T.D. 12/95
Decision rendered on July 5, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

STANLEY BRUCE BROWN

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

CANADIAN ARMED FORCES

Respondent

DECISION

TRIBUNAL: Anne L. Mactavish, Chair
Lloyd Stanford, Member
Murthy Ghandikota, Member

APPEARANCES: Helen Beck, Counsel for the Canadian Human Rights Commission

Brian Saunders, Major Randy Smith, Counsel for the Canadian Armed Forces

Stanley Bruce Brown, on his own behalf

DATES AND
LOCATION OF HEARING: July 26 and 27, 1994, August 4 and 23, 1994, September 22, 23, 26 and 28 1994, November 7 - 10, 21 - 24, 1994
Ottawa, Ontario

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I COMPLAINT

On February 13, 1989, Stanley Bruce Brown ("Brown") filed a complaint with the Canadian Human Rights Commission ("the Commission") against the respondent the Canadian Armed Forces ("the CAF") alleging that the CAF had discriminated against him on the basis of disability (diabetes) contrary to section 7 of the Canadian Human Rights Act ("CHRA"). Brown alleges that in September of 1987, he requested an extension of from one to five years to his initial twenty-five year term of engagement with the CAF, which request was denied. Brown alleges that the reason his request was denied was the medical restrictions associated with his diabetes. Brown disagrees with this decision, and alleges in his complaint that, notwithstanding his condition, he was able to continue his service with the CAF in a satisfactory manner.

At the hearing of this matter, the Commission sought leave to amend the complaint to cover the reconsideration by the CAF of Brown's request for an extension, which reconsideration took place in 1989. This amendment was allowed on the consent of all parties.

Brown sought a further amendment to deal with his request in 1989 to join the reserve element of the CAF. For reasons delivered in the course of the hearing, this amendment was allowed. Brown's motion to amend the complaint to include reference to the career restrictions

placed upon him by the CAF in 1981, a matter which had been the subject of a previous, unsuccessful human rights complaint, was denied.

II BROWN'S MILITARY CAREER

Brown enroled in the Royal Canadian Navy, one of the constituent elements of what subsequently became the CAF, on September 18, 1964 as an Ordinary Seaman. He was nineteen years of age, and had completed grade 12 in Manitoba.

Throughout his career with the CAF, Brown was engaged in the Supply Technician Trade. Supply technicians are involved in the procurement, storage and management of supplies, including food-stuffs, clothing, ammunition and military equipment.

In October of 1973, Brown was diagnosed with diabetes. While he was initially able to manage his condition with diet alone, within a matter of months, he was taking daily insulin.

Although Brown did encounter certain difficulties as a result of his diabetes, which difficulties will be discussed further on in this decision, according to the performance evaluation reports of the time, he fulfilled the responsibilities associated with his position in a commendable fashion. This was reflected by the promotions he received, ultimately achieving the rank of Warrant Officer in March of 1979.

In late 1980, Brown was advised that his medical category was being downgraded.

The CAF has a system of medical standards in place to ensure a common method of medical examination and medical categorization of candidates for and serving members of the CAF. Individuals are assessed on a number of bases, two of which are of relevance to this case: the geographical factor ("G"), which considers climatic conditions, accommodation and living conditions and the availability of medical care, and the occupational factor ("O"), which involves an assessment of physical activity and physical stress, together with mental activity and mental stress, associated with the particular occupation or trade of the individual.

Both before and after 1980, Brown had been assigned a G4 grade, the grade assigned to individuals considered unfit for medically isolated postings, because of a medical disability, or to any individual who has a medical condition that has the potential for sudden, serious complications. Until November of 1980, Brown had been assigned an O2 rating, the grade ordinarily assigned to individuals who are free from medical disabilities, except those minimal conditions that do not impair the individual's ability to perform at an acceptable level of endurance in a front-line combat environment and do heavy physical work. In November of 1980, Brown's occupational grade was changed to "O3", the grade assigned to individuals who have moderate medical or psychological disabilities which prevent them from doing heavy physical work or operating under stress for sustained periods, although they will be able to perform most tasks in moderation.

While it was initially an issue in this case, by the end of the hearing it was common ground amongst Brown, the Commission and the CAF that the imposition of the "G4O3" rating was appropriate, having regard to Brown's physical condition.

Each trade has its own minimum medical standard. For Supply Technicians, the minimum standard is G3O2. This applies to the initial assignment of personnel to the trade. Where an experienced member's medical grade falls below the standard for that individual's trade, the matter then becomes the subject of a review by the Career Medical Review Board ("CMRB"). The CMRB reviews the employment limitations placed on members by reason of their medical conditions. Members may be considered for retention in their trade, based upon their individual merits, with or without career restrictions. Alternatively, the member may be "remustered", that is, given an occupational transfer, or finally, the member may be released from the CAF on medical grounds.

In Brown's case, the matter came before the CMRB in 1975, when his geographical rating dropped from G2 to G4, and again in November of 1981 as a result of the change in his occupational grade. In 1981, the CMRB decided that Brown should be retained in the CAF, but restricted him to his present rank until such time as his medical

category was raised to permit full employment in his trade. This decision was made subject to Brown's satisfactory performance, service requirements and there being no further deterioration in his medical category.

As noted previously, the imposition of career restrictions on Brown was the subject of an earlier, unsuccessful human rights complaint and is not in issue in this case.

Following the 1981 CMRB decision, Brown continued with the CAF in the Supply Technician Trade, in a variety of postings at various locations in Canada. He continued to receive very good performance evaluations on a regular basis.

Brown's term of engagement with the CAF was to end on September 17, 1989. By letter dated September 3, 1987, Brown requested an extension to his term of engagement of one to five years, which request was supported by his superior officers. In the alternative, Brown requested that his term be extended to the end of the Active Posting Season ("APS") in 1989.

The APS runs from May 1st to August 31st of each year. The bulk of military postings occur during this time period, so as to accommodate members and their families. Ordinarily, a member will use up any accrued leave prior to the termination of the term of engagement. In Brown's case, this would have meant that his actual departure from active service would have occurred in February of 1989.
In October of 1987 Brown's request for a one to five year extension was turned down on the basis of the restrictions which had been imposed upon him by the 1981 CMRB decision. Brown was advised that his request had been rejected because he

> "... is medically restricted ... he cannot meet ORCDP [Other Ranks Career Development Plan] criteria for re-engagement ..." (Exhibit HR-45).

Had this decision not been reconsidered in 1989, Brown would have been released under item 5(c) of Article 15.01 of the Queen's Orders and Regulations, as having completed the service for which he was required.

In June of 1988, Brown requested a one day extension, which request was again supported by his superiors. This request was granted in September of that year. While the evidence on this point was somewhat confusing, it appears that Brown, at least, understood that the net effect of a one day extension would be to permit him to take terminal leave after the last day of his term of engagement rather than before.

Not satisfied with the one day extension, Brown and his superiors continued to press for a one to five year extension, and the matter was referred back to the CMRB for reconsideration. A medical exam was

conducted in May of 1989 as part of the lead-up to the CMRB. The examining physician gave Brown a G4O2 rating. This was changed to G4O3 by one of the physicians reviewing the medical assessment. As previously noted, it was ultimately common ground that the G4O3 rating assigned to Brown was appropriate in all of the circumstances.

Notwithstanding that he was below the medical standard for his trade, Brown's retention in the service was recommended by his Commanding Officer on the basis that he had proven himself fully capable of executing his present duties.

In preparation for the CMRB hearing, Brown's medical restrictions were reviewed by his career manager with a view to determining his percentage employability within the CAF. This is done by reviewing the medical restrictions of the member against the requirements of the various positions within the CAF at the member's rank in the member's trade. Utilizing the medical restrictions reflected in the 1981 CMRB decision, it was determined that Brown was fit for 76% of the positions in his rank, and for 72% of the positions at the next highest rank.

Under CAF policy, if a member is employable in 80% or more of the positions at the member's rank, in the member's trade, the member will be retained, without restrictions. Where the percentage employability is between 60% and 80%, the member will be retained, with career restrictions.

It appears that the percentage employability figures calculated for Brown may not have been accurate, as a result of the failure of the career manager to factor in certain vested rights to which Brown was entitled by virtue of his having originally enlisted in the Royal Canadian Navy as opposed to the unified CAF. However, the difference between the numbers provided to the CMRB and the correct calculations is not material, and would not have affected the results.

Again in preparation for the CMRB, Brown's file was reviewed by the CAF's Director of Health Treatment Services, who also sat (in a non-voting capacity) on the CMRB. The Director of Health Treatment Services placed further restrictions on Brown, declaring him to be

unfit for Base Defence Force ("BDF") and General Military Duties ("GMD"). The effect of these added restrictions was to reduce Brown's percentage employability to zero, as all Warrant Officers in the Supply Technician Trade in the CAF are required to be able to participate in both BDF and GMD.

The policy with respect to the percentage employability calculations and BDF and GMD restrictions appears to have evolved over a period of time, and a more flexible policy was subsequently instituted, allowing for an analysis of which BDF and GMD duties the member could and could not perform, in calculating the member's percentage employability. In 1989, however, the matter was viewed as an all or nothing exercise.

Following its review of the matter, the CMRB decided on July 20, 1989 that Brown should be released from the CAF effective September 17, 1989. The Board further ordered that Brown be permitted to commence his retirement leave after that date, effectively nullifying the previously granted one day extension.

The reason given for the decision to release Brown was that he was:

> "... disabled and unfit to perform his duties in his present trade or employment, and [was] not otherwise advantageously employable under existing service policy." (Exhibit HR-59)

The Board further determined that Brown was unsuitable for transfer to the Supplementary Reserves. The CMRB also changed Brown's release category from item 5(c) - Completion of Service, to 3(b) - release on medical grounds.

Notwithstanding the decision of the CMRB, by memo dated August 11, 1989 Brown made application for a transfer to the Reserve Force.

The Reserve Force is a component of the CAF, established pursuant to the provisions of the National Defence Act. There are three types of Reserve service - A, B and C Class, which range from Class A - Part-time Service to Class C service, which is full-time employment, often with a regular force unit, where the operational needs of the CAF require. The medical requirements for the Reserve Forces are the same as those for the Regular Force.

Brown's request to join the Reserves was denied, and he ceased being on active service with the Forces in September of 1989, although he remained on the payroll until April 7, 1990.

Brown was fortunate in obtaining alternate employment, first in the private sector, and shortly thereafter, as a civilian employee with the Department of National Defence, which employment commenced in March of 1990. Brown's salary with the Department of National Defence was higher than that which he was earning while a member of the CAF, and as a result, he has suffered no wage loss as a result of his release from the CAF. Brown claims, however, that both he and his family will suffer future losses with respect to his pension entitlement. This is of particular concern to Brown as, subsequent to his discharge from the CAF, he was diagnosed with cancer of the nasopharynx. He has undergone surgery and radiation therapy, but regrettably, his prognosis at this time is guarded.

III NATURE OF THE DISABILITY

In understanding the nature of Brown's disability, the Tribunal was aided by the testimony of Dr. Cora Fisher, an internist and Chief of

Medicine at the National Defence Medical Centre in Ottawa, and Dr. Bernard Zinman, an endocrinologist with a speciality in diabetes. As well, both the Commission and the respondent filed medical literature on the subject.

Diabetes Mellitus is a chronic disease in which the beta cells of the pancreas fail to produce sufficient insulin to allow the body to properly metabolize glucose. Glucose, which is derived from the food we eat, is an essential fuel for the body.

There are several types of diabetes, two of which will be considered here. In cases of non-insulin dependent diabetes ("NIDD", also known as "Type 2" diabetes) the pancreas produces some insulin, enough to prevent the most serious complications of diabetes, but not enough to prevent some manifestations of the disease. Individuals suffering from NIDD may be managed with diet, exercise and oral medication to lower the blood sugar levels.

Insulin dependent diabetes ("IDD" or "Type 1" Diabetes) occurs where the pancreas ceases to produce any insulin whatsoever. This occurs as

a result of an auto-immune reaction in which the beta cells of the pancreas are destroyed. As this destruction process occurs, an individual may, as Brown did, go through a phase of being a non-insulin dependent diabetic, while there is still some residual insulin production. Once the destruction of the beta cells is complete, the insulin dependent diabetic will, as the name suggests, be dependent on insulin for his or her survival.

Essential to the treatment of IDD is the regular monitoring of the patient's blood sugar. The level of sugar in the blood will be affected by a number of factors - the administration of insulin, when and what the patient has eaten, the amount of physical exercise the patient has engaged in, and the consumption of alcohol, amongst others. Stress and climatic conditions may also affect the level of sugar in the blood.

Because of the influence of diet, exercise etc. on the well-being of the insulin dependent diabetic, it is also essential that the patient be able to exert a measure of control over his or her environment. That is, it is an important aspect of diabetic control that the patient have regular meals, be able to anticipate when he or she will undergo physical exertion, and otherwise be able to regulate the various components that go into good diabetic control.

Insulin dependent diabetics are at risk of both short and long term complications arising from the disease. Both types of complications can have extremely serious consequences.

One of the principal short term complications is hypoglycemia. Hypoglycemia occurs when a patient's blood sugar level becomes too low. A patient may become hypoglycemic, inter alia, as a result of taking too much insulin, causing the glucose in the blood to be

consumed more rapidly than anticipated, or from not consuming enough nourishment in a timely fashion. Hypoglycemia may also result from a patient engaging in physical exercise without making the necessary adjustments to food and insulin consumption.

When a patient becomes hypoglycemic, he will often manifest certain early symptoms which may alert the patient to the incipient problem. These include sweating, shakiness, hunger and anxiety. If treatment is not administered, generally by consuming glucose, the patient will move into the next phase. As the brain becomes deprived of glucose,

the patient may become irritable or confused, may demonstrate inappropriate behaviour, and may resist treatment. If left untreated, the patient will lose consciousness, develop seizures, and death will result.

Hypoglycemia can develop very rapidly, with potentially fatal consequences. As noted, patients will often have warning signs that they are becoming hypoglycemic, although this is not always the case. Patients may suffer from "hypoglycemic unawareness", in which the early warning symptoms are absent, and the patient may end up in serious difficulty without warning. According to Dr. Fisher, in dealing with diabetic members, hypoglycemia is the primary concern for the CAF because its onset can be so rapid, without warning, with such immediate and serious consequences. (Transcript, p. 1708)

Hyperglycemia occurs where a patient's blood sugar becomes unduly high. A number of factors may cause hyperglycemia: including the failure to take insulin in a timely fashion, excessive consumption of food or illness. In addition, infection, trauma or stress may also cause the patient's blood sugar to rise. If left untreated, the patient may, within hours or days, develop diabetic ketoacidosis ("DKA") and death will ensue.

Treatment for DKA includes intravenous fluids and insulin. Proper treatment of DKA requires measurement of blood plasma bicarbonate, blood ph, blood gases and electrolytes, all of which require hospital facilities.

The majority of patients with IDD will experience some form of long-term complications. These can include blindness, kidney damage, and nerve damage. Nerve damage to the feet and legs can result in injuries going undetected, leading to serious infections and gangrene. Indeed, diabetes is the major cause of non-traumatic amputations. Diabetics are also at increased risk of arteriosclerosis, heart disease, stroke and peripheral blood vessel disease.

Recent studies have revealed that the more tightly controlled the patient's blood sugar, the fewer long-term complications will develop. Nevertheless, according to Dr. Zinman, there is currently no method of determining which insulin dependent diabetics will suffer long-term complications. (Transcript, p. 2271)

IV BROWN'S DIABETIC HISTORY

Brown's diabetes has been controlled with varying degrees of success since his diagnosis in 1973. Considerable evidence was led on this issue, which we do not propose to review in detail. Certain key incidents will, however, be discussed.

In 1976, Brown was sent to Montreal to assist with the Montreal Olympics. Brown was responsible for the medical supplies for the Games. While in Montreal, Brown was working long hours, and was unable to obtain regular meals, which resulted in an elevation in his blood sugars. This in turn resulted in Brown's hospitalization at the St. Hubert Base Hospital for stabilization. Following his discharge, he was returned to his unit in Halifax.

In 1980, Brown was hospitalized at the National Defence Medical Centre in Ottawa for two weeks in order that his diabetes could be evaluated, and his medication adjusted. According to the medical records from that admission, Brown's blood sugar readings indicated a certain degree of fragility, and that he suffered occasional hypoglycemic attacks.

Brown continued to experience occasional episodes of hypoglycemia. In 1981, Brown was involved in a motor vehicle accident, which appears to have been caused by hypoglycemia. In February of 1984, Brown was again admitted to the National Defence Medical Centre in Ottawa suffering from hypoglycemia. According to the medical records of the time, this episode occurred after Brown fell asleep following physical exercise.

From 1982 to 1984 Brown was involved in auditing supplies at Canadian Forces Bases at various locations across the country. Brown was based in Ottawa at the time, and the position required extensive travel. Brown began experiencing difficulties with his diabetes as a result of the travel, and the accompanying irregular work and meal schedules. As a result, Brown's physician advised the CAF that Brown's medical condition had deteriorated, and that travel should be limited. The CAF was further advised that Brown should have a regular day shift and closer medical supervision than his present job allowed. As a consequence, Brown was moved to a position at National Defence Headquarters in Ottawa.

In or around 1985, Brown suffered an episode of hypoglycemia in the workplace. According to Brown, the incident occurred when he worked past his regular lunch hour. Brown was discovered in an incoherent state by his supervisor. The supervisor attempted to administer glucose, and called an ambulance. Brown was seen briefly in hospital and released the same day. What is telling about this particular

incident is Brown's testimony that the attack occurred without any of the usual warning signs of incipient hypoglycemia. This incident was relied upon by Dr. Fisher in support of her conclusion that Brown suffers from hypoglycemic unawareness.

Brown further testified that he does not always recognize the symptoms indicating that he is becoming hypoglycemic. He would not notice the sweatiness, for example, if he was engaging in physical exercise.

In 1987, Brown commenced intensive insulin therapy (ie: four injections per day instead of the previous two per day). While intensive insulin therapy more closely emulates the body's own natural insulin production and allows for better regulation of blood sugars, patients on intensive therapy are more prone to episodes of hypoglycemia. According to Dr. Wiseman, the endocrinologist treating Brown at this time, Brown did have occasions when his blood sugars were in the range that would be considered hypoglycemic, although he did not complain of symptoms. In medical reports filed at the hearing, Dr. Wiseman described Brown's diabetic control in the period up to December, 1988, (when Dr. Wiseman ceased treating Brown) as "labile" or unstable.

Brown has continued to suffer periodic episodes of both hypoglycemia and hyperglycemia since leaving the CAF. In recent years some of these episodes may be attributed, at least in part, to the changes his body is undergoing as a consequence of his cancer and the effects of the various treatments he has undergone.

V ROBINSON AND HUSBAND DECISIONS

Many, but not all of the matters in issue in this case have been the subject of previous litigation between the Commission and the CAF. At the time this case was heard, the parties had had the benefit of the decisions of the Federal Court of Appeal in Canada (Attorney General) v. Robinson and Canadian Human Rights Commission (1994), 170 N.R. 283 and Canadian Human Rights Commission v. Canadian Armed Forces et al. (1994), 167 N.R. 258 (the Husband decision). Applications brought by the Commission for leave to appeal to the Supreme Court of Canada were pending during the hearing.

Since the conclusion of the hearing, the Supreme Court of Canada has dismissed the Commission's applications for leave to appeal in both

Robinson and Husband. Because of the significance of these decisions for this case, it is important to review the conclusions of the Federal Court of Appeal in some detail.

Robinson dealt with the enforceability of the CAF's policy requiring all members to be "seizure free". The CAF contended that the seizure free policy was a bona fide occupational requirement ("BFOR"). In support of this position, the CAF argued that every member of the Forces was a soldier first, was liable to be called upon for combat duty, and that epileptics would pose unacceptable risks in combat situations.

In accepting the argument of the CAF, the majority of the Federal Court of Appeal adopted the following comments of the Chief Justice of

the Federal Court of Appeal in Canada (Attorney General) v. St. Thomas and Canadian Human Rights Commission (1993), 162 N.R. 228:

> "In my view, examination of this issue must take account of a contextual element to which, the Tribunal did not give sufficient consideration. It is that we are here considering the case of a soldier. As a member of the Canadian Forces, the Respondent, St. Thomas, was first and foremost a soldier. As such he was expected to live and work under conditions unknown in civilian life and to be able to function, on short notice, in conditions of extreme physical and emotional stress and in locations where medical facilities for the treatment of his condition might not be available or, if available, might not be adequate. This, it seems to me, is the context in which the conduct of the Canadian Forces in this case should be evaluated."

In Robinson, the Federal Court of Appeal accepted that the provisions of the National Defence Act render all members of the CAF liable for combat duty, including those who may be serving in support roles. The Court found this liability to be absolute, and one that could not be modified by administrative practice.

A similar conclusion was reached in the Husband case.

In this case, considerable evidence was led with respect to conditions in the field and in combat, which evidence was consistent with the characterization of conditions contained in the above extract from St. Thomas. For reasons which will be dealt with in greater detail further on in this decision, the Tribunal is satisfied that Brown could not safely serve in the field or in combat without presenting an unacceptable degree of risk to himself and his fellow members of the CAF. The effect of the decisions in Robinson and Husband would therefore, at first blush, appear to be fatal to the Complainant's case. The Commission has attempted to distinguish these decisions as both cases were argued on the basis that the discrimination in issue was direct discrimination, whereas, the Commission argues, the present case is one of adverse effect discrimination, and different considerations therefore apply.

The CAF concedes in this case that it has discriminated against Brown, but states that it did so directly, on the basis of Brown's physical disability.

In light of the Commission's argument, it is therefore necessary to consider the nature of the discrimination in this case.

VI NATURE OF THE DISCRIMINATION

The accepted criteria for distinguishing direct discrimination from adverse effect discrimination were articulated by Mr. Justice McIntyre in Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536:

"A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks

employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force .... An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply." (at p. 551)

This principle was cited with approval by the Supreme Court of Canada in Albert Human Rights Commission v. Central Alberta Dairy Pool et al., [1990] 2 S.C.R. 489. In Dairy Pool, the majority of the Supreme Court of Canada went on to hold that:

"Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must

rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that

generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish the BFOQ. This is distinguishable from a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to which the rule applies. On the facts of many cases the "group" adversely affected may comprise a minority of one, namely the complainant. In these situations the rule is upheld so that it will apply to everyone except persons on whom it has a discriminatory impact, provided the employer can accommodate them without undue hardship." (at pp. 514-515)

and further that:

"... once a BFOR is established the employer has no duty to accommodate. This is because the essence of a BFOR is that it be determined by reference to the occupational requirement and not the individual characteristic. There is therefore no room for accommodation: the rule must stand or fall in its entirety."

"... The end result is that where a rule discriminates directly it can only be justified by a statutory equivalent of a BFOQ, i.e., a defence that considers the

rule in its totality. ... However, where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship." (at pp. 516 and 517).

In order to determine the type of discrimination in issue in this case it is therefore necessary to identify the working rule in issue and to determine its neutrality.

The Commission argued variously that the employment rule in issue was:

- the requirement that the member be at all times liable to perform any lawful duty (CHRC Memorandum of Argument, para. 87);

- the rule regarding fitness for duty (CHRC Memorandum of Argument, para. 95);

- the CMRB's employability rule (CHRC Memorandum of Argument, para. 99);

- the advantageously employable requirement (Transcript, p. 2474); and

- the soldier first requirement as embodied in s.33 of the National Defence Act (Transcript, pp. 2477-9).

The Commission states that the distinction between direct and adverse effect discrimination is not clear, and that in determining the nature of the discrimination, the Tribunal should use the analytical tool that "makes sense", having regard to the remedial nature of human rights legislation and its quasi-constitutional status.

The Commission points to the evidence of Cpl. Dobson, Sgt. Shank and Sgt. MacDonald, three insulin dependent diabetics, all of whom remain on active service with the CAF, as well as to evidence regarding medical waivers granted by the CAF, and to the fact that a number of members of the CAF do not meet the CAF's medical standards and argues that the fact that the CAF can and does make exceptions, on a variety of bases, to the fitness requirements is itself evidence that the type of discrimination is adverse effect in nature.

The CAF argues that the soldier first requirement is not the employment rule in issue, but the occupation against which the impugned requirement must be assessed. According to counsel for the CAF, the employment rule in question is:

"... if you suffer from insulin dependent diabetes, you run the risk of severe hypoglycemia. As a result, the geographical and occupational limitations are imposed upon you. That,

then, is the working rule." (Transcript p. 2576)

Applying the jurisprudence previously cited to the evidence in this case, the Tribunal is satisfied that the discrimination in issue is direct in nature. In reaching this conclusion, the Tribunal has considered the evidence as a whole, and in particular the following:

1. The 1987 decision to release Brown was made on the basis of the restrictions imposed upon him by the 1981 CMRB decision, restrictions which were imposed by the CAF in response to Brown's medical condition;

2. The BDF and GMD restrictions imposed on Brown by the Director of Health Treatment Services in 1989, which so detrimentally affected his percentage employability, were restrictions resulting from his status as an insulin dependent diabetic with a G4O3 rating;

3. The 1989 decision of the CMRB confirming Brown's release was made on the grounds that Brown was disabled and unfit to perform his duties in his present trade or employment and was not otherwise advantageously employable under existing service policy; and

4. The decision to deny Brown's entry to the Reserves was based upon his lack of medical suitability and his failure to meet the minimum enrolment medical standards.

Thus, while the result of Brown's medical condition was that he was unable to perform all the tasks associated with his position as a Warrant Officer in the Supply Technician trade, the actions of the CAF in this case have been taken as a response to Brown's medical condition. That is, the CAF drew conclusions about Brown's ability to perform the tasks associated with his position and imposed occupational restrictions upon him as a result of his membership in a particular group - in this case, insulin dependant diabetics. This is the essence of direct discrimination.

It should be noted that this conclusion is consistent with the wording of the complaint itself:

"My request for an extension of service was denied because of my being medically

restricted because of my condition of diabetes." (Exhibit HR-1)

The employment rule at the foundation of the CAF's actions is the requirement that members meet the CAF's medical standards. These standards, focused as they are on the member's physical condition, are not neutral on their face, but rather are directly discriminatory.

The fact that an employer may make a number of exceptions to the employment rule is indeed troubling and may, in certain circumstances, call into question the bona fides of the occupational requirement. It does not, however, in the Tribunal's view affect the character of the discrimination in issue.

Having concluded that the discrimination in this case was direct in nature, the jurisprudence is clear that there was no obligation on the CAF to accommodate Mr. Brown.

VII BONA FIDE OCCUPATIONAL REQUIREMENT

It remains to be determined whether the CAF was justified in discriminating directly against Brown on the basis of his disability.

Section 15(a) of the CHRA provides the CAF with a defence if the discriminatory practice in issue constitutes a bona fide occupational requirement:

"It is not a discriminatory practice if:

(a) a refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based upon a bona fide occupational requirement."

The burden of proof in establishing this defence is on the Respondent, on a balance of probabilities (Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R.C. 202 at 208 and O'Malley supra., at p. 558).

In order to succeed in establishing a particular job requirement as a BFOR, an employer must satisfy both an objective and subjective test:

"... To be a bona fide occupational qualification and requirement, a limitation ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate

performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economic performance of the job without endangering the

employee, his fellow employees and the general public." (Etobicoke, at p. 208)

It should be noted that the CAF policy requiring that all insulin dependent diabetics be assigned a medical category of G4O3 or worse is not in issue in this case. The complaint before this Tribunal relates only to the treatment afforded Brown by the CAF.

There was no suggestion either in the evidence adduced or in argument that the CAF did not subjectively believe that the limitations placed on Brown were necessary for the adequate performance of his job. Accordingly, the subjective element of the BFOR is not in issue in this case.

In assessing whether the CAF medical standards, as they were applied to Brown, are objectively justifiable, the Tribunal must keep in mind the occupational context in which this analysis must be carried out. That is, the effect of the denial of leave to appeal in Robinson and Husband has been to clearly establish that all members of the CAF are soldiers first, and are liable to serve in combat, as service requirements demand.

As was noted previously, the fact that the CAF does allow a number of exceptions to its medical requirements does, in the Tribunal's view, potentially call into question the bona fides of the occupational requirement. This issue was, however, thoroughly canvassed by the Federal Court of Appeal in Robinson, where it was determined that the soldier first requirement was an obligation imposed by statute, and could not, therefore, in the Court's view, be modified by administrative practice. (Robinson, supra, at p. 289)

There has been some debate in the jurisprudence as to the degree of risk that must exist before a BFOR defence will succeed. Certain cases have suggested that a minimal risk would be sufficient, whereas other cases have utilized a standard of sufficiency. Still other cases have suggested that only a real or a substantial level of risk will support a BFOR defence.

Applying the standard articulated by the Supreme Court of Canada in Etobicoke, supra, and approved by the Federal Court of Appeal in the decision in Robinson and Husband, supra, the Tribunal is satisfied

that Brown's condition created a sufficient risk, were he required to serve in combat, so as to justify the actions of the CAF under ss.15(a) of the CHRA. Indeed, the Commission conceded that, whichever standard of risk was applied, if one accepts that the occupation against which the CAF's medical standards must be considered is that of a soldier first, Brown would present an unacceptable degree of risk in combat situations. (Transcript p. 2374)

In concluding that a BFOR has been established in this case, the Tribunal has considered the need of the insulin dependent diabetic to be able to control his or her environment, including the need for regular meals and predictable amounts of exercise as well as the need to store and access medication on a regular basis. These needs clearly could not be met in combat situations.

The Tribunal has also considered Brown's medical history, and the fact that he has, on a somewhat regular basis, had episodes of hypoglycemia, on at least one occasion, without any of the usual warning symptoms.

In addition, the Tribunal has considered the potential safety concerns, both for Brown and for his fellow members, were Brown to become hypoglycemic while in the field. The medical evidence has established that hypoglycemia can come on quickly, in some cases, without warning, and can lead to death within a short period of time unless treatment is administered. As well, before losing consciousness, individuals may demonstrate inappropriate behaviour and resist assistance. Clearly, in the combat context, this could have disastrous consequences. This point was graphically confirmed by the testimony of Sgt. MacDonald. In cross examination, Sgt. MacDonald was asked what could happen, were he to become hypoglycemic while holding a semi-automatic machine gun. Sgt. MacDonald's response was that "anything could happen" (Transcript p. 1065).

As a result, if one accepts that all members of the CAF must be able to participate in combat, the Tribunal can only conclude that Brown's condition presents a sufficient degree of risk to justify the actions taken by the CAF.

Finally, in anticipation that the decisions of the Federal Court of Appeal in Robinson and Husband might be overturned by the Supreme Court of Canada, the Commission asked that the Tribunal make a finding that the CAF had not adequately explored individualized reasonable job alternatives for Brown. In light of the decisions of the Supreme Court of Canada denying leave in Robinson and Husband, it is not

necessary to deal with the Commission's request.

VIII RESPONDENT'S COSTS

The respondent has raised an issue with respect to the costs associated with Dr. Zinman's attendance at the hearing. The respondent points out that the Commission did not advise the

respondent until mid-way through the case that the Commission was not contesting the assignment of the G4O3 rating to Brown. Brown himself only conceded near the end of the hearing that the G4O3 rating was appropriate. As a result, counsel for the respondent argues, the respondent was put to the unnecessary cost of calling an expert witness, namely Dr. Zinman, to address an issue that was not ultimately in dispute. The respondent seeks compensation for the costs associated with Dr. Zinman's attendance from the Commission.

The respondent acknowledges that this Tribunal has no power to order the Commission to pay such costs, but rather, seeks a recommendation to that effect from the Tribunal.

A review of the record reveals that counsel for the Commission advised the Tribunal on November 7, 1994 that the Commission was no longer challenging the objective validity of the G4O3 classification. (Transcript p. 1581) Dr. Zinman was not called to testify until November 22, 1994. That is, the respondent was already aware of the Commission's concession on this point at the time it elected to call Dr. Zinman. Under the circumstances, the Tribunal is not prepared to make the recommendation requested by the respondent.

IX ORDER

For the foregoing reasons this complaint is dismissed.

DATED this day of May, 1995.

Anne L. Mactavish

Murthy Ghandikota

C. Lloyd Stanford