Federal Court of Canada | Cour fédérale du Canada

A-211-89

CORAM: **HEALD J.A.**
STONE J.A.
LINDEN J.A.

IN THE MATTER OF an Application under Section 28 of the **Federal Court Act**

AND IN THE MATTER OF a decision of the Human Rights Tribunal established pursuant to the **Canadian Human Rights Act**,R.S.C. 1985, c.H-6, as amended, rendered by Emmanuel Sonnenschein dated the 21st day of April 1989.

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

MARK ROSIN

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Respondents

Heard at Ottawa on Tuesday and Wednesday, November 6 and 7, 1990

Judgment rendered at Ottawa on Friday, December 7, 1990.

REASONS FOR JUDGMENT BY: **LINDEN J.A.**

CONCURRED IN BY: **HEALD J.A.**
STONE J.A.

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REASONS FOR JUDGMENT

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Mark Rosin was an 18-year-old Royal Canadian Army Cadet, who was part way through a summer course in parachuting when he was removed summarily from the course by his commanding officer after it was

discovered that he had only one eye. For several previous summers, Rosin had served as an exemplary cadet, hoping and dreaming that he would one day be accepted into the basic three-week parachuting course and earn his wings. One of these courses, regularly offered to ordinary members of the armed forces, was open each summer to cadets. In the summer of 1984, Rosin was among the 54 cadets selected. He successfully completed the first two weeks of the three-week course when it was discovered that he had a glass eye, replacing an eye lost when he was seven years old. Although this information was known to the officers he had worked with in the past, it was not put in the application form he filled out in applying for the course because it was not specifically asked for and because he and his medical adviser did not think that his monocularity was relevant. Unbeknownst to Rosin, however, there existed an armed forces sight standard that had to be met in order to qualify for the parachute course. This standard required that each participant have excellent vision in both eyes. In short, the standard denied all one-eyed people access to the course.

Rosin filed a complaint with the Canadian Human Rights Commission, alleging violation of sections 5, 7 and 10 of the Act. After a hearing before a one-person tribunal, it was found that there had indeed been breaches of sections 5, 7 and 10, and that no *bona fide* occupational requirement had been established. Various remedies were ordered, including a directive that Rosin be allowed to enrol in the basic parachuting course and that compensation of $1500 plus interest be paid to him.

This s. 28 application has been brought to set aside the order of the tribunal. While accepting that the exclusion of all one-eyed individuals from the course was *prima facie* discrimination on the basis of disability, counsel for the Armed Forces contended that sections 5, 7 and 10 were not applicable to this parachuting course. Section 5 did not cover the situation, it was argued, since this course was not a "service...customarily available to the general public". Further, sections 7 and 10 did not apply, it was contended, because the cadets were not "employees" of the Armed Forces. It was then argued that the sight standards were "*bona fide* occupational requirements" under section 15. Lastly, it was contended that the tribunal exceeded its jurisdiction with regard to two of the remedies it ordered.

I shall deal with each of these four submissions in turn.

1. Customarily available to the general public

The first issue is whether the parachuting course offered by the Canadian Forces at Edmonton was a service or facility customarily available to the general public according to the wording of section 5 of the Canadian Human Rights Act which reads:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

Although it was not questioned that this course was either a "facility" or "service", counsel for the applicant strenuously argued that it was not

customarily available to the general public. He contended that it was a specialist military course available only to members of the Armed Forces and to certain cadets on a restricted access basis. Ordinary members of the public, he suggested, did not have access to the course. It was a two-stage process, the public perhaps having access to the first but not the second. For the respondents, however, it was pointed out that any young person between 12 and 18 years of age could join the Royal Canadian Army Cadets, which had 24,000 members, and then apply to attend this course. The tribunal found that section 5 covered this facility or service and I agree with that conclusion.

In the interpretation of human rights codes, the Canadian courts have consistently accorded them a meaning which will advance their broad purposes. Our courts view human rights codes not as ordinary statutes but as special, as fundamental, as "almost constitutional" in their nature. For example, Mr. Justice Lamer, as he then was, declared that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law." (See Insurance Corp. of B.C. v. Heerspink, [1982] 2 S.C.R. 145 at p. 158; see also La Forest J. in Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84.) Mr. Justice McIntyre of the Supreme Court of Canada reiterated this view in Ontario Human Rights Commission v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536, at p. 547 when he wrote:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment ... and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

Chief Justice Dickson (as he then was) has outlined the correct way to approach human rights legislation. Such laws should be given not only their plain meaning but also "full recognition and effect" and, in accordance with the Interpretation Act, "a fair, large and liberal interpretation as will best ensure that their objects are attained". Chief Justice Dickson warned: "We should not search for ways and means to minimize those rights and to enfeeble their proper impact". (See Action Travail des Femmes v. C.N.R. (1987), 40 D.L.R. (4th) 193 (S.C.C.) at p. 206; [1987] 1 S.C.R. 1114, at p. 1134.)

Utilizing this approach, it is clear that the tribunal did not err in deciding that this course was "customarily available to the general public". Canadian courts have broadly interpreted these words, as well as other similar word formulae used to express this idea, in the various statutes of the provinces, the United Kingdom and the United States. The essential aim of the wording is to forbid discrimination by enterprises which purport to serve the public. (See Tarnopolsky & Pentney, Discrimination and the Law (1985) chapter 11.)

In order for a service or facility to be publicly available, it is not required that all the members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private", leaving outside the scope of the legislation very few activities indeed.

A leading decision illustrating these principles, particularly as they apply to government, is Re Saskatchewan Human Rights Commission and Government of Saskatchewan Department of Social Services (1989), 52 D.L.R. (4th) 253 (Sask. C.A.) where Mr. Justice Vancise held that the Department of Social Services could not discriminate against individuals by deciding whether they could receive social benefits on the basis of their marital status. The legislation in Saskatchewan forbade discrimination against persons with respect to "accommodation, services, or facilities to which the public is customarily admitted or which are offered to the public". Mr. Justice Vancise observed:

> Broadly speaking, services provided by the Crown are available to all members of the public. Most services the Crown provides can be described as publicly available benefits ... In most cases, the receiver of a government service will be required to follow prescribed application procedure and to demonstrate that he qualifies for the service being offered. Most government services are intended to benefit some specific class according to perceived governmental policies and objectives. Eligibility criteria and application forms generally ensure the impartial and universal application of services rather than a restriction of an offering of the service to the public. [p. 266]
>
> ...
>
> The fact that a service is offered to the public does not mean that it must be offered to all members of the public. The government can impose eligibility requirements to ensure that the programme or services reaches the intended client group. The only restriction is that the government cannot discriminate among the client group, that is, the elderly, the poor or others, on the basis of the enumerated characteristics set out in the Code. [p. 268]

The Saskatchewan Court of Appeal, in arriving at its decision, relied on an article by Professor Greschner, "Why Chambers is Wrong: A Purposive Interpretation of 'Offered to the Public'" [1986] Sask. L. Rev. 161 where it is written:

> The interpretation of 'offered to the public'...should be as follows: any service offered by a government is a service offered to the public. This interpretation furthers the policy of the Code of eliminating discrimination, for all government services would be covered. It is also consonant with the overall expansive scope of the Code... A government by its nature has only public relationships with persons...

This reasoning is persuasive. It is difficult to contemplate any government or branch of government contending that a service it offered was a private one, not available or open to the public. Indeed, it may well be said that virtually everything government does is done for the public, is available to the public, and is open to the public. Moreover, to allow a government to evade the operation of the Code merely by setting up eligibility requirements and then arguing that the program is not open to the public is unacceptable; a program is still offered to the public, even though all members of the public cannot avail themselves of it.

It will be noted that the English wording of the Canadian Human Rights Act being considered here is not exactly the same as the wording utilized in the Saskatchewan legislation. The federal statute speaks of services "customarily available to the general public", whereas the Saskatchewan law talks of services "offered to the public". While it may appear at first blush that these differences in wording may be significant and that the federal law is to have a narrower scope than the Saskatchewan legislation, closer analysis leads me to conclude that both word formulae convey essentially the same meaning.

The first and most important reason for this is that the French version of the Canadian Human Rights Act, which is entitled to equal status in statutory interpretation, uses the phrase services "destinés au public". There is no adverb equivalent to "customarily", nor is there any adjective modifying the word "public" that would correspond to "general". This leads

me to the conclusion that the words "customarily" and "general" used in the English version of the Canadian Human Rights Act are not significant.

A second reason that leads me to conclude that the word "customarily" is not significant is that the Saskatchewan legislation uses it in the same section in connection with "accommodation", but not in relation to "services and facilities". In addition to possible stylistic considerations, it may be that historical reasons may explain the use of the word "customarily" in relation to "accommodation". (See Tarnopolsky & Pentney, Dicrimination and the Law (1985), chapter 11.)

A third reason not to emphasize the slight differences in the language used in connection with these provisions is that no court seems to have done so in the past, at least in relation to governmental services. (It may be that, in dealing with private sector organizations which offer advertising services to the public, different considerations might be taken into account. See Gay Alliance Toward Equality v. Vancouver Sun et al. (1979), 97 D.L.R. (3D) 577 (S.C.C.) at p. 590, *per* Martland J.) We should not inspect these statutes with a microscope, but should, as mentioned above, give them a full, large and liberal meaning consistent with their favoured status in the lexicon of Canadian legislation.

Additional support for this view can be obtained from Re Singh, [1989] 1 F.C. 430, a decision of this Court, where Mr. Justice Hugessen, writing for the Court, intimated that services rendered by public servants in administering the Immigration Act might well be "considered services

customarily available to the public". Without making any final determination on the point, because it was unnecessary to do so, Mr. Justice Hugessen opined that it was "arguable" that "by definition, services rendered by public servants at public expense are services to the public" and within s. 5 and held:

> It is not by any means clear to me that the services rendered, both in Canada and abroad, by the officers charged with the administration of the Immigration Act (1976) are not services customarily available to the general public.

According to Mr. Justice Hugessen, then, echoing Mr. Justice Vancise and Professor Greschner, these government services might be said to be available to the public and, hence, properly fall within s. 5.

Another decision of this Court, consistent with this conclusion, is A.G.C. v. Druken, [1989] 2 F.C. 24, where it was initially suggested in the factum of the Attorney General that unemployment insurance benefits were not "services customarily available to the public", but this argument was not pursued. Mahoney J.A., speaking for the Court, explained that the "applicant appears to have found persuasive" the *dictum* of Mr. Justice Hugessen in Singh, *supra*. Unemployment insurance, then, was conceded to be a service customarily available to the general public, despite its limited availability.

In addition to these appellate court decisions, there are several human rights tribunal decisions which have adopted this view. One of the most recent cases is Courtois v. Department of Indian and Northern Affairs (1990), 11 C.H.R.R. D/363, where it was decided that it cannot be maintained that a reserve school "does not constitute a service customarily available to the general public simply because this reserve school is limited primarily to Indians. In fact, although it is a so-called Band school, the costs of this school

are nevertheless paid primarily by public funds. To say that these schools are not a public service because they are intended solely for Indians would be to say, ...that all persons who belong to a specific group (that is, Indians) are no longer members of the community as a whole which would open the door to all kinds of discriminatory practices".

A helpful explanation of the meaning of these words has also been offered in Hobson v. B.C. Institute of Technology (1988), 9 C.H.R.R. D/4666 at 4667:

> I find that the mere fact of authority to establish substantial entrance requirements or qualifications for entrance to publicly funded educational institutions such as the respondent or universities or colleges does not mean that these institutions and the services they provide are not customarily available to the public. Additionally, it is not necessary that all members of the public be able to demand the services or entrance to the facility as a matter of right for such to be customarily available to the public. In the instance of public educational institutions, such as the respondent, it is sufficient, in this respect, if such services or facilities are customarily available to the "public" in the sense of "all persons legally or properly qualified."

(See also Monsoorali Rawala and Victor Souza v. De Vry Institute of Technology (1982), 3 C.H.R.R. D/1057; Anvari v. Canada Employment & Immigration Commission (1988), 10 C.H.R.R. D/5816.)

In conclusion, given the judicial approach taken to human rights legislation, given the importance of the French version of the legislation referred to above, and given the other considerations outlined above, I conclude that the tribunal was correct in holding that this course was a service or facility "customarily available to the general public".

2. Employment

The second issue is whether Mark Rosin was an employee of the Armed Forces when he was involved with the parachuting course and, hence, whether he came within sections 7 and 10 of the Canadian Human Rights Act which read:

> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.
> ...
>
> 10. It is a discriminatory practice for an employer, employee organization or organization of employers
>
> (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,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

It was argued by counsel for the applicant that these cadets were not employed by the army. He suggested that they were not being paid any "salary" and that they were not doing any work for the army. He likened them to teenagers attending a summer camp, who were receiving training. Counsel for the respondents contended that they were employees, who were under the control of the Armed Forces, who received some money for their services, and whose presence benefited the army. The tribunal, although somewhat confused in its language and reasoning, seemed to find that sections 7 and 10 applied in these circumstances and I agree.

Remembering the broad and liberal approach that must be taken to this type of legislation, I have no difficulty in concluding that Mark Rosin was an "employee", as this term is used in human rights legislation, during the time he was a cadet in 1984. There is little in the way of specific definitions of employment either in the Human Rights legislation nor in the cases themselves. (See Tarnopolsky and Pentney, *supra*, chapter 12.) What is clear is that courts have interpreted the words broadly, finding employment relationships to exist in this context where in other contexts they might not have so found. Normally, for employment relations to exist, money is paid as wages to someone who works for the person who pays those wages, but in the human rights context the situation is much more flexible. The cases about vicarious liability are not particularly helpful here. What is necessary is to give the word employment a "liberal interpretation". (See McDonald J. in Cormier v. Alberta Human Rights Commission et al. (1984), 5 C.H.R.R. D/2441.)

There are cases where an employment relationship has been found for the purposes of this legislation even though salary was not paid by an "employer" nor was work done directly for the employer. In Re Pannu and Prestige Cab Ltd. (1987), 8 C.H.R.R. D/3909, for example, where members of the Sikh faith were denied positions because of their religion, the Alberta Queen's Bench held that an employment relationship existed, even though the individual taxi drivers did not work for and were not paid any remuneration by Prestige Cab, which operated a fleet of taxis. They earned money by working but it was not paid to them by the taxi fleet operator. "The mode of payment...is not determinative of the relationship", concluded Mr. Justice

Bracco. This decision was affirmed by the Alberta Court of Appeal, Chief Justice Laycraft explaining that here, because of the need to interpret liberally, the word "employ" may be used "in the sense of 'utilize'". Although there may not have been an employment relationship in the traditional sense, there certainly was in the sense meant in this type of legislation, that is, "utilization".

Another example of an employment relationship being found in the context of human rights legislation, where it might have been otherwise in another situation, was Prue v. City of Edmonton (1984), 15 D.L.R. (4th) 700 (Alta. Q.B.), a case of age discrimination. Associate Chief Justice Miller, relying on the recent trend in the cases, found that a board of commissioners of police and a police chief were employers for the purposes of human rights legislation, even though the salaries of the officers were paid by and the actual employment contract was with the City of Edmonton, because the Act was "remedial legislation" and "as such it is entitled to a fair, broad and liberal definition". There may not have been an employment contract with those doing the discriminating, but there was a sufficient employment relationship nevertheless. At p. 712, Miller A.C.J. proclaimed:

> I find the words were used in a sense to permit Albertans to be protected from wrongful discrimination in the manner in which they seek a livelihood. These words used in the Act are such forward-looking words. They seek to protect Albertans from wrongful discrimination regardless of the particular mode of earning income which the individual might choose. Thus, Albertans are protected in their ability to compete on an equal basis. The ancient common law master-servant relationship cannot have been intended to apply to define the meaning of these words in a manner allowing technical legal rules to limit the rights of any Albertans.
>
> I can see no public policy that would favour the narrow technical meaning that has been argued for these words. Counsel argue that if I find that the words apply to an "office holder" then a person might complain of wrongful discrimination in, say, the appointment of provincial court judges. I do not see the reason for fearing such an application, should it ever arise. Surely the halls of justice are not a place where wrongful discrimination should be accepted while the rest of Alberta society is to be conducted at a higher

> standard. The administration of justice must serve as an example of the operation of truth in the open forum of the courtroom. It should not shield behind fanciful notions and place itself above the law. The argument applies *a fortiori* to other servants of the administration of justice, including policemen. How can one say that wrongful discrimination might be acceptable in the administration of justice? Yet this would be the effect of looking to the narrow meaning of the words in the Act that have been suggested to me.

This Court has recently indicated that it will also accord a broad and liberal meaning to the word "employ", as used in the Canadian Human Rights Act. In Canadian Pacific Limited v. Canadian Human Rights Commission and Fontaine (File A-514-89 - November 13, 1990) a cook was dismissed by C.P. when it was discovered that he was suffering from AIDS. He was actually not "under contract" with C.P. but worked for a subcontractor, Smith (1960) Limited, who paid his salary and assigned him to cook for a C.P. railroad gang in Saskatchewan. Chief Justice Iacobucci agreed with the "authorities that gave a broader meaning to 'employ' than that afforded by the technical master-servant relationship". He quoted Chief Justice Laycraft in Pannu (*supra*) and adopted the meaning of "to employ" as "to utilize", concluding that the tribunal was correct in deciding that "CP indirectly refused to continue to employ Mr. Fontaine".

In the light of these authorities, I find that the tribunal was correct in holding that sections 7 and 10 were applicable to Rosin. Although he may not have been an employee in the traditional sense of master and servant, he was in the sense meant to be covered by this legislation. There was a situation of control over him, there was some remuneration and there was clearly some benefit derived by the Armed Forces from his attendance. He was certainly being "utilized" by the Armed Forces.

Rosin was controlled in many ways: he was required to wear a cadet uniform; he had to obey all the rules and follow all the commands he received; he ate what he was fed and slept when he was told to sleep. In short, he was very closely controlled by the Armed Forces in all that he did. This element of control is enshrined in the National Defence Act, R.S.C., c. N-1, which reads, in part:

> 46. (1) The Minister may authorize the formation of cadet organizations under the *control and supervision* of the Canadian Forces to consist of persons not less than twelve years of age who have not attained the age of nineteen years.
>
> (2) The cadet organizations mentioned in subsection (1) shall be trained for such periods, administered in such manner, provided with material and accommodation under such conditions and shall be subject to the *authority and command* of such officers as the Minister may direct. ... (Italics mine.)

As for remuneration, Rosin may not have been paid a salary as such, but he received $240 when he was removed from the course, the same amount he would have received had he completed it. This was called an honorarium by the Armed Forces, but it was nevertheless money paid to the cadets at the end of the summer sessions. Children at summer camp do not receive any money at all. On the contrary, they pay to go. In addition, Rosin received room and board, which, although not payment in the usual sense, is certainly something of value that was given to him while he attended the course.

As far as the work done by Rosin is concerned, it may be said that he did not do any productive work, in the traditional sense of the word, and that he was merely being trained and taught. It should be pointed out, however, that in many present-day jobs, employees frequently receive education and training which is considered by their employers to be part of

their work or duties. They are usually paid a salary during these education or training periods. One cannot help but note also that, except in time of war or emergency, the work of the regular Armed Forces is in large part that of training, of getting into a state of readiness and of staying prepared so that they may respond swiftly and effectively if called upon. Moreover, these camps for army cadets are not operated for altruistic reasons alone; the Armed Forces expressly set out in their regulations that they wish to recruit from among these cadets future members of the Armed Forces. This is probably what was meant by the tribunal when it discussed "salaries...paid by implication" in "recruiting cadets and people who may join the Forces in the future". In other words, there were potential benefits that might be garnered by the Armed Forces from the participation of these cadets in these summer programs.

I have no difficulty, therefore, in concluding, considering all of these matters - control, remuneration and benefit - that the Armed Forces employed Rosin, in the sense meant by the Canadian Human Rights Act, during the summer of 1984. There was, consequently, a *prima facie* breach of sections 7 and 10.

3. *Bona Fide* Occupational Requirement (BFOR)

Having decided that the Canadian Human Rights Act is applicable and that, *prima facie*, sections 5, 7 and 10 have been breached, it is now necessary to determine whether the tribunal was correct in holding that the discrimination was not justified on the evidence presented at the hearing.

Section 15 of the Canadian Human Rights Act reads, in part:

> 15. It is not a discriminatory practice if
>
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;
>
> ...
>
> (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation.

It is clear that acts done in apparent violation of Section 5 may be justified pursuant to Section 15(g) and conduct contrary to Sections 7 and 10 may be excused pursuant to Section 15(a). The standards set out in these two provisions are very similar. It has recently been made clear by the Supreme Court of Canada that there is no difference between a *bona fide* occupational requirement and a *bona fide* occupational qualification. "They are equivalent and coextensive terms." (See Alberta Human Rights Commission v. Central Alberta Dairy Pool (Supreme Court of Canada, No. 20850, Sept. 13, 1990 at p. 13, *per* Wilson J.) Similarly, it might be concluded that the two phrases - "*bona fide* occupational requirement" (as in s. 15(a)) and "*bona fide* justification" (as in s. 15(g)) convey the same meaning, except that the former is applicable to employment situations, whereas the latter is used in other contexts. The choice of these different words used to justify *prima facie* discrimination, therefore, are matters of style rather than of substance. I shall refer henceforth to both of the above phrases as B.F.O.R.

The law of B.F.O.R. has been clarified to some extent by the Supreme Court in the recent decision of Alberta Human Rights Commission

v. Central Alberta Dairy Pool (*supra*). Madame Justice Wilson, writing for the majority (4-3) held that, in cases of direct discrimination (which, it was agreed, was the situation in this case), the employer must justify the discriminatory rule as a whole. It is not necessary, as it is in cases of indirect discrimination, to take into account any measures adopted to accommodate any individuals involved. In cases of direct discrimination, the rule stands or falls in its entirety, since it applies to all members of the group equally. In assessing the validity of such a rule, the tribunal must decide whether it was "reasonably necessary" to ensure the efficient performance of the job without endangering the safety of the employee, fellow employees and the public. The onus is on the employer to establish that the rule or standard is a B.F.O.R. It is not enough to rely on assumptions and so-called common sense; to prove the need for the discriminatory rule convincing evidence and, if necessary, expert evidence is required to establish this on the balance of probabilities. Without that requirement, the protection afforded by human rights legislation would be hollow indeed. Hence, it is necessary, in order to justify *prima facie* direct discrimination, to demonstrate that it was done in good faith and that it was "reasonably necessary" to do so, which is both a subjective and an objective test. (See Central Alberta Dairy Pool, *supra*; Ontario Human Rights Commission v. Etobicoke [1982] 1 S.C.R. 202 *per* McIntyre J. See also Special Report to Parliament on the Effects of the Bhinder Decision on the Canadian Human Rights Commission (1986).

The tribunal's decision concerning the evidence of B.F.O.R. is attacked on at least three grounds. The first is that it ignored the evidence of the Forces' experts to the effect that one-eyed parachutists posed an

increased risk to themselves and others. If the evidence was ignored totally, it was urged that this would be an error of law, leading to an order setting aside the decision. If, however, the evidence was not totally ignored, but was weighed along with the other evidence and found unpersuasive, it would be within the discretion of the tribunal to reject it. There was evidence of an opthamologist, Dr. (Capt.) L. T. Green, who, although not a parachutist, indicated that one-eyed people have a restricted field of vision and their depth perception is affected, which, in his view, might increase the risk of an accident. However, the tribunal felt that the witness's testimony about the risk was not necessarily his own view but was "something advised by someone and which he accepted in good faith." The applicant also called two expert parachutists, Lt. Col D. Bondurant and Capt. Vida, who described the risk posed by one-eyed parachutists, but no statistical data was offered establishing that monocular parachutists were more prone to accidents than other parachutists. The tribunal noted that these so-called experts had no training in risk management, indicating it was not impressed with their evidence. The tribunal, therefore, did not accept this evidence on the ground that it was "impressionistic", using the language of the Etobicoke case. The tribunal also had before it the conflicting evidence of Lt. Col. (ret.) A. Bellavance, who testified for Rosin. He agreed that the more a parachutist can see, the better it is. However, he also indicated that one-eyed people can do parachuting and that other countries did not bar one-eyed parachutists from their armed forces. The tribunal also considered an article about monocularity which was ambiguous about the risks involved in various activities. The tribunal, perhaps somewhat careless in its use of language, concluded that there was "no evidence" as to the B.F.O.R. On a careful reading of the reasons, however,

it can be seen that this wording was meant to convey not that there was "no evidence" but that the evidence of the applicant was not convincing for the tribunal - something it was entitled to conclude. In short, on all the evidence before the tribunal, it was not satisfied by the applicant that an increased risk justifying the B.F.O.R. had been proven. This Court cannot interfere with such a conclusion when it is based on evidence, which it was.

A second complaint of the applicant is, that if any degree of risk is proven, however small, a B.F.O.R. is established. I have already indicated that the tribunal was not satisfied by the evidence that there was any increased risk. Hence, it is not necessary to deal with this issue. If it were, one would have to take into account the Central Alberta Dairy Pool case, where Madam Justice Wilson indicated that the Bhinder case may have been incorrectly decided on the basis that the increased risk there was only marginal, and, hence, may not have been sufficient to support the B.F.O.R. defence. (See also to the same effect as Bhinder, Re Canadian Pacific Ltd. and Canadian Human Rights Commission (1987), 40 D.L.R. (4th) 586 (F.C.A.)).

The third criticism of the decision is that it took into account certain of Rosin's individual characteristics in determining whether a B.F.O.R. had been established. It is true that, in cases of direct discrimination, the characteristics of any particular individual are not relevant. Either the provision applies to all persons in the group or to none of the individuals in it. The question in this direct discrimination case is not whether the individual in question can do the job, but whether a monocular parachutist

can do the job. While the tribunal certainly mentioned the attributes of Mr. Rosin, and took comfort in them, it did not rely on them in holding that the standard was not a B.F.O.R. A close reading of the reasons indicates that the tribunal would have found that the regulation was an improper generalization in any event. After all, people wearing glasses were allowed to enter the course, even though it was shown that some of them removed their glasses when jumping. Others were said to close their eyes when they jumped. Further, even if the rule excluding monocular people were considered valid in the abstract, it did not hold true for one-eyed persons with the characteristics, vision and adaptability of people like Rosin, rather than Rosin himself.

The tribunal had sufficient evidence before it to come to the factual conclusions it did and to make the finding it did on the B.F.O.R. issue. Hence, it is not open to this Court to interfere.

4. Remedies

Among the remedies provisions of the Canadian Human Rights Act, are Sections 53(2), 53(3) and 54 which read:

> 53.(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:
>
> (a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including
>
> (i) adoption of a special program, plan or arrangement referred to in subsection 16 (1) or

(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

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

(d) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

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

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(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.

...

54. (1) Where a Tribunal finds that a complaint related to a discriminatory practice described in section 13 is substantiated, it may make only an order referred to in paragraph 53 (2) (a).

(2) No order under subsection 53 (2) may contain a term

(a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or

(b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained such premises or accommodation in good faith. 1976-77, c. 33, s. 42.

The tribunal made an order granting four remedies, as follows:

1. The Complainant be placed in a program which is similar to that which he had taken, preferably the Cadet Course, at the next available time, or a similar course which would be suitable to him and the Respondent and he is to be given the opportunity to take either the full course or the partial course and we further order that any rules which would restrict a person merely by having monocular vision be rewritten so as to eliminate the situation from reocurring and in particular the visual, geographical and occupational rules that would prevent a person with one eye from taking a parachute course be modified or suspended forthwith.

2. Although the Complainant has not specifically indicated that he wishes any compensation, the Tribunal awards the Complainant for loss and hurt feelings pursuant to Section 53(3)b the amount of $1,500.00.

3. There will be a calculation of interest under the "Interest Act" which interest will be calculated from a date thirty (30) days from the date of this Judgment.

4. It is also ordered that all expenses relating to transportation, food, uniform and other requirements will be paid for by the Respondent as well as the fact that the Tribunal orders that the Respondent is not to, in its manner of placing the Complainant in the parachutist course, delete in any way, shape or form, the number of persons who would ordinarily come from the geographical area from where the Complainant came, nor from any other area and the Complainant is to be given a fair and reasonable opportunity to meet all tests and not receive any further discrimination.

The applicant challenges two of them. First, it is contended that there was no jurisdiction to make the order allowing interest as was done under number 3. I do not accept this submission. While there is no specific provision expressly granting human rights tribunals the power to give interest, it is included in the power granted to "order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine." (see s. 53(3)). Such awards for interest have been ordered frequently by human rights tribunals. (See, for example, Canadian Armed Forces v. Morgan, Sept. 14, 1990; Boucher v. Correctional Service of Canada (1988), 9 C.H.R.R. D/4910; Chapdelaine v. Air Canada (1987), 9 C.H.R.R. D/4449; Hinds v. Canada Employemt and Immigration Commission, Oct. 11, 1988.) Specifically, interest has been allowed on awards for hurt feelings and loss of self-respect. (See, for example, Kearns v. P. Dickson Trucking Ltd. (1989), 10 C.H.R.R. D/5700; Fontaine v. Canadian Pacific Ltd. (1990), 11 C.H.R.R. D/288.)

Courts, including this Court, have held that interest may be awarded in other similar contexts, under the concept of "compensation", for to deny it would be to fail to make the claimant whole, especially in these

days of high interest rates. (See Minister of Highways of B.C. v. Richland Estates (1973), 4 L.C.R. 97 (expropriation case); Re West Coast Transmission Co. Ltd. and Majestic Wiley Contractors Ltd. (1982), 139 D.L.R. (3d) 97, (commercial arbitrator); Canadian Broadcasting Corp. v. Broadcast Council of CUPE [1987] 3 F.C. 515 (F.C.A.) *per* MacGuigan J.A., (Canada Labour Code)).

Therefore, there is no reason to interfere with this remedy, which is available to human rights tribunals pursuant to the wording of the statute as interpreted in the jurisprudence.

Whereas no complaint is made in relation to most of paragraph 4, the applicant also argues that part of paragraph 4 was beyond the jurisdiction of the tribunal when it ordered the respondent

> ...not to, in its manner of placing the Complainant in the parchutist course, delete in any way, shape or form, the number of persons who would ordinarily come from the geographical area from where the Complainant came, nor from any other area...

I am not persuaded that this aspect of the order was beyond the jurisdiction of the tribunal. It is sensible to cover this matter so as to ensure that no one is displaced as a result of the order of the tribunal. If this were not so ordered, there might follow an inadvertent violation of Section 54(2)(a) in that someone accepted for the course next year might be removed from a position accepted in good faith, something which is prohibited by the Act.

I am of the view that the order of the tribunal should be affirmed and the application dismissed.

" A. M. Linden "

judge

I concur.

" Darrel V. Heald ", J.A.

I agree.

" A. J. Stone ", J.A.

A-211-89

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

MARK ROSIN

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT
