T.D. 13/95
Decision rendered on

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

HUMAN RIGHTS REVIEW TRIBUNAL

BETWEEN:

JAMES RUSSELL LAMBIE

Appellant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION OF THE REVIEW TRIBUNAL

TRIBUNAL: ELIZABETH LEIGHTON, Chairperson
CLAUDE PENSA, Member
RAJ SAUNDER, Member

APPEARANCES: Pascale-Sonia Roy, Counsel for the Appellant

Rosemary Morgan, Counsel for the Canadian Human Rights Commission

Brian Saunders, Counsel for the Respondent

DATES AND LOCATION
OF HEARING: November 9 and December 5 and 6, 1994 and February 14, 1995
Winnipeg, Manitoba
April 6 and 7, 1995
Ottawa, Ontario

APPEAL FACTS

In a complaint to the Canadian Human Rights Commission, dated December 12, 1988, James Russell Lambie, then a Lieutenant-Colonel in the Canadian Armed Forces, alleged that he had been discriminated against by his employer, the Canadian Armed Forces. His allegation was that the Canadian Armed Forces had denied him an appointment as a Base Commander with its necessary promotion to the rank of Colonel, because of his marital status. The original complaint was founded upon sections 7 and 10 of the Canadian

Human Rights Act; reference to section 10 was subsequently withdrawn at the commencement of the original hearing.

That original hearing took place during three sessions in Ottawa, Ontario:

September 8 and 9/92
September 28, 30, October 1/92
January 20 and 21/93

The evidence presented at the original hearing described events of Spring 1987 - and most particularly late May and early June of that year - as well as an overview of the protocol involved in officers' appointment and promotion within the existing milieu of the Canadian Armed Forces. Lieutenant-Colonel Lambie alleged that he was denied the appointment as Base Commander for C.F.B. Greenwood, and its necessary promotion to the rank of Colonel, because, at the time when this promotion and appointment arose, he was separated from his first wife (from whom a divorce had not yet been granted) and was living in a common-law relationship with the woman who would subsequently become his second wife.

The Canadian Armed Forces denied that Lieutenant-Colonel Lambie's appointment/promotion was rejected based upon any consideration of his marital status.

The decision of the original Tribunal dated the 23rd day of March, 1993 and rendered on April 23, 1993, found that Lieutenant-Colonel Lambie had established a prima facie case that he had been discriminated against by the Canadian Armed Forces, in the course of his employment. The Tribunal found that Lieutenant-Colonel Lambie's marital status was a proximate cause of the denial of his appointment and consequent promotion (Canadian Human Rights Act, s.s. 3(1) and 7). Once that finding was made, the original Tribunal addressed the shift in onus to the Respondent, Canadian Armed Forces, "to provide a legitimate explanation in order for the behaviour complained of to be acceptable." It dismissed the complaint and indicated that it had done so because it was "satisfied that there was no inappropriate consideration of <Lieutenant-Colonel Lambie's> marital status" by the officers involved in the decision and it was "not prepared to find that there had been a deliberate plan <on the part of the Respondent, the Canadian Armed Forces> to cover-up any wrongdoing or improper consideration of marital status on the part of General Ashley", the individual who made the final decision with regard to the staffing of the position of Base Commander, C.F.B. Greenwood.

Lieutenant-Colonel Lambie appealed that Tribunal decision on April 12/93; a Human Rights Review Tribunal was convened and heard submissions on November 9/93 in Winnipeg, Manitoba. Those submissions addressed Lieutenant-Colonel Lambie's application to call additional evidence (Canadian Human Rights Act, s. 56(4)).

On March 31, 1994 (dissent, dated March 29/94 and only addressing the

need for the constitution of a new Review Tribunal), the Human Rights

Review Tribunal rendered its decision that Lieutenant-Colonel Lambie be allowed to call two additional named witnesses to present viva voce evidence and that the Canadian Armed Forces be allowed to present rebuttal evidence, "including the calling of new witnesses and the recalling of individuals who have already been called to give evidence." The Appeal, to be heard by a differently constituted Review Tribunal, would include the hearing of the new viva voce evidence as well as the submissions of the parties based upon the existing record and the new evidence.

On the 3rd of May, 1994, The Attorney General of Canada brought an Originating Notice of Motion in the Federal Court of Canada, Trial Division, to obtain, inter alia, an order setting aside the aforementioned Human Rights Review Tribunal decision of March 29-31/94 and an order that the Appeal of Lieutenant-Colonel Lambie be heard by a differently constituted Human Rights Review Tribunal only on the basis of the record before the original Tribunal. That application was heard by the Honourable Mr. Justice Rothstein who dismissed it on November 23, 1994, releasing his written reasons for that decision on December 2, 1994 in Ottawa, Ontario.

On that date, December 2/94, an appeal from the Honourable Mr. Justice Rothstein's decision was filed in the Federal Court of Appeal. That appeal had not been heard as of the date of the conclusion of this Human Rights Review Tribunal's hearing of evidence and submissions, April 7, 1995. This Review Tribunal had been appointed on October 25/94 (to supersede a Review Tribunal previously appointed on April 21/94); it heard evidence and submissions in sessions in Winnipeg, Manitoba and Ottawa, Ontario on December 5/6, 1994, February 14, 1995, and April 6/7, 1995.

JURISDICTION OF THIS REVIEW TRIBUNAL

Counsel for Lieutenant-Colonel Lambie indicated that this Review Tribunal could, and should - because of the Appeal pending before the Federal Court of Appeal - make two findings. The first should result from this Review Tribunal's broad jurisdiction to rule on all the evidence heard by this Review Tribunal as well as the established record as if, in toto, that constituted a hearing de novo. That position was tempered, however, by submissions that the ruling of the original Tribunal that there was a prima facie case for the complainant were not at issue and therefore, should be simply accepted as such. A second finding should be made based simply upon the record - as if an appeal had been made from the decision of the original Tribunal and nothing other than submissions of Counsel and the existing record were before the Review Tribunal.

This submission was made, presumably, to avoid problems which might arise from the pending appeal of the Honourable Mr. Justice Rothstein's decision.

Counsel for the Respondent made submissions that, as an appellate review, this Review Tribunal should interfere with the original Tribunal's finding only if there is held to be a palpable and manifest error in fact and/or in law. The basis for such a decision should include the record and viva voce evidence heard by this Review Tribunal.

As this Review Tribunal was dealing with what might be described as an

amalgam of evidence, it is appropriate to look to the Canadian Human Rights Act to clarify the nature of a Review Tribunal.

Section 56(2) to 56(5) of the Act states as follows:

"(2) Subject to this section, a Review Tribunal shall be constituted in the same manner as, and shall have all the powers of, a Tribunal appointed pursuant to section 49, and subsection 49(4) applies in respect of members of a Review Tribunal.

(3) An appeal lies to a Review Tribunal against a decision or order of a Tribunal on any question of law or fact or mixed law and fact.

(4) A Review Tribunal shall hear an appeal on the basis of the record of the Tribunal whose decision or order is appealed and of submissions of interested parties but the Review Tribunal may, if in its opinion it is essential in the interests of justice to do so, admit additional evidence or testimony.

(5) A Review Tribunal may dispose of an appeal under section 55 by dismissing it, or by allowing it and rendering the decision or making the order that, in its opinion, the Tribunal appealed against should have rendered or made."

Two decisions referred to in Carson et al v. Air Canada (1984) 5 C.H.R.R. D/1857, dealt with the question of the powers of Review Tribunals. In an interim decision of a Review Tribunal in Butterill, Foreman and Wolfman v. Via Rail Canada Inc. (1980) 1 C.H.R.R. D/233, a ruling was made that Review Tribunals have a broad discretionary power which allows them to substitute their own opinions for that of the original Tribunal - a broader power than "appeal" Tribunals. This conclusion was upheld by the Federal Court reported in Butterill, Foreman and Wolfman v. Via Rail Canada Inc. (1982) 3 C.H.R.R. D/1043; Thurlow, C.J. indicated at D/1044-45 as follows:

"... in any event, having regard to para. 42.1(6)(b) of the Act, I do not think it is fairly arguable that the Review Tribunal is not empowered to substitute its judgment for that of the Human Rights Tribunal."

Further, at D/1046, he says:

"It was for the Review Tribunal to deal with these issues on such evidence as there was in the record of the Human Rights Tribunal and such further evidence as they might admit."

It has become "trite law" that the underlying spirit of Human Rights legislation requires a broad and liberal interpretation. Review Tribunals have been given the powers to hear additional viva voce evidence and, where appropriate, to render the decision, to make the order, which it feels the original Tribunal should have rendered or made.

Therefore, we proceed to our findings and conclusions in this case

based upon the record and upon the viva voce evidence heard by this Review Tribunal.

FACTS

As noted under "Appeal Facts", the original complaint filed by Lieutenant-Colonel Lambie was the result of an incident which took place in the late Spring of 1987. At that time, Lieutenant-Colonel Lambie was taking a French language course in Winnipeg, the location of his appointment in the Canadian Armed Forces at Air Command Headquarters. He was involved in a common law relationship with the woman who would become his second wife; the legal process of the divorce of Lieutenant-Colonel Lambie and his first wife had not yet been finalized.

Lieutenant-Colonel Lambie gave evidence that on May 28, 1987 he had a conversation with a personal friend and superior, General Garland; he was, at this time, Deputy Commander of Air Command and, because of the absence of the Commander of Air Command, General Ashley, was "in charge" Ashley, however, would return by June 1/87.

The conversation, according to Lambie, was short and to the point - he was to be appointed as Base Commander for Base Greenwood and would thus be promoted to the rank of Colonel.

A second conversation took place between Lambie and Garland on the following day, May 29/87. This conversation, according to Lambie, centred on his personal situation - his upcoming divorce, his need to attend at Base Greenwood first as a single Base Commander, his intention to marry his common law spouse, her intention to take a leave of absence from her job when she joined him at Base Greenwood as his legal wife (something he indicated that Garland suggested he keep from Ashley). He did learn, additionally, that there had been three candidates for this appointment and, because the first two were not available to accept, Lambie, the third on the list of recommendations, would be appointed with the necessary promotion.

On June 3/87, Lieutenant-Colonel Lambie, expecting to hear of his official appointment and promotion, received, according to his evidence, another telephone call from General Garland. Instead of his expectation, he received what he described as a blunt denial that the conversations he had previously had with General Garland had ever taken place, and the information that the appointment of the Base Commander Greenwood would go to another.

Lieutenant-Colonel Lambie was, he said, first stunned by this news, and, eventually hurt and angry. He attempted to find out how this very sudden change could have happened and felt thwarted. His letters, written to superiors, were either not answered or answered without what he felt was an adequate explanation. A grievance filed did not give him an adequate explanation; it did, however, give him further information about the incident which underlined his beliefs that he had been the victim of discrimination based upon his marital status. Eventually, he filed a complaint with the Canadian Human Rights Commission.

This incident must be viewed in the context of what was described in evidence as the culture of the Canadian Armed Forces. That culture was founded upon the historical military necessity for a "chain of command". It is steeped, therefore, in structures and protocols, both written and

unwritten. The unwritten rules are an amorphous and changing set of regulations often concerned with the social side of the military milieu.

There was much discussion of the role of the wife of a Base Commander. Traditionally, the Base Commander's wife was expected to take upon herself the role of "mother hen"; certainly, even as her role evolved, she was expected to be a hostess for her husband, the Base Commander. The evolution of her role was, perhaps, hastened by the passage of the Canadian Human Rights Act; even in the late 1980's, however, discussion about the roles of military wives amongst top-ranking military personnel were being facilitated by such "strawman's" papers as that written by General Curleigh and entered as an exhibit.

The written rules involve all aspects of work within the military. For example, officers' movement through appointments and promotions in the ranks is based upon personal evaluation reports, prepared annually and reviewed in a "merit list" ranking system. In 1987, Lieutenant-Colonel Lambie ranked 11th on the merit list for Lieutenant-Colonels; during that year the top 10 Lieutenant-Colonels on that list were promoted. Those promotions were already made by May/87 as the review would have taken place in the previous fall. Vacancies creating promotion were anticipated usually based upon a traditional 3-year stint at any one appointment. By May the anticipated vacancies would have been filled. The vacancy at Base Greenwood was not an anticipated one; the Base Commander there had not fulfilled his 3-year term when he was promoted, unexpectedly according to some evidence. Thus, there was a need to look either to other Colonels available for that appointment (one had to be a Colonel to be a Base Commander) or to Lieutenant-Colonels who could be promoted to the rank of Colonel at the time of such an appointment. There were two Colonels who were highly regarded - Colonels Faulkner and Kirkwood. Both were in positions in Ottawa. For personal reasons, Faulkner had made it known that he did not wish to move from that city; Kirkwood could not be expected to be moved as his Ottawa appointment was recent. But for these reasons, either of these two would have been appointed as Base Commander for Base Greenwood when it became vacant; however, Lieutenant-Colonel Lambie's placement on the merit list - next in line for promotion -made him the candidate likely to receive that appointment and promotion given the information noted about Colonels Faulkner and Kirkwood.

Indeed, Captain Rees, the assistant to Colonel Hamilton, Director of Personnel Careers for Colonels in early 1987, indicated in her evidence that Colonel Hamilton had confided his happiness at the upcoming appointment and promotion of Lieutenant-Colonel Lambie (described by him as previously "always the bridesmaid, never the bride") when he personally placed Lambie's name on the board, indicating that appointment. Hamilton must have known of the impending promotion of the Base Commander at Greenwood - his happiness was in anticipation of the appointment/promotion of Lambie. Rees was asked to create the paperwork - the pro forma - which

was needed for the Lambie appointment/promotion; her evidence is that she did that work and received the document creating the appointment/promotion back from the Chief of Defence Staff, duly signed. That document was kept by her for the day when it would eventually be needed. In the meantime, Colonel Hamilton did not live to see what he thought would be Lambie's appointment/promotion; he died on March 7/87. The pro forma, according to Captain Rees, remained in her filing cabinet, ready to be made official.

She went on to indicate that, upon the Base Greenwood opening finally materializing in mid-May 1987, she took it upon herself, as she was doing Colonel Hamilton's work after his death, to call Air Command Headquarters in Winnipeg to initiate the process by which the appointment/promotion of Lambie would become official; she awaited a return call so that the pro forma could be used as Colonel Hamilton had anticipated it would be. That call never came; instead, she was instructed that the pro forma for Lambie's promotion was to be destroyed and the paperwork for Colonel Kirkwood's appointment to Base Greenwood was to be done.

From the perspective of General Ashley, the Commander of Air Command who was responsible for making the decision as to who to appoint as new Base Commander for Base Greenwood, his decision was based upon candidates recommended to him by General Garland, General Curleigh, General Patrick, and Colonel Friesen, who was by June/87, Colonel Hamilton's replacement. In addition, his decision was influenced by his own bias towards the appointment of a navigator to the Greenwood Base, although that appointment could have been either a navigator or a pilot (which Lambie was) as long as he had appropriate maritime air experience and was the best qualified candidate available at the time. He heard of the need for such an appointment on June 1/87 - the appointment was made on June 3/87. Colonel Kirkwood was appointed. He was a navigator Colonel with appropriate experience who was, according to Lambie, highly qualified for the appointment but who had been, until this 2-day time-frame, not available for the appointment.

Needless to say, much discussion took place amongst the generals at Air Command Headquarters in Winnipeg during those first two days of June/87. According to those generals, this discussion concerned candidates for this appointment, lists of them having been compiled. Although Garland indicated his recommendation was for Lieutenant-Colonel Lambie should a pilot be chosen, all indicated that the best candidate for the position was the paramount factor and, to a lesser extent, the use of a navigator at a Base which could accommodate such a person (all Bases would accommodate a pilot as Base Commander; only seven could appoint a navigator as Base Commander). Certainly, all involved indicated that marital status was never a factor - nor even mentioned!

The evidence of Ms. Robertson, at the time General Patrick's secretary, a civilian employee, indicated a very different bias - that of appointing an individual who had his "life in order" and who was not "shacking up" with some woman to whom he was not married. She indicated that she was able to hear portions of conversations amongst those discussing the appointment (Garland, Patrick, and Ashley) as she did her work on June 1/87. Those conversations, she indicated, were heated and

culminated with the need to "get this matter resolved". Indeed, the matter to which she referred was, according to Ms. Robertson, that of a posting of Lieutenant-Colonel Lambie to Base Greenwood as Base Commander.

Although the possibility of such a thing actually ever happening was denied by both viva voce and affidavit evidence from the Respondent, Ms. Robertson claimed to have seen Lieutenant-Colonel Lambie's posting message and, eventually, to have been ordered by her superior to destroy it.

By June 3, 1987 the appointment of the Base Commander for Base

Greenwood had been made; it was not Lieutenant-Colonel Lambie who would go to Greenwood.

BURDEN OF PROOF

In complaints made under the Canadian Human Rights Act, the complainant bears the initial onus of establishing a prima facie case of discrimination based upon one of the proscribed grounds of discrimination.

A prima facie case was defined in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. (1985) 2 S.C.R. 536 at page 558, as follows:

"....one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer."

The standard of proof to determine whether that prima facie case has been established by the Complainant is the balance of probabilities.

Foreman et al v. VIA Rail Canada Inc. (1980) 1 C.H.R.R. D/111
Bhinder v. Canadian National Railways (1981) 2 C.H.R.R. D/546

Once the prima facie case has been established by the Complainant, the burden shifts to the Respondent, to establish a justification, again on the balance of probabilities.

Holden v. Canadian National Railways (1991) 14 C.H.R.R. D/12 (quoting Ontario Human Rights Commission v. Borough of Etobicoke [1982] 1 S.C.R. 202 and Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. [1985] 2 S.C.R. 536

The justification which the Respondent presents must not be merely a "pretext", an explanation given to avoid a finding of a discriminatory practice. In Grover v. National Research Council of Canada, (1992) 18 C.H.R.R. D/1 (at D/46), the Tribunal quotes from the Basi case (Basi v. Canadian National Railway Co. (No. 1) (1988) 9 C.H.R.R. D/5029), as follows:

"Faced with the employer's response, the final evidentiary burden returns to the complainant to show that the explanation provided is pretextual and that the true motivation for the employer's action was in fact discriminatory.

To accomplish that end the complainant would have a herculean task where it is necessary for him to prove, by direct evidence, that discrimination was the motivating factor. Discrimination is not a practice which one would expect to see displayed overtly. In fact are there rarely cases where one can show by direct evidence that discrimination is purposely practised.

Since direct evidence is rarely available to a complainant in cases such as the present it is left to the Board to determine

whether or not the complainant has been able to prove that the explanation is pretextual by inference from what is in most cases circumstantial evidence. [Emphasis added]"

How can the Tribunal determine whether this explanation is pretextual? The Basi decision referred to the work by B. Vizkelety, entitled Proving Discrimination in Canada (Toronto: Carswell, 1987). There, an appropriate test is suggested as follows:

"an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses."

DEFINITIONS

The case before this Review Tribunal involves an allegation of discrimination based upon a proscribed ground of discrimination pursuant to the Canadian Human Rights Act, namely marital status.

DISCRIMINATION itself was discussed in Carson et al v. Air Canada (1984) 5 C.H.R.R. D/1857, from both a British and an American perspective as well as from the more strictly statutory perspective of the Canadian Human Rights Act. At paragraphs 15977-78, the Review Tribunal notes, as follows:

In discussing what constitutes "discrimination," Lord Reid stated in the House of Lords decision in Post Office v. Crouch, [1974] 1 All E.R. 229, at p. 238:

Discrimination implies a comparison. Here I think that the meaning could be either that by reason of the discrimination the worker is worse off in some way than he would have been if there had been no discrimination against him, or that by some reason of the discrimination he is worse off than someone else in a comparable position against whom there has been no discrimination. It may not make much difference which meaning is taken but I prefer the latter as the more

natural meaning of the word, and as the most appropriate in
the present case.

In a U.S. decision, in considering the meaning of the
words "discriminate" and "discrimination," Mr. Justice Burton
stated, referring to the general ordinances of the City of
Dayton, Ohio:

"Discriminate" means to make a distinction in favour of or
against the person or thing on the basis of the group,
class or category to which the person belongs, rather than
according to actual merit. "Discrimination" means the act
of making a distinction in favour of or against a person or
thing based on the group, class or category to which that
person or thing belongs, rather than on individual merit.
Courtner v. The National Cash Registry Co., 262 N.E. 2d 586 (1970)."

It concludes that "discrimination presumes a distinction between

persons on a basis not related to merit".

The Canadian Human Rights Act spells out unlawful "discriminatory
practice" for employment in sections 7 and 3, when there is no exception
allowed by the Act to what would otherwise be that unlawful discriminatory
practice.

7. It is 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 group of discrimination.

3.(1) For all purposes of this Act, race, national or ethnic
origin, colour, religion, age, sex, marital status, family
status, disability and conviction for which a pardon has been
granted are prohibited grounds of discrimination.

Case law has established that it is sufficient that the discrimination
be a basis for the employer's decision.

Holden v. Canadian National Railway (1991) 14 C.H.R.R. D/12
quoting Sheehan v. Upper Lakes Shipping Ltd. (1978) 1 F.C. 836
(F.C.A.)

As noted in Carson et al v. Air Canada (1984) 5 C.H.R.R. D/1857 at
D/1866, "if a human rights tribunal finds that a complainant's <allegation
of discrimination based upon a prohibited ground of discrimination> was a
proximate factor of the respondent's treatment of the complainant, even
though other factors may have been present as well, then prima facie,

unlawful discrimination has occurred."

Professor Ian Hunter of the University of Western Ontario noted in his article "Human Rights Legislation in Canada: Its origin, development and interpretation" (1976, 15 U.W.O. Law Review 21, at 32) that:

"...Canadian Boards of inquiry have consistently held that it is sufficient if the prohibited ground of discrimination was present to the mind of the Respondent, however minor a part it may have played in the eventual decision.

The definition of MARITAL STATUS was addressed by the Court in Schaap v. Canada (Canadian Armed Forces) (1990), 12 C.H.R.R. D/451 (F.C.A.). Mr. Justice Hugessen noted that he did

"not think the purpose of the human rights legislation is to favour the institution of marriage (or, for that matter, that of celibacy). On the contrary, I think the legislation, by including marital status as a prohibited ground of discrimination along with such factors as race, ethnic origin, colour, disability and the like, is clearly saying that these are all things which are irrelevant to any of the types of decisions envisaged in ss. 5 to 10 inclusive. Those decisions are to be made on the basis of individual worth or qualities and not of group stereotypes."

His brother Judge, Pratte, J. defines the expression as follows:

"...I think that the expression "marital status" in the Canadian Human Rights Act, [S.C. 1976-77, c. 33] does not mean the status of a married person but, rather, the status of a person in relation to marriage, namely, whether that person is single, married, divorced or widowed."

He goes on to address the issue of the "status" of persons living in "common law", as follows:

This being said, in my view only one question remains: can the discrimination of which the applicants were the victims be said to be based on their marital status in spite of the fact that the reason for that discrimination was not simply that the applicants were not married but, rather, that each one of them was not married to the woman with whom he was living? In view of the approval given by the Supreme Court of Canada in Brossard (Town), supra, at p. 295 [D/5523 C.H.R.R.] and following to the passage of the reasons of MacGuigan J. in Cashin v. Canadian Broadcasting Corp. (No. 2), supra, at p. 30 [D/5347 C.H.R.R.] and following, where he considers a similar problem, it is now clear that this question must be answered in the affirmative."

ISSUES

The issues in the Appeal before the Review Tribunal are straight-
forward:

1. Did the original Tribunal make a palpable or manifest error when it found that there was a prima facie case for Lieutenant-Colonel Lambie's complaint?

2. If the answer to question 1 is in the negative, did the original Tribunal make a palpable or manifest error when it found that the Canadian Armed Forces had provided a legitimate explanation for the behaviour which formed the basis for the prima facie case?

3. If the answer to question 2 is in the affirmative, what remedies are available to the Appellant?

These issues will be dealt with considering all of the evidence which the Review Tribunal had before it.

PRIMA FACIE CASE

The decision of the original Tribunal found that the complainant, Lieutenant-Colonel Lambie, had "adduced sufficient evidence on this point <that he was discriminated against by his employer, the Canadian Armed Forces, in the course of his employment, based upon a prohibited ground of discrimination, namely marital status> to support his allegations in the absence of any response from the Respondent ... <and> has therefore met the requirement of establishing a prima facie case".

That Tribunal had the advantage of hearing the viva voce evidence for the Complainant of Lieutenant-Colonel Lambie, Captain Rees, Colonel Reynolds, Major Laird, and Generals Chisholm, Doshen and Sutherland.

Cashin v. CBC, (1988) 3494 (C A.)

The finding of the original Tribunal was based upon their acceptance of the evidence of a "choice" having been made in the course of Lambie's employment and of "Lt. Col. Lambie's testimony with respect to his conversations with General Garland" which involved discussions of his marital status in conjunction with the employment "choice".

The Tribunal's understanding of the law concerning the sufficiency of evidence necessary to make a finding of a prima facie case is underlined by their citation of the case of Ontario Human Rights Commission v. Simpsons Sears Ltd., (1985) 2 S.C.R. 536.

The Review Tribunal finds that the original Tribunal made no palpable nor manifest error in its finding that the complainant had established a prima facie case of discrimination by the respondent. Indeed, the Review Tribunal's reading of the record, as well as hearing the viva voce evidence of Ms. Robertson underlines the finding of the original Tribunal on this point.

JUSTIFICATION

Once it had made its finding of a prima facie case of discrimination against Lt. Col. Lambie by the Canadian Armed Forces, the original Tribunal turned to the respondent's case. It noted that "the Respondent must establish on the balance of probabilities that the consideration of marital status was not a proximate cause of the denial of the complainant's promotion and appointment or of General Ashley's decision not to consider the complainant for the position of Base Commander, Greenwood." Further, it indicated at page 12 of its decision that "the crux of the issue before this Tribunal is the decision that was made by General Ashley in the staffing of the position of Base Commander, Greenwood."

The Tribunal goes on to indicate that substantial time was taken by the respondent "to elaborate upon General Ashley's decision-making process in terms of who was consulted, why they were consulted, the degree of influence they may have had in the process, and most importantly ... what factors were considered in making this decision". It then simply "accepts the Respondent's evidence <of the process as being> logical and reasonable in the circumstances." That acceptance is sufficient that "the Tribunal is satisfied that there was no inappropriate consideration of the Complainant's marital status in this matter."

The Tribunal then addresses the issue of whether this explanation that the military process was followed to find the best person for the position was the truth or "fabricated to cover-up the real reasons for what occurred." In other words, having found, on a balance of probabilities, that the respondent had a reasonable explanation for what had appeared to be a case of discriminatory practice, to make a decision (again on the balance of probabilities) as to whether this explanation was pretextual - an explanation made "after the fact". The Tribunal acknowledges inconsistencies and contradictions in General Ashley's evidence but is "not prepared to find that there has been a deliberate plan to cover-up any wrongdoing or improper consideration of marital status on the part of General Ashley".

The Review Tribunal finds that the original Tribunal made a clear error of law in its decision that there must be evidence of "a deliberate plan to cover-up any wrongdoing or improper consideration of marital status" in order to find that the justification advanced by the Respondent is pretextual. Clearly, as the burden of proof shifts from the complainant to the Respondent and back to the complainant to prove the elements of the complaint and its defence, the standard of proof remains the same - ON A BALANCE OF PROBABILITIES. The use of the phrase "a deliberate plan" indicates that the original Tribunal had shifted its standard of proof from "on a balance of probabilities" to a standard very near to that required by criminal procedures. As this shift occurred in the area of the decision involving the issue of whether the explanation given by the Respondent was pretextual, it is all the more relevant to the conclusion of this Review Tribunal that a palpable and manifest error of law was made.

The issue of the pretextual nature of an explanation is one which is seldom able to be addressed by direct evidence. More often, the

complainant must argue that the explanation is pretextual from circumstantial evidence. As indicated in the Basi case (supra) "an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses".

In this case, the crux of the matter is as noted by the original Tribunal: the decision that was made by General Ashley in the staffing of the position of Base Commander, Greenwood, and the reasons for that decision. If one of the reasons that eliminated him from the process - no matter how many other reasons were involved in the decision-making process - was the marital status of Lt. Col. Lambie, he is the victim of discrimination. If the explanation given for the decision is, on a balance of probabilities, pretextual, to avoid such a finding, it must be rejected and the finding of discrimination must stand.

Having found that the original Tribunal erred in its analysis of the issue of the pretextual nature of the Respondent's explanation, the Review Tribunal must review the evidence before it, both from the Record and from the viva voce evidence it heard. In that review of evidence, the credibility of the evidence will be paramount.

The case of Faryna v. Chorny [1952] 2 D.L.R. 354 (BCCA) sets out parameters which should guide this Review Tribunal in such an assessment of credibility, as follows at p. 357:

"The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

The evidence presented to the original Tribunal in support of the complaint of discrimination by Lt. Col. Lambie's employer, the Canadian Armed Forces, on the basis of his marital status was accepted by that Tribunal as sufficient to prove, on a balance of probabilities, a prima

facie case of discrimination. They accepted Lambie's evidence of his discussion with Garland of his marital status in relation to his anticipated appointment/promotion to Base Commander, Greenwood. Indeed, Garland indicated in his evidence that during his conversation with Lambie "his marital status was discussed at length". They accepted Lambie's perception that the appointment/promotion was "a sure thing with mere formalities left to clear up".

The initial discussions between Lambie and Garland would have been appropriate to the issue of Lambie's appointment/promotion according to the evidence presented to the original Tribunal concerning the milieu of the Canadian Armed Forces in the 1980's when such employment discussions involved, amongst other things, the marital status of the officers involved. That evidence was presented to the original Tribunal by Generals

Garland, Patrick, Curleigh, Sutherland, Doshen and Chisholm, viva voce and included exhibits of materials written both in response to Lambie's later enquiries and grievance, and as an independent discussion paper which indicated, in writing, that marital status would be considered in decisions concerning the appointment and promotion of officers.

The Review Tribunal, as noted already, accepts the prima facie case so presented by the Complainant to the original Tribunal. Weighing her evidence with all of the evidence before the Review Tribunal, on a balance of probabilities, the viva voce evidence of Ms. Robertson before the Review Tribunal is accepted by the Review Tribunal as simply underlining the tone of the conversations which took place amongst Generals Ashley, Patrick and Garland, as well as the finding that a consideration of marital status was one basis of the decision which was made by General Ashley.

The evidence of the Respondent, both at the original Tribunal and in response to Ms. Robertson's evidence before the Review Tribunal, must then be assessed as to its credibility.

In order to make an assessment of credibility, the Review Tribunal must address all of the evidence before it, and consider that evidence in light of the following:

1. internal inconsistencies in the evidence of individual witnesses

2. inconsistencies between and amongst witnesses

3. the independence of witnesses

4. the environment in which the events took place

The Review Tribunal accepts, as already indicated, that the Canadian Armed Forces discriminated against Lt. Col. Lambie when the decision concerning his appointment/promotion to Base Commander, Greenwood was being made. It accepts, as well, that in 1987 marital status was a consideration of the Canadian Armed Forces when such decisions concerning officers to be appointed to command posts were being made.

The Respondent's witnesses insisted that NO consideration of marital status was given to the decision made by Ashley, after consultation with others -- Patrick, Garland, and Friessen.

General Ashley went even further -- he indicated that he personally gave no consideration to Lt. Col. Lambie as a potential candidate for the position of Base Commander, Greenwood; his concern was the process of the appointment, including the consideration to be given to a navigator for this position. He denied, or could no recall, that Lt. Col. Lambie was amongst the candidates before him.

This position was contradicted by other evidence for the Respondent. Garland indicated that Ashley specifically told him that Lambie will NOT be selected for Base Commander, Greenwood. He also gave evidence that his recommendation was Lt. Col. Lambie, as first on the pilot list. This

placement position came from Friessen who identified Lambie as a candidate for the position, and gave evidence of that recommendation to Ashley.

Ashley also underlined his position that it was the process that was all-important by indicating that he also had discussions about the appointment prior to his decision with General Curleigh; Curleigh, on the other hand, indicated that he had no discussions after his list of recommendations was sent in -- his only conversation with Ashley about the appointment was his notification of the appointment of Col. Kirkwood.

The flavour imported by Ashley of "consensus" amongst those at Air Command who helped him with his decision is contradicted, as well, by Patrick's evidence of one brief discussion with Ashley on June 1, the Monday, followed only by the announcement of Kirkwood's appointment. That brief discussion did not include, according to Patrick, Ashley's bias towards the appointment of a navigator even though Ashley's evidence stressed that the desirability of appointing a navigator to Greenwood was a "focus" of the discussion.

Clearly, then the Respondent's evidence contains internal inconsistencies as well as inconsistencies amongst the witnesses -- most especially when the Review Tribunal examined the evidence of General Ashley, the "crux" of the decision-making process.

These witnesses for the Respondent were all a part of a decision-making process, it has already been noted, that considered marital status, amongst other issues, in certain promotion discussion and decisions at that time.

Given the above findings, the evidence of the Respondent, both in the record and viva voce before the Review Tribunal, on a balance of probabilities, is pretextual. It is an attempt to explain that the decision made by Ashley was made based upon military considerations and process only, when, in fact, that decision had, as a proximate cause, the additional factor of Lt. Col. Lambie's marital status.

Therefore, the Review Tribunal finds that Lt. Col. Lambie was discriminated against by his employer, the Canadian Armed Forces, when it denied him an appointment and promotion in the course of his employment.

REMEDIES

Section 53 of the Canadian Human Rights Act has been interpreted to create remedies which "must be effective, consistent with the "almost

constitutional" nature of the rights protected". (Robichaud v. Canadian Treasury Board [1987] 2 S.C.R. 84, at p. 92)

Lt. Col. Lambie, now retired from the Canadian Armed Forces, cannot be appointed to a Base Command position, as he probably would have been had he not been discriminated against; indeed, there cannot be further opportunities for advancement which would possibly have come with that

appointment.

The Review Tribunal does have jurisdiction, however, to attempt to place Lt. Col. Lambie today in a position which, if he had not been discriminated against, he would have found himself. Therefore the Review Tribunal makes the following Order:

1. The Respondent shall amend its record of the career of Lt. Col. Lambie to indicate his promotion to the rank of Colonel, effective July 1, 1987.

2. The Parties shall appoint, within 30 days of the date of this decision, a mutually agreeable arbitrator to determine and calculate the following:

A. retroactive payment of salary differential by the Respondent to the Complainant, based upon his promotion to the rank of Colonel

B. any pension benefit differential and/or change to be given to the Complainant by the Respondent because of his promotion to the rank of Colonel

C. all other benefits accruing to the Complainant as an officer with the rank of Colonel, including but not limited to SISIP and GOIP benefits

3. The Respondent shall pay to the Complainant compensation for leave and time spent to develop and prepare his complaint to the Canadian Human Rights Commission, as well as to attend the hearings of his case. The arbitrator chosen to determine and calculate payments and benefits noted in Order Number 2 shall facilitate this calculation.

4. In the event that the Parties cannot agree upon a mutually acceptable arbitrator within 30 days, or cannot, using their chosen arbitrator, determine and calculate the aforementioned payments of salary, compensation, and benefits within 90 days of the date of the appointment of that arbitrator, the Review Tribunal shall retain jurisdiction to hear further evidence concerning these issues.

5. The Respondent shall pay interest to the Complainant on the calculated salary differential and benefits lost due to his denial of promotion to the rank of Colonel; that interest shall be calculated from July 1, 1987 to the date of the Complainant's retirement, and shall use the simple interest rate of the Bank of Canada.

6. The Respondent shall pay interest to the Complainant on the calculated pension differential from the time of the Complainant's retirement to the date of the final acceptance of the parties of the calculations at the simple interest rate of

the Bank of Canada.

7. The Respondent shall pay to the Complainant the sum of $1,500.00 for hurt feelings, humiliation and loss of self-esteem.

8. The Respondent shall pay to the Complainant interest on the award noted in Order Number 7, at the simple rate of interest of the Bank of Canada.

9. The Respondent shall pay to the Complainant his Costs for Review Tribunal proceedings, after assessment on the Federal Court Scale.

Dated at London, Ontario on this day of August, 1995.

Elizabeth Leighton, Chairperson

Claude Pensa, Member

Raj Saunder, Member