, it did not always work because of the demand for one of the four to go out on mobile details. He also noted that, while mobile work would not consume all of the work of a technician, there were some who were more in demand than others, especially for network productions. Because the mini- mobile was such a specialized operation two technicians had been permanently assigned to that unit. Marty Raine indicated that it had been his policy as Manager of TV Technical Services at Calgary to try and promote the use of Calgary technicians in network productions. However, he rejected the contention which was contained in the evidence of Mr. Raminder Singh, the Investigating Officer for the Canadian Human Rights Commission, that employee preference is one of the criteria for job assignments. It is certainly a factor which the Corporation likes to consider in individual cases, but is not a standard consideration. Mr. Raine was somewhat reticent in cross examination in responding to the suggestion that there is a link between career advancement and assignment to mobiles, especially network mobiles.

It is clear from the records of overtime earnings prepared by the C. B. C. and produced in evidence that a significant number of overtime hours are available to operational technicians. These opportunities are by no means all tied to work on mobile assignments. Overtime work is not infrequently available in the studio, especially when technicians are called in to cover

> 8 on their days off, or to work outside regular hours. Having said that, however, the figures suggest mobile assignments are a good source of overtime hours for those who do them regularly, especially where they are out of town. Mobile assignments typically involve set up and break down time, and, if

located out of town, time for travel to and from the remote location. In the course of cross examination by Mr. Duval, Mr. Raine noted that, until recently, there had been no formal system of evaluation by the Corporation of N. A. B. E. T. employees. Communication relating to job performance would take place at an informal level in discussion between the Manager of TV Technical Services and the two Technical Producers.

By way of summary, it is my strong sense that the position of the C. B. C. on job assignments for N. A. B. E. T. technicians is that they are members of specialized groups who have no claim to any equalization of opportunity on scheduling or overtime and who, while encouraged to seek ways of advancing their careers, are subject to the creative imperatives and preferences of producers, especially when it comes to involvement in network assignments.

C. The Individual Complaints Although the complaints in this hearing were joined, they involve several differences in the context and duration of the discrimination alleged and the adverse consequences which the complainants claim they have suffered. It is thus important to set out in some detail the evidence of the three technicians.

1. Gail O'Connell Ms. O'Connell was hired by C. B. C., Calgary in April, 1980. After a short period in air master control, she became a VTR Operator, a Group IV Technician classification.

During 1982 she spent approximately six (6) months in production, during which time she was in the C. U. P. E. bargaining unit. She returned in mid- October of that same year to the position of VTR operator which she has held to this date. She indicated in her evidence that as early as 1981 she had become concerned at the lack of assignments of her to mobile broadcasts. Like her colleagues she consulted the weekly schedules, and found that in contrast there were male technicians who were consistently drawing these assignments. In particular she noted that Don Nesbitt, who had been hired shortly after her

> 9 and was also a VTR operator, was receiving significantly more in the way of assignments than she was. This concerned her, as she had received nothing in the way of negative comment about her work, and was anxious to further her career, in particular to gain experience on new equipment which was being brought in and used in mobile settings. Moreover, she had indicated her interest from time to time in doing mobiles to the Technical Producer for Mobiles. Mr. Ron Petrescue, as well as her frustration at not receiving a reasonable share of them. These were casual encounters, and it was her feeling that Petrescue was giving her the brush off. In her examination in chief her recollection was that she had had no mobile assignments in 1981, two in 1982 and approximately four in 1983. The number increased after the lodging of her complaint with the Human Rights Commission: six in 1984, ten to fifteen in 1985 and yet more in 1986. Even during this latter period she felt that she was still getting less in the way of mobile assignments than Mr. Nesbitt, although by 1985 she was satisfied that there was equality between the assignments allocated to the two of them.

Until 1983 the expression of her concerns had been made to the Technical Producers. She believed that it was well known that she had an interest in

doing work on the mobiles. Her concern that she was being discriminated against was raised formally with the station management through a letter, dated August 12, 1983 from the President of the local chapter of N. A. B. E. T., Mr. Harry Johnson, (Exhibit C- 143) addressed to Mr. Andrew Simon, the Director of T. V. and Mr. Leo Hebert, the Production Manager. The letter stated that Ms. O'Connell and her two colleagues were "not being treated in a fair or equal manner of comparison to the men with similar qualifications under the same technical group classification" Mr. Johnson alleged more specifically

1. There is gross inequality in respect to overtime. 2. They are usually disregarded for assignments to remote/ mobile duties and when they are scheduled, its often to menial tasks.
3. There is very little opportunity for these employees to learn or prove their expertise outside their primary job functions.
4. Career opportunities and advancement are not offered to > 10

women when they have shown an interest, but are offered to men with far less seniority and expertise.

Subsequent to the receipt of this letter by C. B. C. management, Ms. O'Connell recollects attending a meeting late in August, 1983 with the other complainants at which Messrs. Raine and

Johnson and Ms. Bev Kelly, the Human Resources Officer at CBRT, were also present. At that gathering the matter of discrimination against the female technicians was discussed. Her description of the reaction of the C. B. C. management was "that there was nothing wrong .... That's just the way it was". (Transcript, p. 172) Her next step was to file a complaint with the Human Rights Commission early in 1984. During the spring she again raised the question of additional assignments, this time with Marty Raine. That summer she began to receive more assignments.

In examination- in- chief Ms. O'Connell indicated that when she began to go out on mobiles it was her distinct feeling that, as a woman, she was expected by her male co- workers to prove herself. Comments made on those occasions suggested that she would have to learn by herself and should not expect assistance from her colleagues.

2. Mrs. Anne Chirka Mrs. Anne Chirka joined the C. B. C. in 1977 in Winnipeg and until she left for Calgary late in 1979 carried out various duties involving video handling. In 1979 she moved to Calgary with her husband, Larry Chirka, who had secured a position as a technician with the C. B. C. station there. She was hired by CBRT in January, 1980 as a video tape editor, classified as a Group IV Technician. In December 1981 she took twelve months maternity leave. Mrs. Chirka has no complaints about her treatment by the C. B. C. during 1980 and 1981. She received what she believed to be an equitable share of the mobile assignments available to VTR operators. Indeed, it was her recollection that she was receiving as many as a male technician, Mr. Mike Weir, who had approximately four years seniority over her.

While Anne Chirka was on maternity leave her husband, Mr. Larry Chirka, developed concern about his position with C. B. C., Calgary. Like his wife, Mr.

Chirka had been employed by C. B. C., Winnipeg before moving to Calgary. His position had been that of a technician on the T. V. crew at the Group I level. In August 1979 he accepted a transfer to Calgary as a VTR operator. After some time in that function and as a recordist in ENG, he became a

> 11 lighting technician in May 1981. This was a line of work he had done in Winnipeg. He gave evidence that in the spring of 1982 he had become perturbed because another lighting technician, a Mr. Howard Becker, had been hired from outside the C. B. C. system and had been given the range of outside assignments which he had covered previously. He felt that if there was a new position then he should have been given a shot at it. His interpretation of events was that he had been demoted. After initially taking this up with the Technical Producers to no apparent avail, he had a meeting with Mr. Raine in September, 1982. His recollection was that Mr. Raine had responded to his questions about his status by suggesting that the station had merely filled a vacancy "with somebody that they felt was more suited or whatever for that position". (Transcript, p. 109) In the course of the conversation Mr. Chirka indicated that he asked Marty Raine whether his relationship with Anne was viewed as a problem. His recollection was that Mr. Raine stated that he was irritated by the Chirkas cumulative salary, and that "certain members of staff expressed disapproval to the fact that the two of us were working together in the VTR....". (Transcript, p. 110). In Mr. Chirkas opinion his situation had not changed



measurably thereafter until 1986. Since the fall of 1982 his work has been a combination of camera operation and lighting at the Group IV level.

Anne Chirka returned from maternity leave in January, 1983. It was not long before she became disturbed about the fact that she was not being sent on mobile assignments. From her reading of the weekly schedules she determined that a male VTR technician with approximately four years less experience, Mr. Don Nesbitt, was getting significant exposure to this type of work. As a consequence the proportion of overtime earnings to salary had been significantly reduced in comparison with her earlier period of employment. In common with Ms. O'Connell she had not received any adverse comment about her work. Although she had indicated that out of town assignments would present difficulties for her because of her family obligations, she believed that she had made it clear that she was available for mobiles within Calgary. Mrs. Chirka gave evidence that she raised the question of why she was being treated differently since her return from maternity leave during a meeting which she and her husband had with Andrew Simon, the Director of Television in April 1983. The main purpose of that interview was to raise with the Director the scheduling problems which she and her husband were having in balancing their work and family responsibilities. In the context of the discussion of those difficulties she

> 12 had mentioned the lack of outside assignments. According to her recollection of the meeting Mr. Simon had responded by stating that it was not right that a husband and wife should work together in the same department or area, and that they should get marriage counselling as "there was obviously something wrong with us if we both wanted to work together". Transcript, p. 32)

Mrs. Chirka gave evidence that during the summer of 1983 she spent some time training in the Electronic News Gathering Department (ENG). This was in the

context of temporary relief during the summer (June and July) to replace a technician who was on vacation. In cross examination by Ms. McIsaac, Mrs. Chirka indicated that she had raised with Marty Raine the possibility of working a day shift consistently, in order to help resolve scheduling difficulties. She also said in reply to a question from Ms. MacIsaac that she had applied for the position of ENG editor in the fall of 1983, but had subsequently withdrawn her application, because she felt that she would have to make a commitment to work overtime on short notice in that position.

Mrs. Chirka indicated that during the year 1983 she did only a couple of mobile assignments. From January 1983 until the filing of her complaint with the Human Rights Commission on January 6, 1984 she estimated that there were fifty such assignments, fourteen of which were out of town. She gave evidence that in her opinion assignments to the maxi-mobile are desirable because of the opportunity "to learn new things, to get out of the building, to meet technicians and producers, production staff from other areas". (Transcript, p. 23) There is also the opportunity to earn additional overtime. She was distressed about her treatment during 1983 and concluded that she was the victim of discrimination. As a result she filed a complaint with the Commission. She felt that her position had improved significantly, since the filing of the complaint. More desirable assignments had come her way. She had done more ENG work, and in 1985 had taken up a position as ENG editor, a Group VI Technician classification. She admitted in cross examination that her career had definitely taken a turn for the better since early 1984.

3. Ms. Patricia Oxendale Ms. Patricia Oxendale has been initially hired on a temporary basis by CBRT in June 1979 as a Group V Technician. After six months in that position she had transferred to C. B. C., Edmonton where she was given a position as

> 13 a VTR Operator with a Group IV classification. She indicated in her evidence that the position in Edmonton had been challenging as programs were telecasted in both English and French, and the studio was somewhat larger than its counterpart in Calgary. She had enjoyed her time in Edmonton, and had not received anything in the way of negative feedback. In January 1982 she had transferred back to the Calgary station as a Group IV Technician working on Video Control and Character Generation. This position was a studio position which had fallen vacant because her predecessor, Mr. Lloyd Jessup, had been assigned as one of the two technicians on the mini- mobile.

She did not find the working conditions in Calgary on her return particularly compelling. Her evidence in examination in chief revealed that she received negative feedback from both the Technical Manager and Technical Producer. In her words: "I was being told I was constantly bitching, that I was incompetent, and that I didn't have any talent and nobody really liked me and I didn't have any friends" (Transcript, p. 121) She also found that her relationship with her co-workers was unpleasant. She felt that a double standard was being applied to her. She indicated that would, for instance, be watched and if she went to the bathroom it would excite adverse comment. She went on to give other examples.

Q. I see. And any other incidents you can think of? A. Yes. I had co- workers come in and try and give me disciplinary action.

Q. I see. Any name calling? A. Yes there was plenty of name calling. Q. Can you elaborate? A. I was constantly being referred to as, at one time, on a number of times I would walk into the control room and I would hear, get that bitch out of here.

Q. From co- workers? A. From co- workers and also from producers. I had a producer.. > 14

Q. Which producer? A. I had a producer named Robert Groves who used to call through on the intercom and say is that bitch ready, or also joke around and say is that slut ready, because he thought it was humorous. (Transcript, pp. 121- 2)

She indicated that she had complained about this treatment to Ms. Bev Kelly, the Human Resources Officer, to the best of her recollection in April, 1983. The reaction she described as follows: "She told me that if people were calling me names, maybe I should take a good look in the mirror because that's probably, they were calling me names for a reason". (Transcript, p. 123).

In common with her two colleagues she consulted the schedules each week and concluded that she was being effectively shut out from assignments which she considered desirable because they provided an opportunity for career advancement. She noted that Mr. Lloyd Jessup who was also on video control and had roughly the same amount of experience as her was consistently getting such assignments. Like the other two complainants she had indicated that she was

available for mobile assignments and that her wishes in that regard were known. Her only expressed reservation related to assignment to the mini- mobile which she did not particularly enjoy because it was old and unreliable.

Ms. Oxendale became so concerned about her situation that she wrote a letter to Marty Raine dated April 22, 1983. In that communication she alleged an unfair labour practice (Exhibit C-27), noting that once again Mr. Jessop had been assigned to a special broadcast in preference to her. This, she stated had been her experience since returning to Calgary. She also charged that Robert Groves had an animus toward her, although he had never personally expressed dissatisfaction to her about her work. She concluded by noting that she had not received any mobile work since September, 1982 and alleged discrimination and an unfair labour practice. In her evidence she stated that the result of this letter was a meeting with Marty Raine at which it was her recollection that he promised to schedule her for more special assignments and to train her in other areas. When nothing happened, she raised the issue again and communicated her problems to the union. She also took the initiative of phoning the Office of

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15 Equal Opportunities of the C. B. C. in Ottawa and talked to Ms. Helen McVey. It was her feeling that things improved a little after that call. She received some training as an ENG recordist in the mini- mobile, although she would only be sent out as a stand- in for other technicians who called in sick. Ms. Oxendale submitted a second grievance that summer when she was overlooked for a mobile at the rodeo. She also testified about the meeting that the complainants had with C. B. C. management and Harry Johnson, the N. A. B. E. T. president. She characterized it as "a waste of time", because no tangible improvements flowed from it. At a further meeting without the other complainants promises were made to her a second time, but again nothing happened. It was at this point that she lodged a complaint with the Human Rights Commission in December 1983.

In the course of cross- examination by Ms. MacIsaac Ms. Oxendale admitted that she had been hired as a studio technician. In her recollection Mr. Raine who had hired her suggested that she might expect outside assignments after a year. Although she had received special assignments in 1983 on the maxi- mobile, these were either as a fill in or in the role of a T. V. Assistant who basically keeps the cable clear of the camera operator's legs. When asked by Ms. MacIsaac what was the main consequence to her of not receiving desirable assignments, she replied

I feel that I have, I do not have a career. I have a job, but I do not have a career, and if I wanted to apply to another station, right now as my resume looks, I really don't have that much to offer them.

She stressed that where she had been given training it was in the context of tasks which had subsequently become obsolete, because of changing technology, for example that of ENG recordist with the mini- mobile. She reiterated her lack of career development during further questioning by Mr. Duval, suggesting that, because of lack of network experience, she had nothing different on her resume in 1987 than was there in 1982. The impact of this on her, she stated, was that she felt humiliated, left out and began to lose confidence in herself.

D. The Investigation by the Commission. The complaints were the subject of investigation by Mr. Raminder Singh, a Human Rights Officer with the Canadian Human Rights Commission in Edmonton. The C. B. C., having conducted its own investigation, had

> 16 concluded that there was no basis for the charges of discrimination on the ground of sex. Mr. Singh in conducting his investigation found the C. B. C. management in Calgary most cooperative. As a consequence he had been able to interview some twenty four members of the management and staff at the Calgary station. He noted that in particular in his discussions with Mr. Raine he had had a chance to learn about the inner workings of the station and the process of allocation and assignment of work. It was Mr. Singh's recollection that Mr. Raine had mentioned three factors which were considered in setting the assignments for the technical staff at the station. (1) program requirements; (2) the ability and skill of the employees, and (3) employee preference. He gave evidence that his own investigation and discussion with the staff suggested that in fact there was little or no consistency in the process of assigning staff. Producers could reject or accept individual staff, and

individuals were put on or pulled off assignments in some cases without any obvious reference to seniority or experience. There was no formal system of appraisal of performance in effect for these employees, and no consistent pattern of feedback to them. He also found no formal system for considering employee preference, although the Technical Producers had suggested to him that they did try to consider the expressed preferences of technicians.

Mr. Singh testified that he done a survey of relative overtime earnings for eighteen technicians, including the complainants based on the computerized overtime sheets which the station management had made available to him. The first time period examined was from September, 1982 to October, 1983. Based on that study he had concluded that Patricia Oxendale ranked fourteenth out of eighteen, Gail O'Connell sixteenth and Anne Chirka eighteenth, noting that the latter had not worked for the full period surveyed. For the period from, November, 1983 to June 1984, which he had also examined, the relative positions were Gail O'Connell twelfth, Patricia Oxendale sixteenth and Anne Chirka eighteenth. Mr. Singh also made a comparative survey for the same two periods of the relative overtime earnings of the three complainants and those with the same job description. (Exhibits C- 49,50,51) He had compared the overtime earnings of Gail O'Connell and Anne Chirka with those of Mr. Mike Weir and Mr. Don Nesbitt (all VTR operators), and of those of Patricia Oxendale with those of Mr. Lloyd Jessup and two other male technicians with less seniority than Ms. Oxendale. Both Mr. Jessup and Ms. Oxendale were video control technicians. The other two were audio and camera technicians respectively. These records showed that the women earned less, generally

> 17 significantly less, than the men in the way of overtime.

Technician Seniority O/ T, Oct. 62 O/ T, Oct. 83 -Oct. 63 -July 64

Weir 8 \$13,677 \$13,092 Nesbitt 3 \$5,647.5 \$8,616 O'Connell 3 \$2,903.7 \$7,224 Chirka 6 \$1,694 \$4,373

Jessup 4 \$7062 \$8,271 Technician A 2 \$8,624 \$13,088 Technician B 1 -- \$9019 Oxendale 3 \$4,420 \$5,653

During cross examination by Ms. MacIsaac Mr. Singh admitted that in calculating the overtime figures he had not made allowance for the fact that some of the individuals in question would have been paid at different hourly rates because of differences in their seniority. He also indicated that he had learnt from his discussion with C. B. C officials that a significant proportion of overtime earnings came from mobile assignments or priority local programs. In response to further questioning by Ms. MacIsaac he indicated that he assumed that the latter term referred to programs such as "Reach for the Top".

Mr. Singh testified that that he had had a phone conversation, with Mr. Andrew Simon, the Director of T. V. Services at C. B. C., Calgary about his conversation, with Chirkas in April 1983. The latter, to his recollection, indicated that in talking to the couple he had pointed to the difficulties in

scheduling with spouses working in the same unit, and stated that it was his view that employees in that position should not work in the same building.

> 18 In answer to a question from Ms. MacIsaac, Mr. Singh stated that he had concluded from his investigation that there had been no "overt", or indeed "covert", discrimination by CBRT against the three complainants. In elaborating on this latter in response to Mr. Duval he reiterated his statement and added "but I found that there was a result of what was going on there, there was an impact or adverse differentiation on female technicians there". (Transcript, p. 277)

D. The Response of the C. B. C. to the Concern and Complaints Mr. Marty Raine gave evidence on Larry Chirka's assignments. He also recalled his meeting with Mr. Chirka in September 1982 at which the latter had raised his concerns about the hiring and deployment of Mr. Howard Becker as a lighting technician. Mr Chirka, he said, had been offered a lighting position early in 1981 when an existing lighting technician had been promoted. The subsequent hiring of Mr. Becker in 1982 was related to the need to replace another technician who had left the station after a N. A. B. E. T. strike in 1981. It was not a new position, nor senior to that which Larry Chirka already held. In response to Chirkas questions about the assignment of Becker to outside assignments which he had previously handled, Mr. Raine had indicated that this had been done to allow the station to assess Becker during his probationary period. He further testified that in response to Chirkas question about his feelings on the Chirkas working in the same unit, he had said

Well I said it didn't bother me, but I pointed out to him when we discussed it, was the fact that I had had a complaint or was made aware of people within the Technical Department being unhappy with the fact that both Anne and Larry Chirka were working at the station in the same area (Transcript p. 427)

When asked by Ms. MacIsaac to elaborate on this, Mr. Raine explained that the complaints related to a supposed advantage that there was to a couple working consecutive shifts, in that they could arrange to spell each other off, for example towards the end of a shift, and so provide

a break which was not available to the individual employee. In cross examination by Mr. Duval Mr. Raine indicated that the complaints went back to early 1981 during the period when both the Chirkas were working in VTR. He had only been told on one occasion of such complaints, probably by one of the Supervising Technicians. He further indicated that he had not wanted to

> 19 know the originator/ s of the complaints. He had communicated to the Supervising Technicians that he did want to hear any more such complaints and that they should advise the complainers that "its really none of their business". He added

Yes. I did not inquire because I, quite frankly, did not want to know and point fingers at any one individual or any group of individuals. I would hope that it would not come from the Studio group of people, and

I did not want to hear that it came from their own fellow workers within the VTR Master Control area, because I would feel that it would be yen- u unfortunate, so I did not want to know. (Transcript, p. 469)

In response to a further question from Mr. Duval, Mr. Raine said that he did not feel it necessary to communicate with those making the complaints. That was the role of the Supervising Technicians. He had considered it adequate to indicate to them what action should be taken. As he had heard nothing further, he had assumed that the requisite action had been taken.

Mr. Andrew Simon, the former Director of Television Services at C. B. C., Calgary, gave evidence on his meeting with the Chirkas in April 1983 at which they had discussed their problems in working out a satisfactory scheduling arrangement. Mr Simon recollected that he had pointed out that there were sometimes insurmountable difficulties with adjusting the schedules of married couples working in a small department. He denied, however, that he had said that married couples should not work for the Corporation, in the same locale or in the same building. Moreover, he said, he did not recall having made any reference to marriage counselling. What he had suggested was that, in light of the scheduling difficulties identified by the Chirkas, one of them might think of transferring to another department. To his recollection Mrs. Chirka indicated that she was thinking about the possibility of applying for a job in production. Mr. Simon further testified that in response to dissatisfaction which Larry Chirka had expressed with his work situation he had made arrangements through Marty Raine to formalize further training in lighting skills for him. This had, in fact, been done, and it was his sense that Larry Chirka had been very satisfied with that initiative and its results. Marty Raine confirmed this in his evidence, indicating that he had worked out a program of training for Chirka with John Davies, the Technical Producer (Studio).

With respect to Anne Chirka, Mr. Raine testified that her involvement in > 20 ENG work in the summer of 1983 was a consequence of technological changes within the station at that time, involving a switch from film to video recording format for news purposes. It had been thought sensible to cross train VTR people in ENG editing because of common medium of tape. It was felt that this would enhance the technical capacities of individuals who were cross trained, as well as providing better back up services for the station.

With regard to the complaints of the three female technicians Mr. Raine gave evidence that the first indication to him that there was a problem was his receipt of the memorandum of April 22 from Patricia Oxendale alleging unfair labour practices. (Exhibit C- 27) He had discussed the matter with Ms. Oxendale and had undertaken to speak with John Davies to request that she be given more consideration in the allocation of mobile assignments. He testified that he had followed up on this promise, talking to both Davies and Mr. Ron Petrescue, the Technical Producer (Mobile). When Ms. Oxendale had asked him four or five days later what had been done, he reported on the steps he had taken, but told her not to expect immediate results. In response to questions about the circumstances of her hiring in 1982, Mr. Raine stressed that she had been hired for studio work, but added that he had made it clear to her that at sometime in the future she could expect to be assigned to one or other of the mobile units on occasion.

Ms. Bev. Kelly, the former Human Resources Officer at C. B. C, Calgary,

testified that she had first become aware of the problem of the three complainants after the receipt by Marty Raine of the April 22 memorandum from Patricia Oxendale. (Exhibit C- 27). While initially she had had no direct involvement in the matter, she had asked Patricia Oxendale, who she knew was anxious to contact the Equal Opportunities Office in Ottawa, whether she could be of assistance. The two had chatted about the complaint and Patricia Oxendale's concern that, despite promises made to her by Marty Raine in response to the complaint, nothing had happened. Ms. Kelly indicated that she had tried to suggest that she should allow more time to Mr. Raine to follow through with the commitment. In further discussion over Ms. Oxendale's concerns about working conditions and the bad treatment she was accorded by both producers and fellow workers, Ms. Kelly recalled

So, she and I had a conversation about her relationships with the crew and that if she felt that she was not getting along

> 21 well with a crew or other members of the Technical Unit, perhaps she could address those individuals, ask what their expectations of her might be, and try and solve the problem that way. Maybe look inwardly. (Transcript, p. 363)

Ms. Kelly recalled that she did have discussions with Anne Chirka during the spring or early summer of 1983 about the possibility of a transfer to another department because of the scheduling problems, but to her recollection nothing had come of it.

The next point at which Ms. Kelly became involved was when the station management received the letter dated August 12, 1983 from Mr. Harry Johnson, the local N. A. B. E. T. President, alleging discrimination against the three complainants. (Exhibit C- 143). As Marty Raine was on vacation when the letter arrived, Mr. Leo Hebert, the Production Manager at the station, had stepped in and organized separate meetings with each of the three complainants at which both she and Mr. Johnson were in attendance. In her mind these were investigative sessions. Her sense was that all three women were concerned about the lack of remote assignments. While Ms. O'Connell and Mrs. Chirka were worried over loss of overtime, with Ms. Oxendale the major problem seemed to be lack of career opportunities. In response to a question from Mr. Duval, Ms. Kelly indicated that in the meeting with Ms. O'Connell she had given the latter the

impression that it would be inadvisable to take the matter outside the local station. Subsequent to these meetings, she testified, she had conducted a survey of schedules and assignments and relative overtime figures for the previous year and a half. The latter revealed that the three women were amongst the lower overtime earners. However, Ms. Kelly stated, she could find no basis for discrimination. When asked by Ms. MacIsaac to elaborate, Ms. Kelly stated

Well, there was a group of people that had a primary assignment to the mobile. We looked at the shift schedules and assignments to see everybody had been assigned to either their mobile or their regular assignments without deviation for the most part. We also looked at areas where there might have been a possibility to - now that's not saying they were never, the three women were never assigned to mobiles or remotes, from time to time they were. But we also looked at areas where it might have been possible to assign them for career

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22 development outside their normal function for assignment, and there were very few cases that that could have been accomodated. (Transcript, p. 366)

In the course of cross examination by Mr. Duval, Ms. Kelly indicated that where there were disparities in the number of assignments and overtime, especially between Ms. Oxendale and Mr. Jessup, these were explicable in terms of the different experience and career patterns they had had. The lack of remote assignments to Mrs. Chirka in the early part of 1983 she attributed to the fact that she had returned from maternity leave in January, by which time all of the mobile crews for the season had been established.

Subsequently there were meetings with the three complainants in October 1983 at which Mr. Raine, she and Harry Johnson had been present. Mr. Raine advised the three women that he had found no basis for the charge of discrimination, but indicated that he was ready to work on a career development plan for each, and would endeavour to see that they received assignments in areas in which they wished to work. Thereafter Ms. Kelly had nothing to do with the matter until the complaints were lodged with the Human Rights Commission. She confirmed that Anne Chirka had applied for a position in ENG in the fall of 1983 but had withdrawn it because of the requirement to work overtime at short notice.

In Mr. Raine's evidence on the events after his return from vacation in mid- September, he indicated that he had received a full report from both Mr. Hebert and Ms. Kelly on what had transpired and what they had done by way of investigation. After looking at the survey done by Ms. Kelly of assignments and overtime he had concluded that there was no evidence of discrimination against the three female technicians. In reponse to a question from Ms. MacIsaac on this, he stated that the relative figures were a consequence of factors which were beyond the control of the station - differences in job descriptions and the functions of work groups, the demands of the production people, the distinctions in terms of both talent and exposure to network producers and so on.

On the basis of the investigation carried out by the station he wrote a memorandum to Mr. Johnson dated October 20, 1983 (Exhibit R- 18). In that memorandum he explained the steps



taken to look into the complaints. He then set out the conclusions reached by management. First of all he

> 23 stressed that station practice in relation to assignments was "based on program requirements, ability, experience, expertise and skill". In the context of the maxi- mobile unit this was reflected in the maintenance of a "core" crew which was assigned to that facility "to guarantee consistency and to permit on- going attention to knowledgeable routine maintenance of a complex unit". He further noted that assignment to network sports details were decided at the beginning of the season and that the crews selected carried on through that season. Assignment to network mobiles was reserved for "those with the most experience and skill". The mini- mobile also required an established crew, again "chosen on the basis of skill". He added that a standard studio crew was established at the beginning for each season for the station's priority program, "The Calgary Newshour". The letter continued

Our research revealed no evidence of discrimination - specifically no

discrimination on the basis of sex. For example -

A) The employees involved have specific assignments chosen in accordance with the procedures above, not on the basis of sex.

B) The above- mentioned criteria regarding assignments result in some technical employees working more often on remotes and others less often, regardless of their sex.

The memorandum went on to suggest that the research and discussion following Johnsons communication had been useful in revealing the aspirations of other technical employees who "might not have yet expressed particular interests ... in different areas of assignment". It related that the three complainants had been asked about their preferences and aspirations, and suggested that the same courtesy would be extended to other technical staff. Mr. Raine concluded by stating that "[ w] e will continue to assign the employees in the manner described above, and where possible, preferences expressed by the technical staff will be taken into account".

In response to examination by Ms. McIsaac on what he had done to carry out the intent of the letter in relation to the three female technicians, Mr. Raine answered that he had proposed to them giving them an opportunity to extend their horizons. In discussion with them, it appeared that there were

> 24 certain positions and job functions in which they were not interested. In view of that, he said, he had proposed putting together a training plan for the whole Technical Department in order to identify everybody's career aspirations for the future. He justified this general strategy in the following terms

The reason for proposing that was that I, quite frankly, did not want any kind of a backlash by other staff in the station feeling that we were suddenly reacting to the serious concerns. I might add of three individuals only, not taking into account the effect on other staff in instituting any

kind of a solution. So what I wanted to do was to have an overall training program that I could inject them into very quickly which would hopefully satisfy their needs. (Transcript, p. 467)

Mr. Raine went on to note that it had not been easy to move on this proposal because of the opposition of Harry Johnson, the N. A. B. E. T. President. The latter, according to Marty Raine, argued forcefully that the suggested training program was not a solution. Moreover, he told Raine to have no further discussions with the three complainants on this matter. He then threatened, in Mr. Raines words that "if I did, he would call their lawyer and have me sued and that this event was going to be escalated rapidly to another court". (Transcript p. 467)

Notwithstanding these orders, said Mr. Raine, he had, after a "cooling off period", suggested to the two Technical Producers that they "quietly" implement the plan. He added that this had all consumed time, but the necessary steps were ultimately taken.

In the course of cross examination by Mr. Duval Andrew Simon indicated that he had been informed of the complaints of the three female technicians and had been kept abreast of events. He had not as far as he could recall, seen the relative survey of assignments and overtime, although he was aware of the fact that some disparities had been found. He also had a recollection of

hearing about the plans of Marty Raine for career development for the three women.

> 25 E. The Records of Overtime Earnings and the Scheduling of Assignments. In order to determine whether there was differential treatment in this cases it is important to consider what the record has to show in the way of both relative overtime earnings and scheduling of assignments. I have already noted that Mr. Singh in the course of his investigation examined the overtime earnings of the complainants and compared them with those of other technicians. These covered a period running from the fall of 1962 to the summer of 1984. They were calculated from the computer printouts made available to Mr. Singh by the C. B. C management. The comparative figures were related to the relative seniority of the technicians in question. However, they were not related to the actual hourly salary level carried by each. Mr. Duval introduced into evidence various records relating to the annual salaries and overtime earnings for each of the complainants. These included C. B. C statements, T- 4 slips and notes made by them. None of these materials provide a consistent basis nor a long enough time span for comparing satisfactorily the relative positions of the complainants and other technicians with the same classification and job descriptions. Relative figures for overtime earnings related to salary levels for the complainants and the other technicians in their groups prepared by the C. B. C were introduced into evidence by both Ms. MacIsaac on behalf of the Corporation, and by Mr Duval on behalf of the complainants. (Exhibits C- 142, R- 21/22). These cover the years from 1981 to 1984 inclusive, and comprise data collected from a common source, and calculations using a standard system of assessment. They are accordingly a more reliable guide on relative overtime earnings than any of the other figures brought into evidence.

The figures which I set out below require some explanation. The dollar figure for overtime earnings includes all additional salary earned. This includes not only normal scheduled overtime and payment for work on a first day off at 1.5 the normal rate, but also additional overtime and payment for work on second day off (2.0 the normal rate), unscheduled overtime (0.5 the normal

rate) and other sums such as night differential benefits and amounts for temporary upgrading. The figure for overtime hours by contrast relates solely to hours worked at 1.5 the normal rate. This is by far the most significant element in scheduled overtime or work on days off. The figures for the normal hourly salary rate typically change at least once in a calendar year. This explains the low and high figures recorded below in each case.

> 26 Relative O/ T Earnings for VTR Technicians, 1981- 1984 Names Weir Nesbitt O'Connell  
A. Chirka N. A. B. E. T Apr. 30, June 16, April 21, Jan. 5, Seniority 1975 1980 1980 1977

1981- O/ T \$5341.46 \$2587.84 \$1945.98 \$3419.82 Hourly Rate (\$ 9.712- (\$ 7.375- (\$ 7.824- (\$  
8.271-

11.965) 9.638) 10.191) 10.191)

O/ T Hours 243.25 144.75 100.50 190.25 1982- O/ T \$10476.72 \$5945.31 \$2776.22 Maternity  
Hourly Rate (\$ 11.965- (\$ 9.368- (\$ 10.191- Leave

13.365) 11.363) 11.979) O/ T Hours 341.75 248.00 65.50\* 1983-

O/ T \$16035.63 \$8,126.13 \$5760.29 \$4069.85 Hourly Rate \$13.675- (\$ 11.365- (\$ 11.979- (\$  
12.569-

14.495) 12.698) 13.352) 13.352) O/ T Hours 436.46 292.75 208.75 149.50

1984- O/ T \$14363.56 \$8534.09 \$9365.52 \$5511.97 Hourly Rate (\$ 14.495- (\$ 12.698- (\$  
13.352- (\$ 14.495-

15.220) 14.019) 15.220) 15.220) O/ T Hours 396.00 259.25 276.75 145.00

\* This figure reflects the fact that for the period April 5 to October 17, 1982 Ms. O'Connell was working in production and subject to the C. U. P. E. contract. Only the overtime hours worked while she was under the N. A. B. E. T. contract are recorded, although the figure for overtime earnings reflect her total additional earnings for that year.

> 27 Relative O/ T Earnings for Video Control Technicians, 1982- 1984 Names Jessup Oxendale  
N. A. B. E. T April 17, Jan. 7, Seniority 1979 1980

1982 O/ T \$8530.50 \$3262.95\* Hourly Rate (\$ 10.743- (\$ 10.191-

12.569) 11.979) O/ T Hours 293.75 138.50

1983 O/ T \$11503.84 \$5,234.89 Hourly Rate (\$ 12.596- (\$ 11.979-

14.495) 13.352) O/ T Hours 361.75 172.00

1984 O/ T \$6776.08 \$4534.41 Hourly Rate (\$ 14.495- (\$ 13.352-

15.220) 15.220) O/ T Hours 189.25 129.00

\* Ms. Oxendale did not start her full time employment with C. B. C, Calgary until February 8, 1982.

Mr. Duval introduced into evidence the N. A. B. E. T. Technical Schedule, CBRT Calgary, for the majority of weeks during both 1983 and 1984 (Exhibits C- 45 to C- 141). These schedules are issued weekly, approximately two weeks ahead of the week actually in the schedule, and are prepared by the Schedules Clerk in consultation with the two Technical Producers. They include studio and remote assignments. The figures set out below relate to assignment to the maxi-mobile or to other remote locations during 1983 and 1984. From time to time a technician from one C. B. C. station will be assigned to work with the

crew from another. This is especially so in the case of network sports broadcasts. Furthermore, a particular technician may be chosen to participate on an international sporting event, such as

> 28 the Olympics or Universiade. The first figure mentioned for each of the technicians in the table below represents the number of days worked on maximobile or other remote assignment. The figure in brackets represents the number of events covered. As some of the events required staff on location for more then one day, the second number is naturally smaller.

Maxi- Mobile and Other Remote Assignments - VTR Technicians, 1983- 84

Year Weir Nesbitt O'Connell A. Chirka 1983 87 36 11 1

(31) (19) (5) (1) 1984 95 35 27 6

(28) (17) (9) (2) In 1983 there were a total of 34 maxi- mobile or other remote assignments in which VTR technicians were involved. Of those, 23 were network sports events, including 15 N. H. L. games, 2 C. F. L. games (including the Grey Cup), 2 curling events, 2 swimming events, one track end field meet and the Universiade Games in Edmonton. Mr. Weir was involved in all of these, bar two (2). He was the only Calgary VTR technician at the Uniersiade and at the Grey Cup, held that year in Vancouver. Mr. Nesbitt participated in 13 sports assignments; Ms. O'Connell in two (2) and Mrs. Chirka in one (1). The remaining 11 assignments were a mixture of other forms of network programming and a few local remote productions. Included was the World Council of Churches Conference to which both Messrs. Weir and Nesbitt were assigned.

There were 40 maxi- mobile or other remote assignments in 1984. Of those 25 were sports events (22 of which were clearly network productions). These included 11 N. H. L. games, 6 C. F. L. games, 3 rodeos, 2 swimming events, 1 skiing and basket ball event and the Los Angeles Summer Olympics. Mr. Weir participated in 22 of these, including the Olympics, the World Downhill races at Whistler and the Grey Cup in Edmonton. Mr. Nesbitt covered all or part of 10 events; Ms. O'Connell 5, and Mrs. Chirka 2. Again

> 29 the remainder of the assignments were a pot- pourri of events ranging from network programs, such as "Take 30" to a local children's program.

Maxi- Mobile and Other Remote Assignments - Video Control Technicians, 1983- 84

Year Jessup Oxendale 1983 48 6

(18) (5)

1984 49 37 (21) (15)

In 1983 there were 24 remote assignments covered by the two Calgary video control technicians in question. Twelve (12) of these were sporting events (all of them network productions). Mr. Jessup covered all but three (3), including the Grey Cup.

In 1984 the figure for remote assignments covered by the two technicians was 33. Of this number 17 were sporting events (with one exception network productions). Ten (10) of these were covered by Mr. Jessup and 6 by Ms. Oxendale. The latter six events all took place after June 25th of that year. For the 1984 C. F. L. season, Ms. Oxendale seems have become the designated Video Control Technician for games in Calgary.

F. Did the C. B. C. discriminate against the Complainants? 1. The Applicable Law Section 7( b) of the Canadian Human Rights Act describes it as a discriminatory practice ... in the course of employment to differentiate adversely in relation to an employee on a prohibited ground of discrimination". It is a "discriminatory practice", according to section 10, for an employer "to establish or pursue a policy or practice ... that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. There is no definition of the term "discrimination" in the Act. However, both the courts and human rights tribunals have given substance to the term in a series of cases and hearings since the enactment of the legislation. The first point to note is that legislation is to be interpreted in a liberal,

> 30 purposive manner. In the recent, unanimous decision of the Supreme Court of Canada in *Action Travail des Femmes v. Canadian National Railway* (1987), 76 N. R. 161 Dickson C. J. in addressing the issue of interpretation of human rights legislation drew attention to the purpose of the Act by quoting section 2 and in particular principle (a) which reads

[E] very 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 discrimination practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap ...

The Chief Justice went on to assert that the purpose of human rights legislation is "to give rise .... to individual rights of vital importance". Although recognizing that in construing the provisions of such legislation words must be given their plain meaning, he stressed that it is important that "full recognition and effect" be given to the rights in question. He warned against searching "for ways and means to minimize these rights and to enfeeble their proper impact" (p. 182).

Despite earlier decisions to the contrary, the Supreme Court has in two recent cases determined that it is not essential to a finding of

discrimination that there be an intention to discriminate. In *O'Malley v. Simpson Sears Ltd.* [1985] 2 S. C. R. 536 which involved the interpretation of discrimination in the context of the Ontario Human Rights Code, McIntyre J. speaking for the Court recognized that a general employment policy or practice which had an "adverse impact" on a particular employee (in this case because of her religious beliefs) can amount to discrimination, although there was no intent to discriminate against the individual.

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause

> 31 discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community it is discriminatory.

He justified this conclusion in the following terms To ... hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of the complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive may be easy to cloak in the formation of rules which, though imposing equal standards, could create ... injustice and discrimination by the equal treatment of those who are unequal ... Furthermore, ... we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination.

This opinion of McIntyre J. was affirmed in the subsequent decision of the Court in *Bhinder v. Canadian National Railway* [1985] 2 S. C. R. 561. Despite the fact that the Court was split on whether there had been discrimination on the facts of the case, both McIntyre J. for the majority and Dickson C. J. for the minority, concurred in finding that "adverse impact" is sufficient for a finding of discrimination under the Canadian Human Rights Act.

The effect of these decisions is that a practice or rule may be found to be discriminatory, whether it involves what McIntyre J. described in *O'Malley* as "direct discrimination" (a practice or rule which is on the face of it discriminatory) or "adverse impact" (a practice or rule which is on the face of it neutral, applying equally to all employees, but which has a discriminatory effect upon a discriminatory ground on an individual employee or group of employees) (p. 551). The distinction has been described by W. Tarnopolsky and W. Pentney, *Discrimination and the*

> 32 Law (1985) in somewhat different terms as one between discrimination involving evil motive or differential treatment on the one hand and adverse

consequences on the other (p. 4- 29). In O'Malley, in addition to recognizing the concept of "adverse effect", McIntyre J. discussed the relative onus of proof on the parties.

[T] here must be a clearly recognized and clearly- assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well- settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore under the Etobicoke rule as to burden of proof, the showing of a prima facie case of discrimination I see no reason why it should not apply in cases of adverse effect discrimination.

In the case of Ontario Human Rights Commission v. Etobicoke [1982] 1 S. C. R. 202 the Court, per McIntyre J., established that the plaintiff bears the burden of establishing a prima facie case in an action involving discrimination on the face of it (a rule of mandatory retirement at age 60 in a collective agreement). In O'Malley McIntyre J. defined a prima facie case in the context of adverse discrimination as "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent- employer (p. 558). In several recent decisions under the Canadian Human Rights Act tribunals have affirmed that the civil standard of proof, that is, a preponderance of evidence on a balance of probabilities, is applicable (see Balbir Basi v. C. N. R. (C. H. R. T. Decision T. D. 2/ 88, Feb. 16, 1988); Corrigan v. Pacific Western Airlines (C. H. R. T. Decision T. D. 6/ 88, April 29, 1988)). B. Vizkelety in her book Proving Discrimination in Canada (1987) has pointed out that in discrimination cases, where direct evidence is not available, discrimination may be established by inference through an appeal to "circumstantial evidence". She states that "[ t] his latter type of evidence, which may be likened to a jigsaw puzzle, usually depends on a series of facts, each of which by itself would be insufficient to permit an inference but when combined may justify it" (pp. 140- 41).

The fact that there may be an independent, non- discriminatory reason or reasons in addition to one involving a prohibited ground of discrimination

> 33 for treating a complainant differently, discrimination may still be found if the one based on the prohibited ground was a "proximate" cause of the differentiation. Thus in Hendry v. Liquor Control Board of Ontario (1980), 1 C. H. R. R. D/ 160 (Ont. Bd. of Inquiry) Chairman D. A. Soberman found that the fact that the complainant in an employment discrimination case may have been "difficult to work with" did not provide a ground for her dismissal as a part time employee of the defendant, when there was also evidence that she was a diligent worker, was exhibiting traits which might well be considered acceptable in a male, and that her treatment reflected male discomfort with her presence in what had been previously a male preserve.

It is not a valid objection to the characterization of a practice, policy or rule as discriminatory that the defendant is bound to act in that way by a collective agreement. In Re Attorney General for Alberta and Gares (1976), 67 D. L. R. (3d) 635 (Alta S. C. L. D.) McDonald J. was faced with a complaint under the Individual Rights Protection Act by a group of female nursing orderlies that they were being paid less than male orderlies carrying out similar functions and duties. There was no dispute that they were being paid less. McDonald J. rejected the argument of the defendant hospital board that the

differential treatment was justified because it was a result of separate collective agreements with two different unions.

Where a complainant has established a prima facie case of either "direct" or "adverse effect" discrimination the burden shifts to the defendant to justify the discriminatory practice or rule. A series of statutory exceptions to the application of the federal Act in employment contexts are set out in section 14. The most important of these is that contained in s. 14( a), the so- called bona fide occupational requirement. An obvious example is a requirement which may discriminate against a particular individual or group, but which is designed with the safety of workers or the public in mind. In the Etobicoke case McIntyre J. made it clear that the onus to establish a b. f. o. r is on the defendant. In the Bhinder case the b. f. o. r justification was applied on the facts to a complaint of "adverse effect" discrimination.

The other area of justification which has been raised is encapsulated in notion of reasonable accomodation. In the case of the establishment of a prima facie case of adverse impact, there is, as McIntyre J. asserted in

> 34 O'Malley, a concern to protect not only the right of the employee, but also that of the employer, in his words "[ t] he Code was not intended to accord rights to one to the exclusion of rights of the other" (p. 553). The concept, borrowed by the Supreme Court from the United States jurisprudence, which is designed to balance the rights of the parties in cases of discrimination on religious grounds is that of the "duty of the employer to accomodate" the needs of the employee, short of "undue hardship". In cases of "adverse effect" discrimination there is said to be no question of justification raised "because the rule, if rationally connected to the employment needs no justification". The threshold question is whether the practice or rule is one of "business rationality" or "business necessity". If it is, the employer is bound to undertake some measure of accomodation to meet the special needs of the employee who is the victim of the discriminatory practice or rule. He is not, however, required to go beyond what in the circumstances is "reasonable accomodation". He is not bound to jeopardize his own business nor to engage in undue expense in the process of accomodating the employee. If reasonable accomodation does not meet the need of the employee to protect his rights, then he may have to chose between his employment or his religious principles. The "reasonable accomodation" issue was addressed in O'Malley (pp. 552- 560). McIntyre J. made it clear that the matter was for the defendant to raise and to prove.

2. Was there Discrimination against the Complainants? This is a case which does not fall neatly into the jurisprudence on discrimination in employment on grounds of sex. It does not involve a complaint of a policy or practice which is discriminatory on the face of it, i. e. which openly or by necessary implication discriminates. The very fact that the complaint involves three female employees of the C. B. C. is proof that neither the Corporation nor its constituent stations discriminates against women in the sense of denying them access to employment. Moreover, there is no suggestion in this case that the complainants were victims of policies or practices which left them more open to discharge or termination because they were women, or denied them access to promotion. It cannot be said that the case falls easily into the category of adverse impact discrimination. There is no suggestion that the C. B. C. or its Calgary station was applying practices, standards or rules, neutral in themselves, for



instance height or weight requirements, which might operate unfairly against women.

In this case, as I see it, we have a complaint that the three individuals in > 35 question who possessed the necessary experience and skills were denied access in the scheduling process to assignments which they considered desirable in terms of job environment and career development, and as a consequence to the additional financial rewards associated with those assignments, while male employees in the same job category and classification with the same or similar seniority and experience were receiving those assignments and the attendant benefits, even though the complainants made it clear that they were interested in and available for the assignments in question. Does the evidence support the complaints? Have the complainants established a prima facie case of adverse differential treatment in the course of employment or a policy or practice which deprives or tends to deprive them of employment opportunities on the basis of their sex, or (in the case of Mrs. Chirka) on the additional ground of family status?

The Commission argued that the evidence showed clearly a pattern of discrimination. In the first place, in the Commission's view, the overtime differentials set out above demonstrate that the women were adversely treated in comparison with their male peers, especially those with the same or similar seniority and experience. Although Mr. Weir's overtime figures were considered as a member of the VTR control group for purposes of comparison, Mr. Duval was not ready to suggest that he was disentitled to special treatment, given both his longer experience and demonstrated skill. Secondly, the Commission asserted, even though it could be argued that overtime earnings are not necessarily a reflection of a greater or lesser number of mobile or remote assignments, the pattern of mobile and remote assignments during 1983 and 1984 in the schedules analysed earlier put it beyond doubt that the women were the victims of discrimination in job assignments. According to Mr. Duval, the evidence suggested that, despite promises which were made by C. B. C. management at Calgary when the initial complaints were lodged with them, nothing significant had been done to remedy the situation, until the complaints were lodged by the three women with the Human Rights Commission. In this context he made specific reference to the experiences of Ms. Oxendale after she had lodged the written complaint with Mr. Raine in April, 1983, Mr. Raine's admission that he feared a backlash if he moved too quickly to accommodate the women after the union had lodged a complaint on their behalf and the problem which he seemed to have with married couples working with each other. Mr. Duval found it difficult to take seriously the contention of the management of Corporation that its discretion in

> 36 matters of mobile and remote assignments was limited, when it proved to be possible to assign the women to more outside broadcasts, after the complaints to the Human Rights Commission were lodged. Despite the C. B. C.'s contention that there were others more qualified to cover mobile and remote assignments, when the complainants were ultimately given assignments of this type, there seems to have been no question raised about lack of suitability.

When it came to attributing a discriminatory character to this pattern Mr.

Duval suggested that, while the discrimination had been unconscious initially, the result, as Mr. Singh had suggested, of the lack of system in scheduling assignments at C. B. C. Calgary, it later took on the character of "covert discrimination" when management, in the shape of Mr. Raine,

dragged its feet, knowing of the desire of the complainants to do more mobile or remote assignments and that they were available to do so. He further suggested that the C. B. C.'s claim that decisions on mobile assignments reflected the important reality of producer preference was a flimsy attempt to raise a bona fide occupational requirement.

The position of the C. B. C. in this case is that the evidence adduced by the Commission does not support the contention that there was a "pattern of discrimination" against the complainants, but rather demonstrates that both the Commission and the complainants were confused as to the process of scheduling and the basis on which technicians are selected for mobile or remote assignments, especially those emanating from the network. Ms. MacIsaac asserted that no evidence had been led that anyone at C. B. C. Calgary had said or done anything that showed a bias against women generally or the three female technicians in particular. Neither the difference in overtime earnings nor the relative number of mobile or remote assignments in the weekly schedules lent any support to the claim that there had been discrimination. No necessary correlation had been made between overtime differentials and mobile and remote assignments. Ms. MacIsaac noted in particular that in 1984, while Ms. O'Connell had less in the way of exposure to mobile assignments than Mr. Nesbitt, her overtime earnings were larger. Moreover, she suggested that only vague and general evidence had been adduced that mobile and remote assignments are desirable, reflecting no more than the subjective view of the three complainants. The C. B. C. evidence on scheduling showed clearly that it is a complicated process subject to competing demands. Ms. MacIsaac noted the importance attached to the input of producers in selecting crews for

> 37 mobile assignments, their desire to work with technicians of proven experience and capability and the fact that crews for certain network sports programs are set before each season starts. She went on to assert that the Corporation is under no obligation to provide exposure to mobile assignments to its technical staff, nor could it be said that anyone in that group, male or female, has a right to overtime. In that context Ms. MacIsaac referred to the difference between the C. U. P. E. and N. A. B. E. T. agreements on the issue of equality of opportunity to overtime. Under the N. A. B. E. T. agreement employee preference is not a factor in the determination of overtime assignments. She expressed some puzzlement at Mr. Duval's contention that the discrimination had initially been unconscious. Her interpretation of what he was arguing for was a form of "unconscious overt" discrimination. She also stressed that she had not introduced any evidence to support a b. f. o. r. On the contrary her objective had been to demonstrate that there was no discrimination at all in this case.

In dealing with the suggestion that there had been adverse effect, Ms. MacIsaac suggested that, if the complainants had received less in the way of exposure to out-of-studio work, there were reasonable explanations. In the case of Mrs. Chirka, she had been treated in her own words fairly before going on maternity leave. She had returned to work in 1983 half way through an N. H. L. season when the crews had long since been established. She had also expressed a preference for a regular schedule with assignments in Calgary. Moreover, she had spent a month that year training in the Electronic News Gathering unit, which precluded assignment to outside or studio broadcasts.

Ms. MacIsaac noted that in her evidence Mrs. Chirka had expressed satisfaction with her situation in 1984 and thereafter. On the allegation of discrimination on the ground of family status, she noted Mr. Simon had denied that he had suggested that the Chirka's married status was a problem. There was no evidence that their assignment load or careers had been adversely affected. Indeed, the evidence was that Mr. Simon had asked Mr. Raine to develop a training program for Larry Chirka. The latter's contention that he had been demoted with the hiring of Mr. Becker was, in Ms. MacIsaac's view, unsupported allegation.

With Ms. O'Connell who had alleged that she had been a victim of discrimination as early as 1981, the difference in number of hours with Mr. Nesbitt in that year was insignificant, amounting to forty four (44)

> 38 hours for the year. In 1982 comparisons were not possible because Ms. O'Connell had on her own motion moved into production for six months. For the 1983 year the difference in overtime hours between her and Mr. Nesbitt was explained by his assignment to the N. H. L. hockey crew during the late winter and early spring of that year, an assignment set before Ms. O'Connell had returned to VTR work. During 1984 she had earned more in overtime than Mr. Nesbitt.

Patricia Oxendale, Ms. MacIsaac noted, had been specifically hired for video work in the studio to replace Mr. Jessup who had been, assigned as a member of the two person team working the mini- mobile unit. She also pointed out that the latter was on occasion attached to the maxi- mobile for remote broadcasts. Another video control operator with more experience than Ms. Oxendale, a Mr. Ryans, was the regular video operator on the maxi- mobile. Ms. MacIsaac asserted that there was nothing mysterious or sinister about the overtime differential between Ms. Oxendale and Mr. Jessup. A similar disparity had been the case, before Ms. Oxendale transferred from the Edmonton station, when a Mr. Trudel had operated the video facilities on the mini- mobile, and Mr. Jessup had been assigned to studio duties. Figures which were introduced into evidence (Exhibit R- 19) showed a pattern between 1979 and 1981 in which Mr. Jessup had earned less in overtime earnings than Mr. Trudel. Ms. MacIsaac noted that Ms. Oxendale had indicated her preference not to be assigned to the mini- mobile, on which many of Mr. Jessup's overtime hours must have been worked. Moreover, the evidence was that Ms. Oxendale had a difficult personality which had presented difficulty with one producer in the Calgary station, Mr. Groves, and with her co- workers. She also pointed out that, while Oxendale and Jessup had joined the C. B. C. at about the same time, Mr. Jessup had instructed for the three years at a community college in the field of T. V. technical work.

In conclusion Ms. MacIsaac argued, no case of discrimination on the basis of sex had been made out by the Commission. There were perfectly rational explanations for what Mr. Duval saw as illegitimate differentiation. The C. B. C had not argued that the three complainants were less qualified or skilled than the men with whom they had been compared. Indeed, when the concerns of the women to gain more exposure in mobile or remote assignments had been made known, the Corporation had responded positively. Any delay was not a product of a desire to stall, but to deal with the issue in a way which would not strain morale generally.

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39 The evidence adduced by the Commission shows, in my opinion, that the three complainants were treated differently from the male technicians who had the same classification and job description as them during the two years 1983 and 1984 (in particular as compared with Messrs. Nesbitt and Jessup). In the case of Ms. O'Connell she suffered in comparison with Mr. Nesbitt in terms of overtime earnings in 1983, although not in 1984. In both years, but especially in 1983, she received less in the way of mobiles or remotes than he did. Mrs. Chirka's overtime hours and earnings were significantly lower than those of Mr. Nesbitt for both years. Moreover, she lagged far behind him during that two year period in terms of mobile or remote assignments. In Ms. Oxendale's case she compared very unfavourably with Mr. Jessup during 1983 and 1984 in terms of both overtime earnings and outside broadcast assignments. Particularly when the differences in overtime figures and number of assignments are correlated the picture is one of apparent adverse treatment.

In her argument Ms. MacIsaac suggested that the main complaint of the three women technicians was that their overtime earnings were too low, the implication being that their motivation was primarily mercenary. My reading of the evidence is somewhat different. Each of the women testified to their interest in enriching their working circumstances and pattern, of career development, and the challenge to their skills, access to network personnel and producers and opportunity to work on different types of equipment which mobile or remote assignments presented. While Ms. Oxendale was particularly assertive on this matter (a point noted in the evidence of Ms. Bev Kelly, the Human Resources Officer), all three were, in my opinion, at least as interested in job satisfaction as they were in the financial rewards. It is worth noting in this regard that Ms. O'Connell who began to make as much, if not more, in overtime than Don Nesbitt in 1984, nevertheless complained that during that year and 1985 she continued to lag behind him in mobile and remote assignments. Moreover, Mrs. Chirkas evidence suggests that, although she has continued to earn less in overtime since 1983 than her colleagues, male and female, new career opportunities which opened up during 1984 in ENG and led to reclassification in 1985 have more than compensated for any shortfall.

I have concluded that the only years in which it is possible to discern anything which can be described as a pattern of differentiation are 1983 and 1984. Mr. Duval and Ms. Savard for the Commission endeavoured to

> 40 argue that the duration of the discrimination was more protracted in the cases of both Ms. O'Connell, beginning as early as 1981, and of Ms. Oxendale, extending into 1985 and 1986. It is impossible to make valid comparisons for those longer periods, because there is no consistent or satisfactory basis to make a relative assessment. For 1981 comparative overtime figures were put into evidence for both Ms. O'Connell and Mr. Nesbitt, but no details were given on the relative pattern of outside assignments. Mr. Duval introduced overtime figures for Mr. Jessup from C. B. C. sources (Exhibit C- 52) of gross overtime earnings for 1985 and 1986. The comparative figures for Ms. Oxendale which Mr. Duval introduced were not from C. B. C. figures, but calculations which she had done, adding up her pay slips and subtracting what appeared as income on her T- 4 slips (Exhibit C- 47). The overtime figures for the years prior to 1985 from this source do not jibe with those in the C. B. C. documents. Furthermore, there was again no data presented on the relative

number and nature of the mobile or remote assignments which Jessup and Oxendale received in 1985- 1986 period.

The fact that there is the appearance of differential treatment in these two sources of evidence does not necessarily mean that there was discrimination against the complainants. There may have been valid reasons why there were differences in overtime earnings and desirable assignments between them and fellow workers. In any event the differentiation must be related to a prohibited ground of discrimination, in this case sex. As I have already noted, Ms. MacIsaac argued that overtime differentials and different patterns of assignment to outside broadcasting could not be characterized in any objective way as discriminatory. By themselves they were neutral, and only took on a discriminatory character at a purely subjective level. She made the point that mobile and remote assignments were only "desirable" because the complainants characterized them as such. She also argued vigorously that, given the creative character of television production and the dominant role of producers within, that process, a reality recognized in the N. A. B. E. T./ C. B. C. collective agreement, it is perfectly understandable that there would be differences in the exposure which individual technicians, male or female could expect to outside broadcasting opportunities. What counts in this context, so the argument goes, are the desires and imperatives of the producer who must have creative freedom, and the chance that a technician will get a network assignment which will bring him or her to the favourable attention of a producer who is ready to use that individual again and so create the

> 41 experience base for future assignments. If there is differentiation, it flows necessarily from the system and applies equally to male, as it does to female technicians.

There is no question that the type of evidence examined above has to be viewed in context. The simple differentiation between individuals in terms of overtime worked and earned and in job assignments cannot in every case be considered as raising a prima facie case of discrimination, even where they have the same job description and similar seniority and experience. There may be differences in the level of skill, in attitude, in initiative, in inclination, in availability and in flexibility which may justify the use of some employees rather than others. Moreover, these distinctions are likely to play a more significant role, the more creative the enterprise involved. However, the fact that there are justifiable reasons for differentiation should not be allowed to deflect attention from the co- existence of less valid reasons for distinguishing between employees.

I find it difficult to agree with Ms. MacIsaac that there is doubt about the desirability of mobile or remote assignments within the C. B. C. system, in particular those which are network produced. The evidence of Mr. Kimber, the Executive Producer of Sportsworld, convinced me that for some technical employees this is highly coveted work. For those who are successful in breaking into it, it provides significant additional stimulation, kudos and job satisfaction. Indeed, if there was any doubt in the minds of the complainants about whether this type of exposure is advantageous professionally it was surely resolved by the presence at CBRT, Calgary of Mr. Mike Weir. He had achieved a reputation for excellence in video work which had translated into a career which took him to the most prestigious national and international sporting and public events. It is presumably true that some technicians within the C. B. C., whose priorities lie elsewhere, might not

consider this pattern of work compelling. However, the evidence suggests that by and large the experience acquired in mobile and remote broadcasting was and is considered desirable for professional growth, as well as for the greater interest and financial rewards which it brings.

The argument that in a creative environment such as television production it is essential and inevitable that selection for particular assignments will reflect only producer discretion and proven experience is a compelling one, blending, as it does, notions of creative or artistic freedom and the

> 42 demands of a meritocracy. Indeed, it would be difficult to argue against the legitimacy of these elements of consideration and reference in any context in which the application of skill relates to an undertaking to work under the direction or in the interests of another person who "calls the shots" and especially one which involves a collaborative effort in which the members of a group work closely together. That those elements are important, indeed dominant, does not mean that other factors are irrelevant, especially in the case of a public corporation which is obliged by human rights legislation in particular to pay serious attention to employment equity and to refrain from discriminatory employment practices. The complaint in this case, as I have suggested earlier, is not that the three female technicians were entitled to strict equality of treatment in terms of job assignments, a claim which it would be difficult to sustain in the face of a bona fide judgement based on job performance that they were not as able or skillful as their colleagues, but that they were not given equality of opportunity in proving themselves and so were denied the possibility of enriching and furthering their careers. I have concluded that, taking all the evidence into account, the complainants have successfully made out a case that they were the victims of adverse differentiation and of a policy or practice which deprived or tended to deprive them of an employment opportunity on grounds of sex.

This is not a case where three people hoping for a break, who merely waited around for something to happen. The uncontradicted evidence of two of the three complainants is that they advised either the Technical Producers who were their immediate superiors at the management level, or the senior management of their desire to be included in mobile or remote assignments. Ms. O'Connell testified that she had specifically raised the matter with Ron Petrescue, the Mobile Producer, on numerous occasions, starting as early as 1981, and informed him of her frustration at being constantly over-looked. Patricia Oxendale indicated she had made it clear to Mr. Raine during and after April 1983, that she was anxious to get experience in outside broadcasting. Anne Chirka in response to a question from Mr. Duval indicated that she had not made specific requests after her return from maternity leave, because she had assumed that she would be treated as she had been before she went on leave. However, she did indicate that she had mentioned the matter to Andrew Simon in the interview which she and her husband had with him in April, 1983. Ms. O'Connell and Ms. Oxendale further testified that their expressions of interest had been largely ignored. Gail O'Connell indicated in her evidence

> 43 that when she raised the issue with Ron Petrescue she felt that he was giving her the brush off. Patricia Oxendale testified that the only response of

management was to allow her to fill in on mobile work, when someone else was sick, and to assign her to train on outdated equipment, in particular the the mini- mobile. She related her

increasing bitterness at being passed over for special broadcasts, a feeling which led her to lodge a complaint of unfair labour practice in April 1983. Anne Chirka gave evidence of her disappointment at being passed over for mobile assignments and of sensing that there were certain "feelings in the air" about her coming back to work which she felt translated into an inclination not to give her extra assignments whether in the studio or cut on mobiles.

Aside from the criticism of Ms. Oxendale for her attitude and personality, which, as she recollected it, came from both the Technical Manager and Technical Producer, there was no suggestion that the complainants were incapable of performing either their regular jobs or remote assignments. This added to their puzzlement and disappointment at being overlooked for special assignments. The position of the C. B. C. is that there is a straightforward, rational explanation for the complainants not being included on a regular basis in mobile or remote broadcasts. Ms. O'Connell and Mrs. Chirka had only recently returned to the ranks of the VTR group, and Ms. Oxendale had been hired for studio work. That might be convincing, were it not for the fact that the schedules suggest that there were opportunities to test their talents early in 1983 and that there was no serious attempt to incorporate the women (in particular Gail O'Connell and Patricia Oxendale) into mobile and remote assignments in a systematic way until the summer of 1984.

From January to May 1983 none of the three women were assigned to any mobile or remote work, even though there were both single sports events, including two different curling championships, a swim meet, skiing, and non-sporting events, including a supervariety show, a locally produced music show, a French network program on the Rockies and a symphony broadcast in which their talents might have been used. For the first four and a half months of 1983 the male technicians in the shape of Messrs. Weir, Nesbitt and Jessup had a monopoly on all the work on outside broadcasts. From May onwards the situation improved only marginally, even though by now the C. B. C. management at Calgary was aware of Ms. Oxendale's displeasure with her exclusion from such programming. In the

> 44 second week in May Ms. O'Connell was assigned to cover the network religious program Meeting Place in Medicine Hat. The reason for this seems clear. Mr. Weir and Nesbitt were tied up covering an N. H. L. playoff game in Edmonton. In June Ms. Oxendale received her first mobile assignment since September, 1982 when she was assigned as a substitute to replace Mr. Ryans, the senior video control technician, on a track and field broadcast. Mr. Jessup was on annual leave at the time, and, according to the evidence of Ms. Oxendale, some juggling of staff had taken place because another technician had gone to Ottawa to cover the Conservative Convention.

Despite the fact that the grievances of the three complaints were lodged by Harry Johnson with the C. B. C. management in August 1983, there were no further mobile assignments of the three women until October. In that month in the same week (Oct. 10- 16) Anne Chirka was assigned to a mobile for the first time that year, to cover an N. H. L. game, and Pat Oxendale to cover a C. F. L. game. The inclusion of both is explained by the fact that the station had to cover both an N. H. L. and a C. F. L. game in quick succession. Both Anne Chirka and Don Nesbitt had days off during that period and the assignments seem to have been split between them. Both Lloyd Jessup and Patricia Oxendale had a

day off on the date of the C. F. L. game, but Jessup had covered the N. H. L. game the day before. Pat Oxendale was added after the schedule had been posted. The following week (Oct. 17- 23) Gail O'Connell was listed as covering a Meeting Place program. The whereabouts of Messrs Weir and Nesbitt at that time were not recorded. In the first week in November Ms. O'Connell was assigned to an N. H. L. game in Calgary. Originally down to work on VTR, she actually performed as a T. V. Assistant. Mike Weir was on VTR at the game and Don Nesbitt was spending a week in the ENG Unit as editor. Patricia Oxendale was assigned the same week to a C. F. L. game at which she performed as a T. V. Assistant. During the week of November 26 to December 4 Ms. Oxendale covered a Fench Service variety show. This was the same week that Mr. Jessup returned from the Grey Cup in Vancouver, and also coincided with one of his days off. The following week Gail O'Connell went as the VTR technician to the ski jumping at Thunder Bay, this time as a substitute for Anne Chirka. Mike Weir was on extra days off, and Don Nesbitt was acting as a recordist in the ENG Unit. This was the first mobile event of the year in which it looks as if one of the two female VTR Technicians was given the right of first refusal on a mobile assignment.

The pattern of assignments for mobile or remote broadcasts in 1983 > 45 suggests to me that the expressed interest of the three complainants in that type of work was basically falling on deaf ears. There seems to have been no serious attempt to accomodate that interest and to test the skill of the women in a mobile context in anything but a perfunctory and grudging way. They were merely being used as fill- ins when male technicians were for one reason or another not available; this despite the fact that mobile assignments are a recognized feature of technical work in a station like Calgary, that the C. B. C. evidence was to the effect that any one or more of the VTR operators could have been used on mobiles and that Ms. Oxendale who had been assigned to studio work had been advised by Mr. Raine that she could in time expect mobile exposure. It seems to me that a reasonable person in the shoes of the three female technicians might well conclude, in the light of the apparent indifference of management at various levels, that she was the victim of discrimination.

The pattern in 1984 is better for the three women, but not significantly so. It will be remembered that the complaints with the Human Rights Commission were lodged in December, 1983 and January, 1984. For the first three months of the new year, with the exception of a local mobile production, the University of Calgary Basketball Classic early in January, which was covered by Gail O'Connell, neither she nor Anne Chirka received any mobile or remote assignments. Mike Weir and Don Nesbitt covered all the assignments which included a variety show, religious broadcaste, a children's program and diving championships, as well as the ubiquitous N. H. L. games. Patricia Oxendale had three maxi- mobile assignments, which included two locally produced childrens shows and a local variety show. In each case Lloyd Jessup was on a day off. During April Anne Chirka was assigned to cover both an N. H. L. game and Canada Cup Swimming during the week of April 2 to 8. The presence of those two sporting events in one week seems to have required the presence of three of the four VTR technicians in the maxi-mobile. During that some month Patricia Oxendale was assigned to Switchback, the local childrens' show, twice and to the network's "Meeting Place". In the case of the two local shows Lloyd Jessup was either working on camera or on his day off. For "Meeting Place" Ms. Oxendale was switched with Mr. Ryans, the senior video control technician.



From April through to the end of the year Mrs. Chirka received no further mobile or remote assignments. Although it is not clear from the schedule why, it may have been that her greater involvement in ENG work explains this. In her evidence in chief, it will be remembered, she expressed herself

> 46 as generally satisfied with her position in 1984. Ms. O'Connell was relatively busy during June and July of 1984 working on two rodeos and the Stampede, with either Mike Weir or Don Nesbitt. In July and August, while Mr. Weir was at the Los Angeles Olympics, Gail O'Connell covered two C. F. L. games. In the first of these she was substituting for Don Nesbitt. For the remainder of the year she had two further mobile assignments, one for a "Reach for the Top" program and the other unspecified. The other mobiles, both sporting and non-sporting, were covered by Mike Weir and Don Nesbitt. Between early May and late July Patricia Oxendale had one mobile assignment, a C. F. L. game at Edmonton late in June. She was added after the posting of the schedule to work with Mr. Ryans. Lloyd Jessup was on annual leave at the time. During the week of July 23 to 29, Ms. Oxendale was overlooked for a C. F. L. game in Calgary. This produced the incident to which Mr. Duval drew attention in his cross examination of Mr. Raine in which Ms. Oxendale "yelled" at him about the unfair treatment accorded to her. The yelling seems to have had some effect, as she was substituted for Mr. Jessup at that game and was involved as a video control technician in the C. F. L. games from Calgary for the rest of the 1984 season.

In 1984 then, there was an improvement in exposure, although little evidence of a voluntary change of heart on the part of management. The pattern for the women (especially Ms. O'Connell and Ms. Oxendale) continued in the main to be one of substituting for male technicians. It was only when Patricia Oxendale protested in a dramatic manner that the management demonstrated more resolute action to respond directly to the concerns of the women. This incident, it should be noted, was at least eighteen months after Ms. O'Connell had begun making her concerns known to the technical producers, some fifteen months after Ms. Oxendale had lodged an unfair labour practice with the C. B. C. management at Calgary, close to a year after Mr. Johnson's letter of grievance on behalf of the three complainants, and six months or so after their complaint to the Canadian Human Rights Commission. Given the range of mobile assignments and these time spans the argument that everything can be explained in terms of crews established for the 1982 to 1983 hockey season loses its cogency.

The second argument of the C. B. C. is more substantial. It that, if these women were victims of adverse differentiation, it was not because they were women. Given the importance of producer discretion and the desire of

> 47 producers both local and network to work with proven crews, some technicians, male and female, will not have, or only very limited, access to mobile or remote productions. It is my opinion that these criteria were overplayed in the C. B. C. evidence. I do not deny that producers feel that they must have a significant degree of control over technical staff. Indeed that is formally recognized in the agreement with the Canadian Television Producers and Directors Association (Exhibit R- 7). However, I have strong doubts as to

whether the system is as inflexible and precedent bound as the C. B. C. witnesses averred. It is clear from the oral evidence and documentation that substitutions are made, and that, if circumstances demand it, accommodations can be made to include those who want this type of exposure. Mr. Raine in his evidence indicated that he had been concerned to press for the inclusion of more Calgary technical staff on network productions. Moreover, as Mr. Duval pointed out, the Technical Manager seems to have been able to make adjustments to respond to Ms. Oxendale's concerns in the summer of 1984. Furthermore, common sense would seem to militate against a system which provides no incentives for self-improvement, and denies the system an opportunity to look at new talent. Taking the C. B. C. argument to its logical conclusion, if the complement of a crew working on mobiles remained stable over a period of years, then no one else, however good, would have access to such work. It has to be borne in mind, too, that creative discretion is subject to the Corporation's obligations under the Canadian Human Rights Act not to discriminate. The argument of creative discretion cannot justify a pattern of conduct which results in an individual or group being excluded from serious consideration for an employment opportunity on a prohibited ground of discrimination.

In the light of the tardiness of the management at CBRT to respond to the concern of the complainants and the implausibility of the argument based on the substantial rigidity of the system for selecting technical crews, the question remains what was the problem in responding to the request of the women to be given a chance to prove themselves on mobile or remote assignments. As is common in these cases there is little or nothing in the way of direct evidence of open discrimination against the complainants. However, the circumstantial evidence suggests that they were the victims of adverse differentiation and of a policy or practice depriving or tending to deprive them of employment opportunities because they were women. To my mind the problem lay in the failure of the C. B. C. management at Calgary to respond forthrightly to the reality that for the first time they had a

> 48 small group of women employees in a specialized technical area who saw what they were doing as a career and were eager to advance those careers. Ms. MacIsaac noted that before Anne Chirka went on maternity leave she was working regularly on mobile assignments and felt satisfied that she was treated equitably. This, she suggested, deflated any argument that the station discriminated against women. It will be noted that during that period Mrs. Chirka had established herself before either Don Nesbitt or Gail O'Connell had joined the station. Moreover, she was some three years senior to them. I sense that the ability and willingness of the Station management to accommodate one female employee in video work did not extend to the later reality of three women in that line of work.

Mr. Raine in his evidence struck me as a person unwilling to "rock the boat". In common with many other organizations the C. B. C. station at Calgary depends on a management strategy in which a significant degree of autonomy is given to line managers, i. e. the producers, subject of course to the general constraints of Corporation and station policy, and the more specific constraints of collective agreements. General managers, such as Mr. Raine, and executive managers, such as Mr. Simon, do not involve themselves directly in the day to day operation of the production work, and will generally only intervene when a difficulty or dispute arises which requires resolution. In a system like this the ability of senior management to anticipate and to respond effectively to human resources problems depends upon the sensitivity

of the managerial antennae, emphasis on the need for communication from below and the willingness to deal firmly and fairly with sources of grievance, whether actual or incipient. Mr. Raine in his evidence gave the very distinct impression that his preference was to leave these matters to the producers and senior technicians and to hope that they could be resolved without any intervention by him. This was the case, even though there were problems which suggested that all was not well at certain points in time on the "studio floor". In Mr. Raine's own evidence he indicated that, when grumbling developed among the technicians about the alleged advantages to the Chirkas of working together during 1981, he had left the matter to the line supervisors, adding that he "did not want to know the originators of the complaints". Patricia Oxendale testified to the problems which she experienced in working with one producer and her colleagues in the technical staff and her feeling that a "double standard" seemed to be in operation in assessing her on-the-job performance. Surprisingly, in view of the soured character of relations which this evidence suggests, there seems to have been no

> 49 intervention by senior management to investigate and resolve this situation. Gail O'Connell gave evidence that her experience in working the occasional mobile broadcast was that she was expected by her male colleagues to prove herself and could not expect any help from them.

Patricia Oxendale also gave evidence of her disappointment at Mr. Raine's marginal response to her complaint of an unfair labour practice, disappointment which in light of the data in the schedules examined was justified. When the complaint was laid on behalf of the women by Harry Johnson in August of 1983, we have the indecisive image of Mr. Raine, knowing that the the three complainants were low in overtime earnings and largely excluded from mobile assignments, denying the charge of discrimination, but undertaking to respond to their complaints, albeit as part of a general program to solicit the wishes of technical employees on career development. He asserted in his evidence that the strategy of designing a general program of career opportunity for all technical staff was he "did not want any kind of backlash by other staff at the station feeling that we were reacting suddenly to the serious concerns ..... of three individuals only, not taking into account the effect on other staff in instituting any kind of solution". Even this strategy, he argued, had been problematic because of the threatening attitude of Harry Johnson.

It is, I believe, in the evidence relating to an apprehended backlash that there lies the nub of the problem for the complainants in this case. The management at CBRT and in particular Mr. Raine, while not necessarily adverse to the concerns of the women with what they justifiably felt to be their adverse position did not feel able or inclined to respond seriously to those concerns. What the reasons were for this reticence must necessarily be somewhat speculative. However, it is, I believe, a permissible inference from the evidence that part of the problem was a fear that resolute action in support of the women would offend some at least of their male colleagues. While it is not an entirely satisfactory guide because it only shows who was in employment with CBRT at a particular point in time the "List of All Technical Staff" introduced into evidence by the Commission (Exhibit C- 53) indicates that the world of technical services at CBRT in 1985 was predominantly male. There is the evidence of both Ms. O'Connell and Ms. Oxendale that they both ran into instances of male concern at or even hostility towards their presence in certain working contexts. The C. B. C. 's

position is that in Ms. Oxendale's case this was a problem associated with her personality. I have difficulty with that

> 50 contention in light of the fact that her record at the Edmonton station was good, and that, despite her "personality", she has continued to be employed and to do satisfactory work at the station in Calgary. From listening to her evidence I have the impression that she is a person who believes strongly in the right of women to be given the opportunity to develop their skills in what they chose to do and is not afraid to say what she thinks. This may of course have been taken as aggressiveness and may have annoyed her male colleagues. However, as Chaiman Soberman noted in the case of *Hendry v. Liquor Control Board of Ontario* (1980), 1 C. H. R. R. D/ 160 (Ont. Bd. of Inquiry) the fact that a woman is viewed as "aggressive and bossy" is no justification for discriminating against her in employment, if she is otherwise performing her job well. Moreover, as Professor Soberman was willing to recognize, when the point was raised by counsel for the OHRC and the complainant, these traits which may arouse consternation when associated with a female, may be perfectly acceptable in a male employee.

For whatever reason, the C. B. C. management at Calgary seem to have had it in mind that there was antipathy by some male employees at the station to the entry of these women to tasks and roles already handled by men. The result was that they proved insensitive to the legitimate aspirations of the complainants to be given a chance to enrich their experience in a facet of the work of a video technician which was not special or unique, but a regular part of the pattern of work at the station at which they were employed. Initially, the technical producers ignored them. Subsequently, when senior management became clearly apprised of their concerns, merely token attempts were made to accomodate them. Neither the criteria of producer preference or experience, nor the character of the N. A. B. E. T./ C. B. C. agreement justified this insensitive treatment. Nor should an aggrieved employee in this context have had to resort, as did Patricia Oxendale, to dramatic expedients to force a change in the attitude of management. As subsequent events have shown, it has proved possible for the C. B. C. to go some distance in accomodating the wishes and preferences of these women, which suggests that, with the right sense of resolve and commitment, similar steps could been taken much earlier. The meaning of employment equality in our society has been put most eloquently by Judge Abella in her Royal Commission Report, *Equality in Employment* (1984) (pgs. 2- 3)

> 51 Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination.

..... Equality in employment is not a concept that produces the same results

for everyone. It is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential.

This conception of employment equality does not mean merely refraining from policies or practices which involve positive conduct that is discriminatory. It clearly extends to omissions, and, as in this case, to the failure to create the conditions in which employment equality is possible because traditional sentiment is allowed to get in the way of job opportunity for women. An employer has a very real obligation to establish an environment in which the legitimate aspirations of women to share equally in the full range of employment opportunities in their line of work are realized. In the present context this means that management has to recognize that women employees do have a right to be seriously considered for particular job assignments, along with male employees, where their seniority and experience is greater than or equivalent to that of the men. The term "serious consideration" necessarily includes an opportunity to prove themselves on the job over a reasonable period of time, and in a reasonable range of different assignment contexts. Only when that has been done does, it seem to me, can management honestly say that it has made a serious attempt to determine relative merit. If, on the basis of testing, male and female employees demonstrate equal ability and willingness to work, then the employer should take steps to accommodate both or all of them. The inevitable implication for the C. B. C. is that the exercise of discretion by producers will be qualified in the sense that they will have to test more people, and may have to accept a larger pool from

> 52 which to draw their crews. However, their ability to evaluate fairly those who are desirous of doing the type of work in question will not be compromised (indeed, it will be enhanced), nor will they be precluded from exercising a preference for those who through a combination of clear seniority, experience and good performance have proven themselves.

In conclusion then I find that the complainants have established a pattern of discrimination against them under sections 7(b) and 10 on the ground of sex.

It will be remembered that Anne Chirka cited family status as an additional ground of discrimination in her case. I have been able to find no clear evidence to support that ground of complaint. Both the Chirkas obviously felt that their presence at the same C. B. C. station had created a negative attitude towards them on the part of both fellow workers and management. Although one wonders at the reasons for Mr. Raine raising an old complaint from co-workers in his meeting with Larry Chirka in September, 1982, a complaint which related to a period when both spouses were working in VTR and to which he, Raine, has apparently reacted unfavourably, the evidence is insufficient to establish that either or both were adversely treated because of their married state. I accept Mr. Simon's evidence that in the meeting between him and the Chirkas in April, 1983 his concern had been simply to point out the difficulty of making scheduling concessions where married couples are working in a small unit and that he had not expressed opposition to them working in the same station, nor suggested that the Chirkas needed marriage counselling. I am inclined to believe that the Chirkas who were facing a tough situation dealing with their family situation read too much into what Andrew Simon was saying. Moreover, despite Larry Chirka's rather pessimistic view of his position, I am satisfied that the CBRT management did take genuine steps to assist him in developing his skills in lighting. I have

found that Anne Chirka was the victim of discrimination on the basis of sex for the reasons stated above. I find no obvious basis for finding that the C. B. C discriminated against her on the ground of family status.

6. The Remedies The remedy that the Commission has sought on behalf of the complainants is the award of damages. In particular, damages have been claimed under section 41(2)(c) and 41(3)(b). Section 41(2)(c) reads

> 53 (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated .... it may make an order against the person found to be engaging or to have engaged in the discriminatory practice any of the following terms that it considers appropriate:

..... (c) that such person compensate the victim as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice.

Section 41(3)(b) provides In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

..... (b) the victim of the discriminatory practice has suffered in respect of feelings or self respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

The Commission has sought damages covering the short fall in overtime earnings between Ms. O'Connell and Mrs. Chirka on the one hand and Mr. Nesbitt on the other, and between Ms. Oxendale and Mr. Jessup. Ms. Savard for the Commission argued that the measure of damages should be the amount by which half of the total overtime earned by each of Ms. O'Connell and Mrs. Chirka, and Mr. Nesbitt exceeded what the two women actually earned in overtime. The same method of calculation was suggested in assessing Ms. Oxendale's damages in relation to Mr. Jessup. The Commission further sought damages of \$5000 for each of the complainants for lost opportunity flowing from the lack of access to mobile or remote assignments. Finally Ms. Savard noted that under section 41(3) "moral" damages can be awarded for hurt feelings on self-respect. Under this head she suggested that a figure between \$1500 and \$2000 would be in order for each of the complainants.

> 54 Ms. MacIsaac quite correctly asserted that in the case of Ms. O'Connell and

Mrs. Chirka the true measure of damages for lost overtime must be related to the total amount of overtime money available earned by the two of them together with that earned by Mr. Nesbitt. In short all three were competitors for a finite amount of overtime opportunity and money among the VTR technicians other than Mr. Weir. Accordingly, the total amount they had earned had to be divided by three. What Ms. O'Connell and Mrs. Chirka had actually earned would then be deducted from that figure to produce the measure of their loss.

There are difficulties with assessing the loss of earnings suffered by the complainants. I have already noted that there is no satisfactory basis for comparing the position of the three complainants and the men of similar seniority and experience in their job classification for any of

the years other than 1983 and 1984. However, even in those years there are problems with making a direct connection between overtime earnings and mobile and remote assignments. As Ms. MacIsaac noted, Ms. O'Connell did less outside broadcasting in 1984 than Mr. Nesbitt, but earned more in overtime. Although the overtime sheets introduced into evidence break down the earnings and hours on a monthly basis, there is no satisfactory way that one can relate particular dollar amounts or hours to mobile or remote work as opposed to overtime at the studio. Even, if I overlook these difficulties, and accept the annual figures as the basis of calculation, there is the difficulty that the reasonable accommodation of the aspirations of the three female technicians would not necessarily have produced exact equivalence in overtime earnings. In the early part of 1983 it may well have been difficult to break up the crew already established to cover the N. H. L. games. It is likely that Anne Chirka, because of her problem in accommodating out of town mobile assignments, would not have had access to as many opportunities, as might otherwise be the case. The fact that Mr. Jessup was specifically assigned to the mini- mobile, and Ms. Oxendale to the studio might still have justified his more regular use on maxi- mobile assignments when the mini was attached to the larger facility, as, it seems was the case at N. H. L. broadcasts. Then is also the problem that with Anne Chirka despite the fact that her overtime earnings in 1984 lagged behind those of her colleagues, she expressed herself as content that she was beginning to get the opportunities in another field which compensated for the lack of mobile or remote assignments. Moreover, in the second half of 1984 Patricia Oxendale was doing as well

> 55 as Lloyd Jessup in terms of the number of mobile assignments she was receiving.

Notwithstanding these difficulties, I am satisfied that to some extent the complainants suffered the detriment of lower overtime earnings as a result of their treatment by the C. B. C. Because of the imponderables, however, I have concluded that it would not be appropriate merely to split the "overtime pool" and deduct the actual earnings of the three complainants from that figure. As it seems unlikely that, even with more exposure to mobiles, the women would have achieved equity in overtime with their male counterparts, I have further halved any short fall achieved on the initial calculation. Thus in 1983 the combined overtime earnings of Mr. Nesbitt, Ms. O'Connell and Mrs. Chirka were \$17,956.00. Divided by three each would have received \$5985.00. As Ms. O'Connell actually earned \$5760.00 in overtime that year, the difference being \$225.00. Halved the loss amounts to \$112.50. Mrs. Chirka actually earned \$4069.00 which deducted from \$5985.00 gives \$1915.00. Half of that figure amounts to \$957.50. For 1984 I have made no made no calculation for either Ms. O'Connell or Mrs. Chirka. The former earned more in overtime

that year than Mr. Nesbitt. In her evidence Mrs. Chirka indicated that in 1984 her career had taken a turn for the better and that she had not felt aggrieved at her treatment.

The combined figure for Mr. Jessup and Ms. Oxendale in overtime earnings in 1983 was \$16,738, which divided in half produces \$8369.00. As the latter actually earned \$5234.00, the short fall was \$3135.00. Dividing that sum in half again produces \$1562.50. In 1984 the combined figure was \$11,310.00, half of which is \$5655.00. As Ms. Oxendale earned \$4534.00, the disparity was \$1121.00. Divided in half the resulting figure is \$560.50. Patricia Oxendale's loss for the two years combined, I calculate therefor, as \$2123.00.

More important in my mind than the damages for lost income are those for lost opportunity. As I have suggested above, the more significant adverse consequence to the complainants was the denial of a serious opportunity to advance their careers. Each of the complainants voiced their frustration at the lack of exposure to mobile work and the denial of access to new equipment, to network producers and a generally more fulfilling environment which that work presented. Ms. Savard argued that \$5000.00 was a reasonable sum in each case. I have concluded that that figure

> 56 should be paid to both Ms. O'Connell and Ms. Oxendale, and \$2500 to Mrs. Chirka. The evidence suggests that the CBRT management took substantially longer to respond to the concerns of both Gail O'Connell and Patricia Oxendale, than to those of Anne Chirka, which meant that they did not begin to get significant exposure to mobile work until well into 1984. During this period Mrs. Chirka was being provided new challenges in ENG work.

Finally I accept that the experiences of the three women coupled with the insensitivity of the C. B. C. have caused them injured feelings and self respect. Again all the complainants gave evidence of their profound disappointment at their treatment by their employer, disappointment which I find was amply warranted by the evidence. For that reason I conclude that the C. B. C should pay an additional \$1500 to both Gail O'Connell and Anne Chirka, and \$2000 to Patricia Oxendale. The larger figure in the latter case is, I believe, justified in light of the fact that she was the first to challenge the policy of the station in Calgary on mobile assignments, was forced to resort to dramatic measures to induce the management to take her concerns seriously, and who most clearly saw this as a matter of the C. B. C standing in the way of her career development.

H. The Order For the reasons given above the Tribunal

1. DECLARES that the complaints of Ms. Gail O'Connell, Mrs. Anne Chirka and Ms. Patricia Oxendale are substantiated;
2. DECLARES that the Respondent engaged in discriminatory practices in that it differentiated adversely in relation to them as employees and engaged in a practice or policy which deprived or tended to deprive them of employment opportunities on a prohibited ground of discrimination;
3. ORDERS the Respondent to pay the complainant Gail O'Connell the sum of six thousand, six hundred and thirteen dollars (\$ 6613.00), the complainant Anne Chirka the sum of four thousand nine hundred and fifty eight dollars (\$ 4958.00) and to the complainant Patricia Oxendale the sum of nine thousand and twenty three dollars (\$ 9123.00).

> 57 Dated at VICTORIA, BRITISH COLUMBIA, this 16th day of May, 1988.

John P. S. McLaren Tribunal Chairman