Attorney General of Canada

(*Applicant*)

v.

Simon Thwaites

Canadian Human Rights Commission

(*Respondents*)

and

Canadian AIDS Society

Coalition of Provincial Organizations of the Handicapped

Canadian Disability Rights Council

(*Intervenors*)

Indexed as: Canada (Attorney General) v. Thwaites (T.D.)

T-1629-93

[1994] 3 FC 38; 3 CCEL (2d) 290

Federal Court, Trial Division

25 March 1994

The following are the reasons for order rendered in English by

Gibson J.:

NATURE OF APPLICATION AND RELIEF SOUGHT

This is an application for judicial review pursuant to section 18.1 of the *Federal Court Act*[1]*ftnote[1] R.S.C., 1985, c. F-7 (as enacted by S.C. 1990, c. 8, s. 5). of a decision of a Human Rights Tribunal [[1993] C.H.R.D. No. 9 (QL)] (the "Tribunal") whereby the Tribunal determined that a complaint by the respondent Simon Thwaites (Thwaites) against the Canadian Armed Forces (the "CAF") had been established and ordered the CAF to pay to Thwaites:

i) $147,015 for past and future loss of wages under subsection 53(2) of the *Canadian Human Rights Act*[2]*ftnote[2] R.S.C., 1985, c. H-6. plus interest thereon from and after June 1992;

ii) $5,000 for special compensation under subsection 53(3) of the *Canadian Human Rights Act* plus interest thereon from and after the date of the complaint; and

iii) reasonable costs of his counsel including the cost of actuarial services.

Thwaites' complaint against the CAF alleges that the CAF discriminated against him by terminating his employment, and by differentiating adversely in relation to him in the course of his employment, by restricting his duties and opportunities, because of his disability, contrary tosection 7 of the *Canadian Human Rights Act*.[3]*ftnote[3] S. 7 of the *Canadian Human Rights Act* reads as follows:

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. His disability was acknowledged to be that he was, at all times relevant to the complaint, infected with human immunodeficiency virus, that is to say, he was "HIV positive".

The decision of the Tribunal was rendered the 7th day of June, 1993.

The relief requested is an order quashing or setting aside the decision.

THE FACTS

Thwaites enlisted in the CAF in 1980 and continued in the employ of the CAF until his honourable discharge in November, 1989. By the spring of 1986, he had progressed in the ordinary way to the rank of master seaman (acting/lacking). At that time, once again apparently in the ordinary way, he was offered and accepted an extended term of service to the year 2002. Thwaites remained at the rank of master seaman at the time of his discharge.

Thwaites was classified and trained in the military trade of naval electronics sensor operator, which was known as a "hard sea trade" because virtually all postings associated with the trade were sea-going, that is to say, aboard naval vessels (typically destroyers) rather than shore postings.

Prior to 1986, Thwaites on one occasion applied for remuster to another military trade and on another occasion applied to be released from the CAF. Neither of these applications was pursued to fruition.

By letter dated the 8th day of January, 1986, the Canadian Red Cross advised Thwaites that an individual who had received a transfusion of blood that included blood donated by Thwaites in 1985 had reacted negatively. Thwaites was requested to undergo blood testing. He complied with the request. By letter dated the 26th day of March, 1986, the Red Cross advised the CAF, with Thwaites' consent, thatThwaites had tested positive for HIV infection. Subsequent testing by the CAF confirmed this. Upon confirmation, the CAF forthwith referred Thwaites to Dr. Walter Schlech of Halifax who was a leading medical specialist in communicable diseases in the Atlantic region.Thwaites' military career, trade and duties were not immediately affected.

About the same time, another member of the CAF cited Thwaites to the CAF as being homosexual. As a result, an investigation was conducted and his security clearance was downgraded below the minimum required for his trade while on-board ship. In October, 1986, he was assigned temporary shore duties of a relatively menial nature. In early 1987, Thwaites' commanding officer and others recommended his release from the CAF by reason of his sexual orientation. The recommendation was not proceeded with.

Commenting on this aspect of Thwaites' difficulties with the CAF, the Tribunal had the following to say:

The evidence given by Thwaites and the CAF witnesses who testified in relation to these channels of investigation was, to say the least, confusing. The Tribunal concludes, however, that there is no doubt of two facts. First, Thwaites had every right to doubt that the reason for his recommended release was his HIV positive status and to question what knowledge of his homosexuality was being shared with those individuals who were to make the decision respecting his medical release. Secondly, all members of the CMRB who sat on August 4, 1988, had received in advance of their meeting in Ottawa, copies of background material which candidly discussed the earlier attempt to releaseThwaites on grounds of homosexuality.[4]*ftnote[4] Applicant's application record, at p. 27. The reference to the "CMRB" is to the Career Medical Review Board about which more will be said later.

Thwaites attended Dr. Schlech's clinic for specialist consultation on his HIV condition on a periodic basis. Also on a periodic basis, withThwaites' concurrence, CAF medical authorities were kept advised of his condition as determined as a result of those consultations. In late October, 1987, Dr. Lynn Johnston, a communicable disease specialist and colleague of Dr. Schlech, advised CAF medical authorities by letter that she had discussed with Thwaites the possibility of his commencing treatment with a drug (AZT) which had then just entered use inCanada, on an experimental basis, with HIV positive patients. In November of the same year, Dr. Schlech wrote again to CAF medical authorities indicating Thwaites had been developing some constitutional symptoms which qualified Thwaites for the experimental AZT treatment program. Apparently without further consultation with Dr. Schlech and his colleagues, CAF medical authorities interpreted these letters and other letters of November, 1987 and January, 1988, as indicating that Thwaites had moved from an "asymptomatic" stage of HIV infection to a "symptomatic" stage. Evidence before the Tribunal indicated that the letters may have overstated Thwaites' condition in order to qualify him for the AZT treatment program. In any event, he commenced the program in January, 1988.

The AZT program required regular clinical follow-up. There was some difference of opinion as to whether the basic minimum clinical follow-up could effectively be performed aboard CAF ships, specifically destroyers and supply ships with which destroyers would rendez-vous on a regular basis while at sea. Following clinical follow-up visits, reports were made by Dr. Schlech and his colleagues to CAF medical authorities.

On the 14th day of March, 1988, Thwaites underwent a full medical examination under the supervision of a CAF medical officer. He was advised that the examination was for the purpose of a Career Medical Review Board review and that the review would probably result in his release from the CAF on medical grounds

Later in March, 1988 the CAF medical officer who supervised Thwaites' medical examination and two other CAF doctors of ascending authority recommended that Thwaites'

need for specialist medical services rendered him unfit for CAF service at sea or in postings lacking ready access to significant medical facilities. These recommendations were apparently made without consultation with the civilian attending medical specialists other than through review of the regular reporting letters.

The regulatory structure under which these recommendations were made was in evolution at the time in question. Interim guidelines published on November 8, 1985, and still in effect in March and April, 1988, provided for individualized assessment of HIV positive members of the CAF. A draft replacement directive was issued for discussion purposes on February 2, 1988. It proposed a more arbitrary categorization of HIV infected members. During consultation, the draft was criticized and an even more arbitrary categorization was recommended. In the result, the medical directive issued on May 9, 1988 to replace the interim guidelines provided that members who had clinically expressed HIV symptoms requiring fairly frequent medical follow-up of a specialist should be categorized as medically unfit for retention in the CAF. This was the impact of the recommendations made by the three medical officers in respect of Thwaites. At the same time, Thwaites' rating in respect of his ability to perform tasks involving physical and mental activity and stress remained constant. The CAF appeared to recognize that he was healthy in appearance and able to work and maintain a normal daily schedule and to deal with the more severe and prolonged stressful demands when at sea.

On August 4, 1988, the CAF Career Medical Review Board convened in Ottawa and reviewed Thwaites' situation. Thwaites had no notice of this meeting and was provided no opportunity to make submissions. Evidence indicated the Board would have dealt with a case such as that of Thwaites in a most summary way. The Board ordered that Thwaites be honourably discharged. Thwaites grieved the Board's decision. The substance of the grievance was eventually rejected by the Chief of the Defence Staff.

THE ISSUES

The issues, restated from the applicant's factum with only minor and non-substantive modifications are as follows:

a) whether the Tribunal erred in applying legal principles governing determination of a "*bona fide* occupational requirement" ("BFOR") pursuant to paragraph 15(*a*) of the *Canadian Human Rights Act*,[5]*ftnote[5] The relevant portions of s. 15 of the *Canadian Human Rights Act* read as follows:

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. in that:

i) it erroneously applied a higher standard than the appropriate "reasonably necessary" standard for a BFOR defence;

ii) it erroneously determined that the "risk of employee failure" sufficient to establish a BFOR "must be substantial";

iii) it erroneously required individual assessment to establish a BFOR and, alternatively, it erred in finding inadequate individual assessment of the respondent by the CAF; and

iv) it erroneously equated the duty to accommodate of adverse effect discrimination with the duty to demonstrate no reasonable alternatives for cases of direct discrimination;

b) whether the Tribunal erred in law in failing to accord due deference to personnel decisions made within the military structure;

c) whether the Tribunal erred in law in awarding excessive monetary relief to the respondent under the heads of future loss of income and past loss of income;

d) whether the Tribunal erred in law in awarding interest on the maximum $5,000 award for special compensation pursuant to subsection 53(3) of the Act;

e) whether the Tribunal erred in law in awarding the respondent reasonable costs of his counsel including the costs of actuarial services.

The issue stated in paragraph (b) was not pursued on behalf of the applicant in argument before me.

The issues described in paragraph a) were responded to principally by counsel on behalf of the respondent the Canadian Human Rights Commission while the issues described in paragraphs c) to e) were responded to principally by counsel on behalf of the respondentThwaites.

In accordance with an order of Madam Justice Reed dated December 13, 1993, counsel for the intervenors addressed the following issues:

1. Must the BFOR defence found in section 15 of the Act be interpreted in a manner consistent with the equality rights guaranteed in section 15 of the *Charter of Rights and Freedoms*.

2. The distinction between direct and adverse discrimination is artificial in that the employers duty to accommodate needs of disabled employees is unaffected by whether the discrimination is direct or arises from adverse impact.

3. Individual assessment must be the norm unless it is established that such assessment is either impossible or would impose an undue hardship.

4. In determining if risk is a factor to be considered in undue hardship or in determining whether the BFOR defence has been met, the degree of risk as well as the person or persons who will bear it must be considered. To meet the BFOR test, any risk must be both real and substantial. This standard is higher if it is the disabled person who knowingly and willingly bears the risk.

It was generally conceded by all counsel that Thwaites was discriminated against by the CAF or that, in the terms of section 7 of the*Canadian Human Rights Act*,[6]*ftnote[6] *Supra*, footnote 3. the CAF engaged in a discriminatory practice, directly or indirectly, in the course of employment, by differentiating adversely in relation to Thwaites on a prohibited ground of

discrimination, that is to say the disability constituted by his HIV positive status. Such discrimination is prohibited unless the actions of the CAF in relation to Thwaites were based on a *bona fide* occupational requirement. Further, it was generally conceded that the discrimination was "direct discrimination" rather than "adverse effect discrimination". The significance of this latter distinction will be further discussed in the analysis portion of these reasons.

THE TRIBUNAL'S DECISION

The decision of the Tribunal is lengthy and detailed. It is divided into the following component parts: Background Facts; The Investigations; Medical Evidence; Applicable Legal Principles; The CAF's Position; Has the BFOR Defence Been Established; Conclusion; and Remedy.

The Tribunal's statement of the applicable legal principles was central to the argument before me and I will therefor quote from it at some length:[7]*ftnote[7] For ease of reference, I have numbered the paragraphs that I have quoted from the Tribunal's decision. The first 23 numbered paragraphs are in sequence. Paragraphs that I have numbered 24 to 26 are not in sequence. The acronyms "CHRA" and "BFOR" used throughout the quotation are, of course, references to the "*Canadian Human Rights Act*" and to "*bona fide* occupational requirement".

[1.] In respect of the BFOR defence provided for in Section 15(*a*) of the CHRA, the Supreme Court of Canada initially held in *Bhinder v. C.N.* in 1985 that consideration of a BFOR was to be without regard to the particular circumstances or abilities of the individual in question. In the short span of five years, the majority of the Court in *Alberta Human Rights Commission v. Central Alberta Dairy Pool* [1990] 2 S.C.R. 489 reversed its position and held that in cases of adverse effect discrimination, the employer cannot resort to the BFOR defence at all. In such cases, there is now a positive duty on employers to accommodate the needs of employees disparately affected by a neutral rule unless to do so would create undue hardship for the employer. Put another way, the employer must establish that the application of the neutral rule or practice to the individual was reasonably necessary in that allowing for individual accommodation within the general application of the rule or practice would result in undue hardship. No longer, in such cases, can an employer justify its practice as a BFOR in relation to safety of employees in a general way and maintain that its discriminatory effect on certain groups of individuals is totally irrelevant.

[2.] The BFOR defence is now only available to an employer when, as in the case before us, direct discrimination is involved: *Central Alberta Dairy Pool supra*, at pp. 516-517, i.e. where the employer's rule or practice makes assumptions or generalizations about the capabilities of individuals because they belong to a particular group. In those cases, the BFOR defence allows the employer to justify its departure from the principle of individualized equal treatment by leading evidence in support of its general policy or the impossibility of individual assessment.

(c) Requirements On Employer To Establish BFOR

[3.] Even when the BFOR defence is applicable, the Supreme Court of Canada has held that the BFOR exception must be interpreted restrictively so that the larger objects of the CHRA are not frustrated. (See *University of Alberta v. Alberta Human Rights Commission*(1993), 17 C.H.R.R. D/87 at p. D/96; *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R.

202 at p. 208; *Bhinder v. C.N.* [1985] 2 S.C.R. 561 at p. 589; *Ville de Brossard v. Quebec* [1988] 2 S.C.R. 279 at p. 307). As Sopinka J. stated in *Zurich Insurance v. OHRC supra* at p. 339:

"One of the reasons such legislation has been so described [of a special nature] is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable member of society, exceptions to such legislation should be narrowly construed".

[4.] As far as the burden of proof upon the employer to establish a BFOR is concerned, the applicable rule is the ordinary civil standard on the balance of probabilities (*Etobicoke, supra*, at p. 208). Some earlier cases held that the burden might be regarded as somewhat lighter when issues of public safety were in question. However, given the Supreme Court of Canada's direction that the BFOR exception must be restrictively interpreted, more recent decisions have held that it is inappropriate to reduce the civil standard even in cases where public safety lies at the root of the employer's defence (*Robinson v. CAF* (1992) 15 C.H.R.R. D/95; *St. Thomas v. CAF* (1991) 14 C.H.R.R. D/301;*Seguin v. R.C.M.P.* (1989) 10 C.H.R.R. D/5980; *DeJager v. Department of National Defence* (1986) 7 C.H.R.R. D/3508).

[5.] The evidence furnished by the employer must satisfy the two branches of the test laid down by the Supreme Court of Canada in*Etobicoke, supra*, one subjective, the other objective, in order to establish the BFOR defence. The employer must first provide subjective evidence of its good faith in establishing its policy or requirements:

"To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code." (per McIntyre J. in *Etobicoke supra* at p. 208)

[6.] In the past this subjective criterion has not been examined closely and Tribunals and Courts generally presumed that the employer was acting in good faith in the absence of any evidence to the contrary. Recently, however, some Tribunals have indicated that more is required to satisfy this criterion. It must mean more than merely condoning an employer for prejudices that it holds in good faith in regard to a group of persons protected by the CHRA. To do so, would only undermine the very objectives of the CHRA which are specifically to eliminate prejudices and stereotypes concerning certain groups. Accordingly, there is an onus upon an employer to show the purpose of its employment policy rule and the reasons that have led it to adopt the said policy were not founded on prejudices or stereotypes whether of the employer or of the employer's clientele but rather "in the interests of sound and accepted business practice" (Per Sopinka J. in *Zurich Insurance supra* at p. 376; also see *Robinson v. CAF, supra*, at p. D/117.)

[7.] As for the objective part of the BFOR defence, it was defined by McIntyre J. in *Etobicoke supra* at p. 208 as follows:

"In addition it [the occupational requirement] must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the

efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

[8.] Here, as well, there has been considerable refinement in the treatment of this objective part of the employer's evidence since it was first formulated in 1982. First, the Supreme Court has in fact imposed a burden of objective proof on the employer: "[The occupational requirement] must be related in an objective sense to the performance of the employment". This implies that the relationship between requirement and employment must be proved on the basis of real facts not on the basis of impressions. Secondly, the Supreme Court speaks of an occupational requirement that is "reasonably necessary" to ensure the adequate performance of the employment. It is a criterion of necessity not convenience (see *Robinson v. CAF*; *supra* at p. D/118; *Martin v. CAF* T.D. 11/92, unreported at p. 21.) An employer cannot overcome the fundamental aim under the CHRA of ensuring equal opportunity for individuals regardless of certain personal characteristics identified by the CHRA on the basis that life would be simpler for the employer, if such people were excluded. On the contrary, case law has interpreted the objective criterion of reasonable necessity in such a way as to ensure that the occupational requirement is truly necessary. In fact, one judge has gone so far (perhaps too far) as to say that the case law has evolved to the point where an employer must show that it is absolutely necessary. Marceau J. in *Levac v. CAF* (F.C.A.), July 8, 1992, unreported at pp. 10-11 stated:

I am prepared to admit that there is also another aspect on which this *Alberta Dairy Pool* judgment may be considered somewhat innovative, at least indirectly, particularly if the reasons of the minority are read in conjunction with those of the majority. It may have rendered the defence of BFOR even less available than previously. Until now, the prevalent view, I believe, was that, to be justified, a *bona fide* occupational requirement had to be, as expressed in *Etobicoke* (at p. 208); reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public . It seems from now on that it must be, not only reasonably , but absolutely necessary, that is, it must be without any other workable, less stringent, alternative . (But see dissenting view of Desjardins J. at p. 7.)

The Ontario Court of Appeal more recently in *Ontario Human Rights Commission v. London Monenco Consultants Ltd* (1992) 9 O.R. (3d) 509 at pp. 516-517, stated that:

"A discriminatory qualification cannot be justified in the absence of a direct and substantial relationship between the qualification and the abilities, qualities or attributes needed to satisfactorily perform the employment given its particular nature." [Emphasis added.]

[9.] Moreover, if an employer is relying upon a general rule of exclusion, it must explain why as a practical alternative, it was not possible to assess individually the risk presented by each employee and thus had to impose a blanket practice. (*Wardair Canada Inc. v. Cremona*(F.C.A.) October 9, 1992, unreported at p. 6; *Saskatchewan Human Rights Commission v. Saskatoon* [1989] 2 S.C.R. 1297 at pp. 1313-14; *Central Alberta Dairy Pool supra* at p. 518).

[10.] The employer must also show that its practice or rule is not disproportionate in that there are no other means less prejudicial to the concerned group's right to equal treatment

than its general exclusion on the basis of the criterion employed. (*Ville Brossard, supra* at p. 312;*Central Alberta Dairy Pool, supra* at pp. 526-527).

d) Distinction Between Direct Discrimination and Adverse Effect Discrimination

[11.] The logical conclusion from this analysis is that there is very little, if any, meaningful distinction between what an employer must establish by way of a defence to an allegation of direct discrimination and a defence to an allegation of adverse effect discrimination. The only difference may be semantic. In both cases, the employer must have regard to the particular individual in question. In the case of direct discrimination, the employer must justify its rule or practice by demonstrating that there are no reasonable alternatives and that the rule or practice is proportional to the end being sought. In the case of adverse effect discrimination, the neutral rule is not attacked but the employer must still show that it could not otherwise reasonably accommodate the individual disparately affected by that rule. In both cases, whether the operative words are "reasonable alternative" or "proportionality" or "accommodation", the inquiry is essentially the same: the employer must show that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.

e) Safety Risk as a BFOR

(i) Increase in Risk

[12.] It was once thought that, an employer, relying on safety reasons, as in the present case, could establish a BFOR by merely showing that the employment of such individuals would result in a marginal increase of risk to public safety. (*Bhinder, supra*; *Canadian Pacific v.Canada* ([*sub-nom. Mahon v. Canadian Pacific*] Mahon) [1988] 1 F.C. 209). It is now clear that the standard that the employer must meet is that the group of persons in question excluded by the employment practice will present a "sufficient risk of employee failure" (see *Etobicoke, supra* at p. 210; *Central Alberta Dairy, supra*, at p. 513; *Robinson v. CAF*, *supra* at p. D/119-D/123.)

[13.] This test of sufficient risk has been recently confirmed by the Federal Court of Appeal in *Attorney-General of Canada v. Rosin* [1991] 1 F.C. 391. Noting that Wilson, J. had held in *Central Alberta Dairy Pool, supra* -pp. 512-513, that the Supreme Court had erred in *Bhinder*, in accepting as evidence of BFOR the proof of a very slight increase in risk for the safety of the employee, Linden J. dismissed on behalf of the Court in *Rosin* the position that proof of any risk, even the most minimal, constitutes proof of sufficient risk consistent with a BFOR. (Linden J. indicated that the Federal Court of Appeal decision in *Canadian Pacific v. Canada* (*Mahon*) *supra*may have been impliedly overruled as well).

[14.] The Tribunal in *Robinson v. Canadian Armed Forces, supra* recently rendered a decision along the same lines. In that case, which dealt with a policy excluding persons suffering from epilepsy from the Armed Forces, the Tribunal concluded that in light of the decision in*Central Alberta Dairy Pool*, the criterion of unacceptable risk stated by MacGuigan, J. in *Air Canada v. Carson*, [1985] 1 F.C. 209 had again become the applicable criterion for sufficient risk. According to the Tribunal, this criterion means that proof of a slight or negligible risk is not sufficient to constitute a BFOR. It seems that the risk must be substantial.

[15.] The significant risk standard recognizes that some risk is tolerable in that human endeavours are not totally risk free. While this standard protects genuine concerns about workplace safety, it does not guarantee the highest degree of safety which would be the elimination of any added risk. What it does, is ensure that the objectives of the CHRA are met by seeking to integrate people with disabilities into the workplace even though such persons may create some heightened risk but within acceptable limits.

(ii) Measuring the Increase in Risk

[16.] The thorny question is determining when some increased risk amounts to significant risk. What must be evaluated, in each case, is whether the risk to safety is sufficiently high to be described as unacceptable in relation to a particular job. In *Levac v. CAF* (1991) 15 C.H.R.R. D/175 aff'd, *A.G. of Canada v. Levac*, July 8, 1992, unreported, the evidence was that the complainant who had a heart condition, was at an eight to ten per cent risk of having a heart attack within the next five years (or six to nine per cent within the next three years); and he was two to three times more likely to die if he was at sea when a heart attack occurred because of the remoteness of care at sea than if he was on shore. This was not considered sufficient risk. In *DeJager v. DND* (1987) 7 C.H.R.R. D/3508, there was evidence that there would be increased danger or risk to the Complainant in that case, an asthmatic, if he were to be in an isolated post, away from medical attention but the Tribunal did not find this to be a sufficient risk so as to justify the CAF discriminating against him.

[17.] The dividing line between insufficient and sufficient risk is ultimately judgmental and turns on the circumstances of each case. In particular, a careful assessment would have to be made of the actual health and safety risks posed by such employees and how they compare with other risks that the employer is willing to accept. If such risks were determined to be significantly higher, then it would have to be asked whether there are any reasonable measures that can be put in place to minimize such risks to an acceptable level"a level that makes them comparable with other tolerated risks.

[18.] The determination of significant risk requires a Tribunal to balance the disabled individual's interest in working and participating in society against the need to protect that individual and others from harm. In an attempt to strike the appropriate balance, it is appealing to rely upon percentages of increased risk. High percentages of say 80% or even 50% can be quite compelling. However, this is a less useful tool when the percentages are low. A raw percentage figure of say 2% or 3% or even 12% might seem appreciable to one person and yet quite small or insignificant to another. Since reasonable people can reach very different conclusions based upon an abstract percentage, it may not provide the appropriate or sole bench mark for drawing the necessary conclusion. This seemed to trouble the Tribunal in *Levac v. CAF supra* at pp. D/193-194, as well.

[19.] Significant risk can best be measured in the context of the particular job and then only in comparison with other risks posed by that workplace. In this way, other tolerable risks arising from the employment establish risk thresholds. If risks of comparable magnitude are acceptable in a particular work environment then risks posed by a person who is HIV positive cannot be considered significant. By utilising a comparative risk analysis, there is recognition that employers cannot expect a completely risk free work environment. Instead, the standard of significant risk seeks to eliminate those risks that pose a significant or substantial threat to health and safety. In any particular situation, one must determine when risks are deemed significant and thus unacceptable by identifying the nature and quantum of other risks that are

tolerated as acceptable in that particular work environment. By applying a comparative risk analysis, one can best determine if the risk is substantial. (See generally S.D. Watson, "Eliminating Fear Through Comparative Risk: Docs, AIDS and the Anti-Discrimination Ideal" (1992) 40 Buffalo L. Rev. 738).

(iii) Nature of the Evidence of Risk

[20.] Whenever an employer relies on health and safety considerations to justify its exclusion of the employee, it must show that the risk is based on the most authoritative and up to date medical, scientific and statistical information available and not on hasty assumptions, speculative apprehensions or unfounded generalizations (*Heincke et al. v. Emrick Plastics et al.* (1992) 55 O.A.C. 33 at 37-38 (Div. Ct.); *Etobicoke supra* at p. 212; *Rodger v. C.N.* (1985) 6 CHRR D/2899 at p. 2907).

(f) Reasonable Alternatives or Accommodation if No Undue Hardship

[21.] The importance of searching for reasonable alternatives or accommodating the individual to permit him or her to do the job or to lessen any risk (if risk is a factor) is now the bedrock of human rights law in this country. Indeed, without such accommodation, the protection given by the CHRA to certain groups, the disabled in particular, would be quite illusory. Anne M. Molloy, in "Disability and the Duty To Accommodate" (1992) 1 Can Lab. Law Journal 23 put it well at p. 26:

"For persons with disabilities, the right to accommodation goes to the very heart of equality. To appreciate the importance of this right, one must understand the reality of discrimination. Much of the problem is attitudinal. The barriers to people with disabilities in employment are rarely rooted in loathing or malevolence. On the contrary, the discrimination is quite often perpetrated with the best of intentions"a genuine concern about the capabilities of persons with disabilities, a desire to protect disabled person from harm or injury or to shield him or her from the embarrassment of what is seen as the inevitability of his failure to measure up. While this may explain the discrimination, it does not, of course, excuse it nor does it make the ugliness of its result any more acceptable. The accommodation of differences for persons with disabilities therefore requires overcoming the ignorance, stereotypical attitudes and paternalism that are the source of much of the overt disability discrimination."

[22.] Accordingly, the pendulum has swung such that a BFOR can rarely be established if the rule or practice makes generalizations about people solely on the basis of disability without regard to the particular circumstances of the specific class of individuals affected. Moreover, in order for there to be true individualization, a close assessment should be made of the individual in question since even persons with the same disability vary markedly in how they personally function and cope with their affliction or vary in the degree of impairment because of the different stages of their infirmity. This was emphasized by Ms. Molloy in her article at p. 26:

"It is of critical importance that the accommodation of persons with disabilities be approached on an individual basis. Disabilities differ dramatically, one from another. There are also great individual variations within the same disability group. The effect of a particular disability on a particular person is very individualized and the accommodation of that disability must therefore also be individualized. In some cases, all that will be required is a little flexibility and creativity. In others, advances in technology will provide a means for a

person with a disability to perform a job that years ago would have been utterly impossible. The key in all cases is to consider the individual needs and to provide the individualized accommodation required to meet those needs in a manner consistent with the employee's dignity and self-worth."

[23.] It should be acknowledged that this may add some risks and make matters somewhat more burdensome for employers but this is a small price to pay for the higher value that society has placed on equal opportunity. (In a different context see *Huck v. Canadian Odeon Theatres* [1985] 3 W.W.R. 717 at 744 (Sask. C.A.), leave to appeal to S.C.C refused.) An employer cannot rely on undue hardship unless it would be forced to take action requiring significant difficulty or expense which would clearly place upon the business enterprise an undue economic or administrative burden. Professor Cumming in *Mahon v. Canadian Pacific* (1986) 7 CHRR D/3278 stated at p. D/3305:

"It would be less costly in the immediate, narrow economic sense simply to allow employers who act with honesty of motive . . . to preclude the disabled from being employed. Difficult evaluations, with attendant time-consuming uncertainty and expense, would be avoided. However, our society has chosen the course of ensuring `equality of opportunity' for the disabled in respect of employment, because the immediate cost and difficulty in employment decision-making is far outweighed by the protection and enhancement of core values for the disabled, and hence indirectly, for all members of society. It is only through the extension of equality of opportunity to the disabled as with other so-called minority groups, that a society can say it is truly free and just."

Against this statement of legal principles, the Tribunal proceeds to determine whether the CAF has established a BFOR defence on the basis of its enunciated position and on the facts of this case. As to the subjective element of the test for a BFOR defence, the Tribunal concludes as follows:

[24.] We heard testimony from all of the relevant CAF individuals involved in the process and we found them to be credible on this issue. Although the overlap of the two matters is striking, we find that on balance the CAF held the honest belief that Thwaites' medical condition had proceeded to the point where he required ongoing specialist care which could not be made available to him at sea. Accordingly, we find that the CAF has satisfied the subjective element of the BFOR test.[8]*ftnote[8] The two overlapping matters referred to are Thwaites' disability and his sexual orientation and the related investigations within the CAF.

With respect to the objective element of the test, the Tribunal concludes that the Career Medical Review Board process "was nothing more than a paper review" and that "Thwaites was never given the benefit of any meaningful individual assessment which is his right under the law." The Tribunal goes on to examine whether any reasonable measures were examined to lessen any increased risk that might have been posed ifThwaites had been retained in the CAF and, more specifically, if he had remained in a "hard sea trade" where he would have been required to spend extensive periods at sea. It concludes that risk could have been diminished but would nonetheless have remained and that the remaining risk arising from his condition would not have been "sufficient to warrant his exclusion." Finally, the Tribunal examined other alternatives to release. It concluded that the CAF's sea/shore ratio was sufficiently flexible to allow for the "accommodating" of Thwaiteswithout causing the CAF "undue hardship". On the basis of its analysis, the Tribunal concluded that the objective

element of the test to establish a valid BFOR defence was not met and that the release of Thwaites from the CAF was "too drastic". It stated that "Medical limitations' policy in the CAF supports accommodation and yet no attempt at any accommodation was made for Thwaites."

The Tribunal's conclusion is in part in the following terms:

[25.] When all is said and done, the one real issue that this Tribunal must decide is whether the Respondent, CAF, could (and should) have made further enquiries of Dr. Schlech, Dr. Johnston and Thwaites himself following receipt by the CAF's non-specialist medical personnel of Dr. Schlech's November 12, 1987 letter. Alternatively, could (and should) the CAF have taken the opportunity to have Dr. Schlech, Dr. Johnston or Thwaites appear personally before the CMRB in order that there be a proper opportunity for individualized assessment?

. . .

[26.] As a question of fact and bearing in mind the purpose of the governing legislation, we conclude, however, that the CAF did not go far enough and did not do what it could to reasonably and properly assess Thwaites. It failed to make a full assessment of Thwaites' condition and determine whether he was exposed to risks significantly greater than the usual risks for those who are not disabled of going to sea and being remote from hospital facilities and specialist care should an unexpected medical emergency arise. In essence, the CMRB decision to dismiss him was not based upon the most authoritative and up-to-date medical, scientific and statistical information available. No individual assessment was performed to determine how he was functioning at the various stages of his infirmity. Moreover, the CAF has failed to show that it could not otherwise reasonably and practically accommodate Thwaites' needs without exposing him or others to unacceptable risks. Nor did it demonstrate that no other reasonable or practical alternative (other than dismissal) could have been found for Thwaites. Accordingly, the complaint has been substantiated.[9]*ftnote[9] The conclusion elaborated in paragraph 26 and stated to be "a question of fact" is not, in my opinion, a question of fact but rather a conclusion of law.

The Tribunal then goes on to deal with the issue of remedy. I will return to this subject at a later stage in these reasons. The remedy provided, which falls short of reinstatement but is nonetheless substantial and here in dispute, is recited at page 42 of these reasons.

STANDARD OF REVIEW

The issues before me as earlier described in these reasons are, I think without question, questions of law. Having reached the same conclusion as to the issues in *Cluff v. Canada (Department of Agriculture)*,[10]*ftnote[10] [1994] 2 F.C. 176 (T.D.). I made and adopted the following comments in the reasons for my order therein regarding the standard of review [at pages 184-185]:

. . . the following quotation from the reasons of La Forest J. in *Canada (Attorney General) v. Mossop* succinctly states the standard of review in this matter:

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue

in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decisions on questions of this kind on the basis of correctness, not a standard of reasonability.

In reviewing the decision of the Tribunal herein "on the basis of correctness", the following extract from the reasons of La Forest J. in*Robichaud v. Canada (Treasury Board)* is generally instructive:

The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination of the ground of sex. As McIntyre J., speaking for this Court, recently explained in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, *per* Lamer J., at pp. 157-58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Dickson C. J. in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* (the *Action Travail des Femmes* case), [1987] 1 S.C.R. 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the *Interpretation Act* that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

It is worth repeating that by its very words, the Act (s. 2) seeks "to give effect" to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre J. puts the same thought in these words in *O'Malley* at p. 547.

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

Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concern. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.[11]*ftnote[11] *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 585; and *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90.

I conclude that the foregoing comments apply equally to the matter now before me.

ANALYSIS

I turn now to the issues raised on behalf of the applicant with regard to the decision of the Tribunal other than those that relate to the remedy provided. I do so bearing in mind the principle acknowledged on behalf of the applicant that, against the foregoing standard of review, the reasons of the Tribunal should not be read microscopically. I do so also being cognizant that the distinction between direct discrimination and adverse effect discrimination, that is suggested in paragraph 11 above quoted from the Tribunal's decision to be perhaps only semantic is, in fact, real. That this is so is implicitly, if not explicitly, confirmed by Iacobucci J., in the Supreme Court of Canada's recent decision in *Symesv. Canada*.[12]*ftnote[12] [1993] 4 S.C.R. 695, at pp. 755-756 citing *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al.*, [1985] 2 S.C.R. 536. There remains for review the conclusion of the Tribunal in the same paragraph "there is very little, if any, meaningful distinction between what an employer must establish by way of a defence to an allegation of direct discrimination and a defence to an allegation of adverse effect discrimination."

i) Did the Tribunal err in applying a higher standard than the appropriate "reasonably necessary" standard for a BFOR defence?

It was argued before me, both on behalf of the respondent Commission and the intervenors, that the Tribunal was correct in its analysis of the case law and that little distinction remains between the "reasonably necessary" or "no reasonable alternatives" standard for a BFOR defence in relation to direct discrimination and the "duty to accommodate" and "individual assessment" standard in relation to adverse effect discrimination. It was further argued before me on behalf of the intervenors that the BFOR defence must be interpreted in a manner consistent with the equality rights guaranteed in section 15 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] and to give effect to this principle the "reasonably necessary" standard must in effect be equated with the "duty to accommodate" and "individual assessment" standard in relation to adverse effect discrimination.

I find it unnecessary to deal definitively in these reasons with either of these arguments.

While the Tribunal did from time to time adopt the language of the standard in relation to adverse effect discrimination when dealing with the reality of a case of direct discrimination,[13]*ftnote[13] See, for example, at p. 59 of the Tribunal's decision, at p. 77 of the applicant's application record where the term "accommodation" is used. the Tribunal not only examined individual assessment in the case of Thwaites which would have gone to the heart of establishing the BFOR if the Tribunal had concluded that it had been effectively and fairly carried out, it further examined whether the CAF had considered reasonable measures to lessen risk in the event that Thwaites were retained in the CAF and whether other alternatives to release of Thwaites had been effectively canvassed. In short, whatever may have been the strengths or weaknesses of the Tribunal's legal analysis, and I am of the view that the strengths of that analysis far outweigh the weaknesses that are only apparent if the decision is read microscopically, in the final analysis the Tribunal effectively and correctly applied a "reasonably necessary" standard to the review of the BFOR here in issue and determined on the facts that the CAF has failed to establish the objective necessity of the alleged BFOR. Against a standard of review of correctness, I find no basis for interfering with the decision of the Tribunal on this ground.

Given the foregoing finding, I regard it as unnecessary to comment of the intervenors' Charter argument.

ii) Did the Tribunal err in determining that the "risk of employee failure" sufficient to establish a BFOR "must be substantial"?

In its decision, at paragraph numbered 14 as quoted above, the Tribunal examined the issue of sufficiency of risk to constitute a BFOR. It noted that another Canadian Human Rights Tribunal concluded in a case involving the CAF "that proof of a slight or negligible risk is not sufficient to constitute a BFOR." It then concluded that "[i]t seems that the risk must be substantial." While this conclusion, may be couched in an unfortunate choice of words, it cannot be interpreted as fatal to the Tribunal's decision. The term "substantial" must be interpreted in its context. In its context it is not the equivalent of "great". It is rather nothing more than something greater than "slight or negligible". I conclude that this is the only reasonable interpretation of the term "substantial" in light of the paragraph that immediately follows the use of the term and that is once again reproduced here for ease of reference:

The significant risk standard recognizes that some risk is tolerable in that human endeavours are not totally risk free. While this standard protects genuine concerns about workplace safety, it does not guarantee the highest degree of safety which would be the elimination of any added risk. What it does, is ensure that the objectives of the CHRA are met by seeking to integrate people with disabilities into the workplace even though such persons may create some heightened risk but within acceptable limits.[14]*ftnote[14] Underlining added for emphasis.

iii) Did the Tribunal err in requiring individual assessment to establish a BFOR and alternatively, did it err in finding inadequate the individual assessment of Thwaites by the CAF?

Whether or not individual assessment is required as an element of the "reasonably necessary" standard for a BFOR defence in relation to direct discrimination is not a question that I find I must address. Certainly the Tribunal, in its legal analysis, seems to reach that conclusion and the intervenors in their argument make a compelling case for that conclusion. But whether or not individual assessment is required as a matter of law, the CAF purported to undertake individual assessment in relation to Thwaites and relied on that assessment in defence of its alleged BFOR. Put another way, the CAF chose to defend its BFOR as being reasonably necessary by relying on its individual assessment ofThwaites. That being the case, it was incumbent on the Tribunal to examine the individual assessment that was undertaken as an element of its examination of the "reasonably necessary" standard for the BFOR defence. I concur with the conclusion of the Tribunal that the individual assessment process was inadequate to support the BFOR against a "reasonably necessary" standard. The inadequate individual assessment resulted in a decision to release Thwaites, an individual who was under a disability. It was critical or central to a process that was acknowledged to result in discrimination against Thwaites on a prohibited ground. The individual assessment process failed to respect the most basic elements of the duty to act fairly.

iv) Did the Tribunal erroneously equate the duty to accommodate that is related to adverse effect discrimination with the duty to demonstrate no reasonable alternatives for cases of direct discrimination?

For the reasons set out in relation to the first issue question discussed above, I conclude that this question must be answered in the negative. I reach this conclusion, not because the Tribunal was necessarily correct in the conclusion drawn from its legal analysis that the standard in respect of direct discrimination equates with or approaches very close to the standard in respect of adverse effect discrimination, but because, in the last analysis, the Tribunal effectively applies a "reasonable alternatives" or "reasonably necessary" standard to the facts of this case. In so doing, it was drawn into the language applicable to cases of adverse effect discrimination by the actions of the CAF in individually assessing Thwaites' situation.

Based on the foregoing analysis, and against a standard of review of correctness, I find no basis for interference by this Court in the conclusion of the Tribunal that the complaint of the respondent Thwaites had been substantiated before it.

THE RELIEF GRANTED BY THE TRIBUNAL

As indicated earlier in these reasons,[15]*ftnote[15] See p. 48, quoted paragraphs c), d) and e). the applicant has put in issue the three elements of the relief granted by the Tribunal to Thwaites. I will deal with them in turn.

i) Did the Tribunal err in law in awarding excessive monetary relief to the respondent Thwaites under the heads of future loss of income and past loss of income?

Counsel for the applicant urged upon me that the Tribunal erred in law in determining the appropriate quantum of compensation payable toThwaites in respect of loss of past income and future income arising from the discriminatory action of the CAF. The relevant portions ofsection 53 of the *Canadian Human Rights Act* read as follows:

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:

. . .

(*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

Neither subsection 53(4) nor section 54 is applicable to the facts of this case.

Counsel for the applicant argued that the Tribunal failed to take into account the principles of foreseeability and remoteness and failed to consider an appropriate cap related, I assume, to those principles as required by the majority decision of the Federal Court of Appeal in*Canada (Attorney General) v. Morgan*.[16]*ftnote[16] [1992] 2 F.C. 401 (C.A.). At pages 414 and 415 of that decision, Marceau J.A., speaking as part of the majority of the Court stated:

(a) Reading the comments of the Chairman of the initial Tribunal and those of the Review Tribunal majority, I am afraid, I say it with respect, that there exists some confusion between the right to obtain reparation for a damage sustained and the assessment of that damage. While the particular nature of the human rights legislation"which has been said to be so basic as to be near-constitutional and in no way an extension of the law of tort (see e.g. *Robichaud v. Brennan (sub nom. Robichaud v. Canada (Treasury Board)* , [1987] 2 S.C.R. 84, at page 89, and *Bhadauria v. Board of Governors of Seneca College (sub nom. Seneca College of Applied Arts and Technology v. Bhadauria)*, [1981] 2 S.C.R. 181)"renders unjustifiable the importation of the limitations to the right to obtain compensation applicable in tort law, the assessment of the damages recoverable by a victim cannot be governed by different rules. In both fields, the goal is exactly the same: make the victim whole for the damage caused by the act source of liability. Any other goal would simply lead to an unjust enrichment and a parallel unjust impoverishment. The principles developed by the courts to achieve that goal in dealing with tort liability are therefore necessarily applicable. It is well known that one of those principles has been to exclude from the damages recoverable the consequences of the act that were only indirect or too remote. In my view, the minority member was perfectly right in writing (at pages D/74-D/75):

If reinstatement is purely discretionary and compensation is less so then it seems to me certain well-known accepted principles of compensatory damages should guide the Tribunal in assessing or quantifying the financial loss. These principles are quoted with approval by the Review Tribunal in the *Foreman* (Can. Rev. Trib.) case, *supra*, [*Foreman v. Via Rail Canada Inc.* (1980), 1 C.H.R.R. D/233] as follows at para. 7716 [D/869 of *Torres*, *supra*]:

In our view the use of the language of "compensation" by the Canadian Act implies that tribunals are to apply the principles applied by courts when awarding compensatory damages in civil legislation. The root principle of the civil law of damages is "*restitutio in integrum*": the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligation to take reasonable steps to mitigate his or her losses. (D/238)

In a recent case, *Canada (Attorney General) v. McAlpine, supra*, [[1989] 3 F.C. 530] the Federal Court of Appeal, on appeal from a decision of a human rights tribunal which relied on that principle in assessing damages for lost U.I.C. benefits, commented as follows at p. 538 [para. 13, D/258]:

. . . the proper test must also take into account remoteness or foreseeability where the action is one of contract or tort. Only such part of the loss resulting as is reasonably foreseeable is recoverable.

After quoting further from *McAlpine*, Marceau J.A. goes on at pages 415 and 416 to state:

I think one should not be too concerned by the use of various concepts in order to give effect to the simple idea that common sense required that some limits be placed upon liability for the consequences flowing from an act, absent maybe bad faith. Reference is made at times to foreseeable consequences, a test more appropriate, it seems to me, in contract law. At other times, standards such as direct consequences or reasonably closely connected consequences are mentioned. The idea is always the same: exclude consequences which appear down the

chain of causality but are too remote in view of all the intervening facts. Whatever be the source of liability, common sense still applies.

It has been found, I know, that the practice developed in cases of wrongful dismissal with respect to the assessment of the lost wages was not necessarily applicable to cases of job loss attributable to discriminatory treatment. Note that, in cases of wrongful dismissal, the act for which the employer is reproached is not to have put an end to the employment but to have done so without proper notice or in contravention of the terms of a contract. The nature of the act source of liability is different, therefore the consequences flowing from it ought to be different.

In my view, the initial Tribunal and the majority members of the Review Tribunal were wrong in refusing to establish a cap or cut-off point for the period of compensation, independent of the order of reinstatement.

While the concepts of remoteness and foreseeability are clearly enunciated in the foregoing quotations, two other concepts are also highlighted by Mr. Justice Marceau. He states that the goal in respect of compensation under human rights legislation and applicable in tort law is the same, that is, to make the victim whole for the damage caused by the act that is the source of liability. Further, he states that "common sense" requires that some limits be placed upon liability for the consequences flowing from an act.

Against the principles enunciated by Mr. Justice Marceau, I find no error in the assessment of compensation for loss of past and future income by the Tribunal that would warrant the intervention of this Court.

The Tribunal relied on expert actuarial evidence introduced on behalf of both Thwaites and the CAF. The evidence was in the form of detailed written reports supplemented by *ftnote"cn´

ii) Did the Tribunal err in law in awarding interest on the maximum $5,000 award for special compensation pursuant to subsection 53(3) of the *Canadian Human Rights Act*?

Subsection 53(3) of the *Canadian Human Rights Act* reads as follows:

53. . . .

(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.

It is important to note that the applicant does not attack the award to Thwaites of compensation in the amount of five thousand dollars as compensation under this subsection. The questions raised are first, whether the award of simple interest on that amount at the Bank ofCanada prime rate "from and after June 1992" has the effect of increasing the award under the subsection 53(3) to an amount in excess of the maximum compensation allowed and second, if it does not, but the interest amounts to a separate award, whether the separate award is beyond the jurisdiction of the Tribunal?

In addressing the question of interest, the Tribunal also provided that interest is payable from and after June, 1992 on the past and future income portion of the award. No objection is taken to this award of interest.

I find that both awards of interest, in the absence of specific authority to award interest and bearing in mind the principle that the *Canadian Human Rights Act* is to be interpreted so as to advance the broad policy considerations underlying it,[17]*ftnote[17] See *Robichaud v.Canada (Treasury Board)* quoted *supra*, footnote 11. derive their authority from the authority contained in paragraph 53(2)(*c*) of the*Canadian Human Rights Act* quoted above[18]*ftnote[18] See p. 65. to order compensation "for any expenses incurred by the victim as a result of the discriminatory practice." The evidence before the Tribunal indicates that Thwaites went bankrupt and borrowed from his parents and possibly others to maintain himself and pay for his treatment. I find it reasonable for the Tribunal to have assumed that Thwaites would have continued to incur interest expense from the time of the Tribunal's order until the awards were paid, thus incurring expense that would likely be only partially offset by the awards of interest provided.

On the foregoing reasoning I find that the award of interest in question was not made under subsection 53(3) and did not have the effect of increasing the award thereunder beyond what is authorized by law.[19]*ftnote[19] See *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.), at p. 437 where MacGuigan J.A., in dissent, indicates that the maximum award "including interest" under s. 53(3)is $5,000. It follows that I find the Tribunal did not err in law in making that portion of its award of interest.

I make no finding as to whether the Tribunal had an inherent right to award interest on its monetary award that is not founded in paragraph 53(2)(*c*), although the *Morgan* decision, *supra*, would appear to provide authority that such an inherent right exists.

iii) Did the Tribunal err in law in awarding Thwaites reasonable costs of his counsel including the cost of actuarial services?

I refer to the authority under paragraph 53(2)(*c*) of the *Canadian Human Rights Act* quoted above to award compensation for expenses incurred by a victim, in this case Thwaites. I find no reason to restrict the ordinary meaning of the expression "expenses incurred". Costs of counsel and actuarial services incurred by Thwaites are, in the ordinary usage of the english language, expenses incurred by Thwaites. The fact that lawyers and judges attach a particular significance to the term "costs" or the expression "costs of counsel" provides no basis of support for the argument that "expenses incurred" does not include those costs unless they are specifically identified in the legislation. On the basis of the principle that the words of legislation should be given their ordinary meaning unless the context otherwise requires, and finding nothing in the relevant context that here otherwise requires, I conclude that the

Tribunal did not err in law in awarding Thwaites reasonable costs of his counsel including the cost of actuarial services.

COSTS

In the respondent Thwaites' application record, Thwaites' costs are requested against the applicant. Rule 1618 of the *Federal Court Rules*[20]*ftnote[20] C.R.C., c. 663 (as enacted by SOR/92-43 , s. 19). provides that no costs shall be payable in respect of an application for judicial review unless this Court, for special reasons, so orders. While it is fair to say that this application for judicial review, including related interlocutory proceedings, has caused Thwaites concern and hardship that may have been rendered particularly difficult by his medical condition and his financial difficulties, the same can be said in respect of many judicial review applications that come before this Court. I am not prepared to conclude that Thwaites' medical condition and financial difficulties constitute special reasons.

CONCLUSION

In the result, I have ordered that the application is dismissed. There is no order as to costs.