

CV 03823

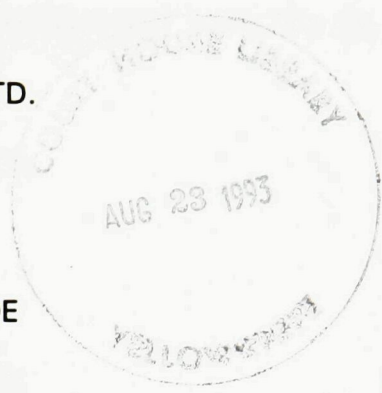
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COMINCO LTD.

- and -

ROSE SLADE



Applicant

Respondent

Appeal of a Minister's decision under the Fair Practices Act, R.S.N.W.T. 1988, c.F-2, by trial de novo. Appeal granted.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Trial held at Yellowknife, Northwest Territories on August 9, 1993.

Reasons filed: August 11, 1993

Counsel for Applicant:	K. Peterson, Q.C.
Counsel for Respondent:	No one <u>contra</u> .

22 VIS 89 9904

CV 0823

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

COMMO LTD.

Applicant

Respondent

ROSE BLADE

Respondent

J.A.P.A.
1983 A.G. 11, 1983 on August 11, 1983

REASONS FOR JUDGMENT OF THE HONOURABLE JUDGE J.E. BICHARD

Total paid at Yukon, Northwest Territories on August 11, 1983

Reasons filed August 11, 1983

C. Jackson, D.C.
No one else



IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COMINCO LTD.

Applicant

- and -

ROSE SLADE

Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an appeal, heard by way of trial de novo, from a decision of the Minister of Justice of the Northwest Territories pursuant to the Fair Practices Act, R.S.N.W.T. 1988, c.F-2.

2 The applicant is an employer which employs persons at its mining operation on Little Cornwallis Island, N.W.T., and to which the Fair Practices Act applies. That legislation prohibits, inter alia, discrimination by employers on the basis of disability. In 1991 the respondent made a complaint under the Fair Practices Act that the applicant had discriminated against her on the basis of disability in 1989. On April 21, 1992 the Minister of Justice of the Northwest Territories ruled that there had indeed been

discrimination. The Minister ordered compensation and other personal relief in favour of the aggrieved employee, and also ordered the employer to discontinue a certain general practice of medical examinations. It is this latter aspect of the Minister's order, affecting the employer's general practice, that is the subject of this appeal.

BACKGROUND:

3 The employer operates Polaris Mine at a remote site in the High Arctic. The complainant's husband was a full time miner there at relevant times. The complainant herself was employed at the mine as a housekeeper on two rotations - July-August 1987 and April-May 1988. During the second rotation she had occasion to seek medical treatment from the company nurse at the minesite, allegedly for back pain. When she applied for a further rotation in October 1988 she was required by the employer to undergo a medical examination at a clinic in Montreal, Quebec. This examination was in accordance with the employer's policy of requiring all prospective employees to undergo a pre-employment medical examination at a clinic engaged by the employer for this purpose.

4 The physician who examined the complainant in Montreal in October 1988 concluded that she had a category "Poor Risk" back and recommended certain limitations in any work activities, e.g., that she not lift any object weighing in excess of 5 lbs. In the employer's view these limitations were inconsistent with employment as a housekeeper

at the minesite, and the employer declined to offer to the complainant any further employment in that capacity.

The complainant subsequently sought medical advice on her own, and received a doctor's opinion that her back was fine. The employer continued its refusal to hire her.

In August 1991 the complainant lodged a complaint pursuant to the Fair Practices Act.

Pertinent excerpts from the Act are as follows:

3. (1) No employer shall refuse to employ or refuse to continue to employ a person or adversely discriminate in any term or condition of employment of any person because of the ..., disability, ... of that person ...

7. (1) The Minister may appoint an officer to inquire into any complaint made under subsection (2).

(2) Any person claiming to be aggrieved because of an alleged contravention of this Act may make a complaint in writing to an officer.

(3) An Officer shall give full opportunity to all parties to present evidence and make representations and shall endeavour to effect a settlement of the matters complained of.

(4) Where a settlement of a complaint is not effected, the officer shall

- (a) submit a report concerning the matter to the Minister; and**
- (b) recommend to the Minister the action that, in the opinion of the officer, should be taken with respect to the complaint.**

(5) On receipt of the report and recommendation of an officer, the Minister

- (a) shall consider the report and recommendation, and**
- (b) may make any order the Minister sees fit, including an order for**

reinstatement of an employee with or without compensation for loss of employment,

and the order shall be served on the persons affected by the order.

...

8. (1) Any person affected by an order of the Minister may, at any time within 15 days after service of the order, appeal by way of originating notice of motion to a judge of the Supreme Court to vary or set aside the order.

...

(4) The hearing of an appeal under this section shall be by a trial de novo.

8 Evidence adduced at the trial de novo (Exhibit 3) indicates that the fair practices officer submitted a report and recommendations to the Minister, purportedly pursuant to subsection 7(4) of the Act. In his report the fair practices officer, inter alia: a) notes the sparse information in the Montreal doctor's report to support his conclusion of a "Poor Risk" back; b) is critical of the employer's refusal to give consideration to the medical reports provided by the complainant herself, and c) suggests the employer should have sought a further medical opinion from a specialist.

9 The Minister's order was issued in the following manner:

ORDER

Pursuant to subsection 7(5)(b) of the Fair Practices Act, I Order that Cominco Ltd., Polaris Mines, has breached subsection 3(1) of the Fair Practices Act and discriminated against Mrs. Rose Slade on the basis of "disability".

Pursuant to subsection 7(5)(b) of the Fair Practices Act, I further Order

Cominco Ltd., Polaris Mines, to cease its requirement that all employees and prospective employees receive medical examinations from the company's choice of medical personnel.

Pursuant to subsection 7(5)(b) of the Fair Practices Act, I further Order Cominco Ltd., Polaris Mines, to make a housekeeping or other suitable position available to Mrs. Rose Slade for at least two rotations of employment at the mine site. At the completion of those two rotations Cominco Ltd., Polaris Mines, is to assess Mrs. Rose Slade's ability to continue on the basis of the performance during those work rotations.

Pursuant to subsection 7(5)(b) of the Fair Practices Act, I further order Cominco Ltd., Polaris Mines, to pay Mrs. Rose Slade \$2,000.00 in recognition of the hurt, solace and humiliation suffered as a result of the breach of the Fair Practices Act by the employer.

10 The contents of the Minister's order are in terms recommended to him by the fair
practices officer.

11 The employer appealed the Minister's decision pursuant to s.8(1) of the Act.

12 Since filing its appeal, the employer has in fact paid the \$2,000.00 compensation
to the complainant and has provided her with two rotations of employment at the mine.
She is presently completing the second of those rotations. At the completion of this
rotation the employer intends to assess the complainant's ability to continue with her
employment on the basis of her actual performance.

13 Since filing its appeal the employer has amended its policy regarding pre-
employment medical examinations to allow for a review of the initial medical assessment

made by the employer-retained medical clinic, as follows:

- 14 **"... where an employee obtains a medical assessment which differs materially in its conclusions from those reached by the medical clinic retained by Cominco for employment-related examinations, Cominco will now ask its own clinic to review the second medical report. If necessary, Cominco will arrange for an independent medical examination of the employee or prospective employee. An applicant for employment or employee will therefore have a second opportunity to demonstrate the ability to meet the requirements of the position in question."**

(Exhibit 1, para. 30)

- 15 At the commencement of the trial de novo, the employer's counsel confirmed that the employer was withdrawing its appeal with respect to the first, third and fourth paragraph of the Minister's order. The employer on this appeal requests only that this Court set aside the second paragraph thereof.

- 16 Notice of the hearing of the appeal was duly served on the complainant and on the Minister of Justice. Neither appeared at the trial de novo. The employer's counsel is advised by counsel representing the Minister that the Minister takes no position with respect to the relief now sought by the employer.

A LACK OF JURISDICTION

- 17 The employer submits that the Minister exceeded his jurisdiction under subpara-

graph 7(5)(b) of the Fair Practices Act in directing the employer to cease its requirement that all employees and prospective employees receive a medical examination from the employer's choice of medical personnel.

8 It does appear, on the face of the order, that the Minister went further than was necessary to deal with the complaint before him.

9 The evidence indicates that the subject matter of Mrs. Slade's complaint was not the fact of being compelled to submit to a medical examination at the employer-retained medical clinic, but rather the employer's insistence on relying solely on that assessment in its decision to employ or not employ her. Her specific complaint in that regard has now been resolved by the third paragraph of the Minister's Order. Any general complaint in that regard is now resolved by the subsequent amendment to the employer's medical examination policy (Exhibit 1, paragraph 30).

20 Keeping in mind the subject matter of Mrs. Slade's complaint, in my view it was inappropriate for the Minister to order a change in the employer's practice on a matter outside the ambit of the complaint before him.

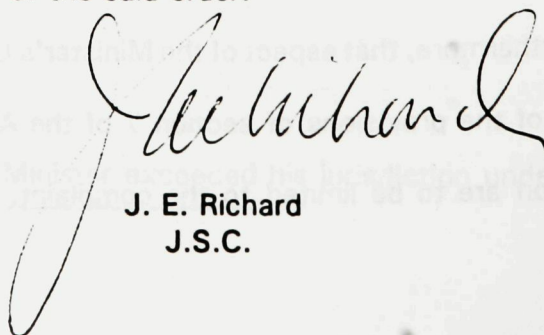
21 Furthermore, that aspect of the Minister's Order is not authorized by the legislation. A review of the provisions of section 7 of the Act indicates that the investigation and adjudication are to be limited to the complaint. By subsection 7(3) the fair practices

officer is authorized to hear representations from the aggrieved employee and the employer concerning the matter complained of. By subsection 7(4) the fair practices officer is directed to make recommendations to the Minister on actions to be taken with respect to the complaint. While it is true that subsection 7(5) authorizes the Minister to "make any Order the Minister sees fit" the words "with respect to the complaint" must be read into that subsection by necessary implication.

22 In Barsoum v. Pape et al [1988] N.W.T.R. 368 this Court, in dealing with a different statute but on a similar jurisdictional issue, ruled that statutory bodies such as a Board of Inquiry or a Minister have no jurisdiction to investigate into, or adjudicate upon, anything that is not the subject-matter of a specific complaint placed before that body pursuant to the legislation.

23 For the foregoing reasons, I find there is merit in the submission that the Minister exceeded his statutory authority in making the direction he did in the second paragraph of his order of April 21, 1992.

24 Accordingly, the appeal succeeds and pursuant to s.8 of the Fair Practices Act I hereby set aside the second paragraph of the said order.



J. E. Richard
J.S.C.

THE UNIVERSITY OF THE WEST INDIES
TRINIDAD AND TOBAGO

IN THE SUPREME COURT OF TRINIDAD AND TOBAGO
IN AND FOR THE DISTRICT OF PORT KAITUMA

COMPLAINT

FOR DAMAGES

AND

FOR AN ORDER OF INJUNCTION



Plaintiff: The University of the West Indies
Defendant: [Name]

For the Plaintiff: [Name]
For the Defendant: [Name]

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