CANADIAN (I H.It It HUMAN RIGHTS REPORTER

BRITISH COLUMBIA
RELIGION AND CREED / DISCRIMINATION
Indexed as: Moore v. British Columbia (Ministry of Social Services)

Volume 17 Decision 24 Paragraphs 1 - 81

Cecilia Moore

Complainant

v.

Her Majesty In Right of the Province of British Columbia as Represented by the Ministry of Social Services

Respondent

Date of Decision: June 29, 1992

Before: British Columbia Council of Human Rights, Lama Bai T

Appearances by: Humphrey Waddock, Counsel for the Complainant

Susan Ross, Counsel for the Commission

RELIGION AND CREED-employment terminated for catholicity - duty to accommodate religious beliefs-REASONABLE ACCOMMODATION-duty to accommodate where employment rule has discriminatory effect-DISCRIMINATION-adverse effect discrimination-DAMAGES-determining quantum by establishing duration of award

HUMAN RIGHTS-nature and purpose of human rights legislation-JURISDICTION-jurisdiction to hear complaint concerning issues covered by collective agreement-COURTS-court's Jurisdiction where alternative remedies available

Summary: The B.C. *Human Rights Council finds that the Ministry of Social Services discriminated against Cecilia Moore because of her religion. Ms. Moore, who is a Roman Catholic, was employed as a Financial Aid Worker. She refused to authorize medical coverage for a client of the Ministry who needed an abortion.*

Ms. Moore was a probationary employee when the incident occurred. The Ministry policy on medical coverage was not completely clear. Ms. Moore turned down coverage for the client partly based on her understanding of policy, but also because she personally did not believe in abortion. When her supervisor was apprised of Ms. Moore's decision to refuse coverage, he directed her to change her decision and authorize medical coverage for the abortion. Ms. Moore refused and indicated that because of her religion she would refuse to authorize coverage for abortion in any other similar circumstances. Ms. Moore's employment was terminated.

The Council finds that clients are entitled to an unbiased decision-maker and barring Ms. Moore from dealing with issues of abortion is necessary for fairness to the clients. The Council also finds that Ms. Moore could have and should have voluntarily disqualified herself. Instead she chose to accept the client's file knowing that it was a request for medical coverage for an abortion and knowing that she would be unable to grant the request for assistance because of her religious beliefs.

However, the Council also finds that the Ministry failed to accommodate Ms. Moore's religious beliefs and did not show that accommodation was not possible, either by exempting her from dealing with such situations or by assigning other files to her.

The Council orders the Ministry to pay Cecilia Moore $7,703.80 as compensation for lost wages, and $1,000 as compensation for humiliation.

Cases Cited

Central Alberta Dairy Pool v. Alberta (Human Rights Comm) (1990), 12 C.H.R.R. D/417: 50,59,65

Fraser v. Public Service Staff Relations Board, [1985]2 S.C.R. 455: 62

Haring v. Blumenthal (April 10, 1979), Civil Action No. 78-0085 (U.S.D.C.) [unreported]: 63

Mohammady v. Mariposa Stores Ltd. (1990), 14 CHR.R. D/215 (B.C.H.R.C.): 76

Moore v. British Columbia (1986),4 B.C.L.R. (2d) 247 (S.C.): 8

Moore v. British Columbia (1988), 23 B.C.L.R. (2d) 105 (CA): 9

Morgan v. Canada (Armed Forces) (1990), 13 C.H.R.R. D/42 (Can. Rev.Trib.): 74

O.P.E.I.U. v. Domtar Inc: (No. 4)(1990), 12 C.H.R.R. D/161 (Ont. Bd.Inq.): 59

Ontario (Human Rights Comm) and O'Malley v. Simpsons-Sears Ltd. (1985), 7 C.H.R.R. D/3102 (S.C.C.): 49,59

Rajput v. Algoma University College (May 12, 1976), (Ont Bd.Inq.) [Unreported]: 74

Torres v. Royalty Kitchenware (1982),3 C.H.R.R. D/858 (Ont. Bd.Inq.): 74

Tramm v. Memorial Hospital (December 21,1989), (D. N.Ind.) [unreported]: 59

Wilford v. Caribou General Hospital (1988),9 C.H.R.R. D/4947 (Nfld. Comm.Inq.): 59

Legislation Cited

Canada

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act.* 1982. being Schedule B of the *Canada Act* 1982(U.K.), 1982, c. 11, s. 24: 8

British Columbia

Guaranteed Available Income for Need. A.S.B.C. 1979. c. 158
s.25: 28
B.C. Reg. 479/76: 19
s. 29: 19,28
s.34: 28

Human Rights Act, S.B.C. 1984, c. 22
s.8: 4
s. 14 (1Xd): 70
s. 17 (2): 70

Public Service Act., S.B.C. 1979. c. 15. s. 6(3): 45

[1] On November 21, 1984, the complainant, Cecilia Mary Teresa Moore, commenced employment with the respon-

dent, Her Majesty in Right of the Province of British Columbia as represented by the Ministry of Social Services (formerly the Ministry of Human Resources) as an auxiliary financial assistance worker float in Region 16, in South Vancouver. In January 1985, the complainant was assigned to the respondent's Fraserview office on Victoria Drive. Her responsibilities as a financial assistance worker (FM) included assessing eligibility for and determining benefits to be paid under the *Guaranteed Available Income far Need Act,* S.B.C. 1979, c. 158 (the *HGAIN* Act").

[2] In February 1985, the ccrnplainant denied a client of the respondent financial assistance under the *GAIN Act* for the purpose of having an abortion. The ccrnplainant's decision was appealed under the respondent's appeal procedure. The appeal was upheld and the complainant was ordered to issue the financial assistance. The ccrnplainant refused. On May 21, 1985, the ccrnplainant's employment was terminated by the respondent for insubordination.

[3] The ccrnplainant is a Roman Catholic. She has attended the Catholic church regularly since childhood and is a strict adherent to Catholic doctrine. Facilitation of an abortion is cootrary to the doctrine of the Catholic church.

[4] The ccrnplainant alleges that the respoodent discriminated against her in employment because of religion, cootrary to s. 8 of the *Human Rights Act, S.a.G.* 1984, c. 22 *(as amended)* (the *"Acr)* (Exhibit No. 1).

Sectioo 8 of the *Act* reads as follows:

> 8 (1) No person or anyone acting on his behalf shall
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person with respect to employment *or* any term or condition of employment,
>
> because of the ... religion ... of that person ...

[5] The ccrnplainant's allegation raises the following issues:

1. Whether or not the complainant was discriminated against on the basis of religion during her employment at the respondent;

2. Whether or not the complainant was discriminated against on the basis of religion when the respondent terminated her employment; and

3. If the complainant was discriminated against in employment, whether or not the respondent met the requirements of the applicable defense, Le. the duty to accommodate.

[6] The events which are the subject of this complaint occurred in 1985. The reasoos for the lapse of time between those events and this proceeding are outlined first.

HISTORY OF COMPLAINT

[7] By letter dated October 17, 1985, from counsel for the ccrnplainant, a connplaint was filed under the *Act* with the B.C. Council of Human Rights (the "Council") (Exhibit No. 5.5, p. 12). The Council was asked to hold the complaint in abeyance pending an action under the *Canadian Charter of Rights and Freedoms* (the *"Charter")*. The letter stated the following in part:

> Our client is contemplating bringing an action under the Charter and we are writing this letter purely to prevent the expiry of any rights which our client may have under the Human Right *[sic]* Act while her Charter action is pending. We would be most grateful, therefore. if you would acknowledge this letter as the filing of a complaint and let the matter stand pending action in the Charter proceedings.

[8] The ccrnplainant then brought an action before the Supreme Court of British Columbia claiming declaratory relief under the *Charter* and the *Act.* In *Maare* v. *British Columbia* July 4, 1986, B.C.S.C. C855620, Vancouver Registry [4 B.C.LR. (2d) 247], Justice Lander concluded that the remedies sought by the complainant in relatioo to the terminatioo of her employment should be pursued under the collective agreement or the *Human Rights Act.* Justice Lander also coocluded that the arbitration board, as a "court of connpetent jurisdictioo" under s. 24 of the *Charter,* was the appropriate forum for the connplainant to advance her *Charter* argument concerning the termination of employment.

[9] These findings were upheld by the B.C. Court of Appeal in *Moore* v. *British Columbia,* 23 B.C.L.A. (2d) 105. In that decision, the Court noted that the essence of the connplainant's claim regarding discrimination in employment "appears to fall within the language of s. 8(1) of the *Human Rights Acr* (p. 117). In addressing the issue of the relationship between the *Charter* and human rights legislation, Macfarlane stated at pp. 109-10:

> ... The question whether claims ought to be advanced under the Charter when the Human Rights Act has direct application was the SUbject of comment by the Ontario Court of Appeal in *McKinney* v. *Univ. of Guelph,* 10th December 1987 (new reported 24 O.A.C. 241) at pp. 22-23 (p. 2530.A.C.):
>
> > There is a natural tendency to think of the *Charter* as a replacement for the federal *Human Rights Act* and the *Human Rights Codes* in the various provinces. It is no such thing. It is not intended to supplant the constitutional right of the federal government in its sphere and the provinces in theirs, to legislate in the field of the civil and human rights *(or* not to legislate if that be the choice). We have always had civil liberties in Canada which have been protected by the common law, legislation, and parliamentary tradition. They did not start with the *Charter* or even with the statues passed from time to time by Parliament and the legislatures. What the *Charter* did was to recognize existing rights and freedoms. fulfill the gestation of others, and create new ones. It acts as a guarantee of these rights and freedorns and is a direction to government at the federal and provincial levels that no action of theirs is to be in conflict with its standards in the human and civil rights field. It therefore follews that if the rights of a citizen have

> been adversely affected in a particular instance, recourse is first had to the relevant human rights legislation enacted at the appropriate constitutional level. Where the conduct complained of is sanctioned by the human rights legislation or any other legislation. resort is then had to the *Charter* to determine if the legislation in question is inconsistent with the *Charter*. If it is. it is the legislation that will be struck down to the extent of the inconsistency. The person aggrieved may then pursue his or her remedies and the party formerly relying on the impugned legislation will have to address the complaint on its merits.
>
> . . . In my opinion, Mr. Justice Lander was correct when he held that the claims in the action based upon the Human Rights Act ought to be dismissed. The appellant must pursue those claims under the procedure provided in the Act, which forecloses any civil action based directly upon a breach thereof, and also excludes any common law action based on invocation of a public policy expressed in the Act ...

[10] Macfarlane also found that, in the event the complainant's assertions were substantiated under the *Act,* the relief provided under that statue matched the relief available to the complainant under the *Charter* (at p, 117):

> ... I am unable to accept the appellant's submission that the act does not afford the quality of relief to which she is entitled. A finding that s. 8(1) has been breached is, in essence, not much different from a declaration that her rights under s. 2(a) or s. 15(1) of the Charter have been breached. What is asserted is a breach of a basic human right. Human rights are protected by both the Human Rights Act and the Charter. There is no need to have access to both in this case. Applying the views expressed in *McKinney,* supra the appellant should resort first to her rights under the provincial legislation. which has direct application in her case. Under that Act she can obtain all of the Mappropriate"relief which would be granted under s. 24(1) of the Charter. The appellant says she wants damages. If these were assessed under s. 24(1) they would, in my view, compensate her for loss of pay, expenses and consequential loss of the nature available under s. 17(2) of the Act ...

[11] On May 26, 1988, leave to appeal the decision of the B.C. Court of Appeal was denied by the Supreme Court of Canada.

[12] During the remainder of 1988 and in early 1989, the complainant attempted, unsuccessfully, to reinstate a grievance that she had filed with the B.C. Government Employees Union (the "BCGEU") shortly after her termination in 1985. In July 1985, the BCGEU had abandoned that grievance.

[13] By letter dated April 14, 1989, counsel for the complainant advised the Council that the complainant wished to proceed with the complaint under the *Act* (Exhibit No. 5.5).

THE FACTS

(14] In early January 1985, the complainant began her assignment as an auxiliary FM float at the Fraserview office of the respondent. At that office she was supervised by the District Supervisor, Arthur Temple. There were four FAW's at the Fraserview office.

(15] On February 27, 1985, the complainant was summoned to the reception desk by the receptionist. The receptionist advised the complainant that a client had made an appointment to see the complainant the following day to obtain medical coverage for an abortion.

[16] The complainant testified that Temple was standing nearby and overheard this conversation. She told him, "I don't believe in abortion.". Temple did not respond. The complainant left the reception area with the client file.

[17] Temple testified that he did not recall this situation or conversation.

[18] Before meeting with the client, the complainant reviewed the GAIN regulations and the policies contained in the Health Services Manual (Exhibits Nos. 6.2 and 6.6). The complainant testified that the question of funding for an abortion was not addressed in the Manual or during her FM training program. The complainant's instructor during training, Patricia Heather Simpson, confirmed that the training program had not covered a situation involving abortion.

(19] Section 29 of the *Guaranteed Available Inc.ome for Need* (GAIN) Regulations, B.C. Reg. *479{T6* (Exhibit No. 6.2) provides for the payment of health care services. Section 29 reads in part:

> 29 (1) The director may authorize an administering authority to provide payment for health care services, within the provisions of Schedule F of these regulations, to
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> (a) an unemployable person and his dependants, if any, where each of the following subparagraphs applies:
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> (i) he is under 65;
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> (ii) he is, or he and his dependants are, in receipt of income assistance in an amount determined under section 1 of Schedule A or sections 1 and 2 (1) of Schedule A;
>
> (iii) he is not in receipt of the Federal Spouse's Allowance or Guaranteed Income Supplemental benefits; ...
>
> (3) The director may authorize payment for essential health benefits that cannot be supplied by other means ...

(20] The objectives of s. 29 of the GAIN Regulations, ~nd the procedures for authorizing services under that section, are contained in the Health Services Manual, dated July 1984 (Exhibit No. 6.6). The Manual states that one of the general objectives of s. 29 is "to provide access to the subs 1-

dized prepaid Medical Services Plan of B.C. (M.S.P.B.C.) and B.C. Hospital Benefits to persons who are eligible under Section 29 of the GAIN Regulations ... "

(21) Section 29(3) of the GAIN Regulations covers the provision of an "essential health care benefit." Under this section, clients can receive medical coverage for the period of an acute illness (Exhibit No. 6.6, p. 3.51):

> 29 (3) (a) (ii) For persons without medical coverage who urgently require an essential medical service, the worker may, with the approval of the District Supervisor, authorize Ministry of Human Resources sponsored *("W)* medical coverage for a period sufficient to cover an acute illness. Temporary medical coverage *MUST NOTbe* provided for a period exceeding that required to obtain Medical Services Plan premium assistance or temporary premium assistance and must only cover the individual suffering from the acute ihness ...
>
> (b) Additional Medical Goods and Services
> Where a request for an essential additional medical service and/or item is received from a client in any of the above categories, the worker must:
>
> - Verify the medical need by means of a prescription from a licensed practitioner.
>
> - Obtain District Supervisor's approval for provision of the service or item.
>
> MONITORING
>
> 29 (5) (a) The District Supervisor will ensure that supporting documentation is placed ih the client file. [Emphasis added.]

(22) The follooing day, February 28, 1985, the client met with the complainant. The client requested temporary medical coverage to cover the costs of an abortion. The costs of a therapeutic abortion could be recovered under the Medical Services Plan.

(23) The complainant asked the client if she had brought in medical documentation to support her request for temporary coverage. The client had no supporting documentation. The complainant said the client told her that the doctor had said she was not suffering from any illness and that there were no medical reasons for having the abortion. In the client's presence, the complainant telephoned the office of the client's doctor. The doctor was unavailable. The complainant spoke with the nurse who verified the information given by the client. The nurse said that she would ask the doctor to send a letter to the complainant.

(24) The complainant concluded that the client did not qualify for medical coverage under s. 29(1) of the GAIN Regulations. She considered the client still "employable." The complainant refused the client coverage under s. 29(3) of the GAIN Regulations because the request did not comply with policy. In that regard, the complainant noted that the client had "no medical documentation supporting that she was suffering from any acute illness." The complainant stated:

> I refused her on the grounds that she wasn't entitled under policy. I told her that she had a right to appeal, and I actually thought the appeal would be futile because I was certain that Art Temple, who I'd known to apply policy very strictly, would back me up on that ... if I actually thought that the Ministry provided for abortion, I wouldn't have done this appeal process. I would have gone straight to my supervisor and told him straight off about my beliefs.
>
> But it seemed to me that there wasn't a moral conflict because the policy didn't provide for it. And I did say at the end that even if policy provided for abortion coverage, I could not sign this coverage because it was against my beliefs ...

(25) The complainant verified her interpretation of the policy with a co-worker, Evelyn Josephine Fox. Fox testified that at the time she reviewed the complainant's client file she had been an FPIV for about eighteen months. She said that she concurred with the complainant's conclusion.

(26) Lori Mist, presently the Assistant Director of Income Assistance and a witness for the respondent on the *GAIN Act,* GAIN Regulations and policy, disputed the basis for the complainant's decision to refuse coverage to the client. Mist indicated that there were two ways a GAIN recipient could obtain medical coverage for pregnancy under the GAIN Regulations. She said that most FPIV's would automatically classify a pregnant woman as unemployable. A GAIN recipient so classified would then become eligible for continuing coverage under s. 29(1) of the GAIN Regulations. Mist noted that some clients did not wish to be classified as unemployable because of pregnancy. She said that if they requested coverage under the category of employable and were unable to supply their own coverage, temporary coverage would be issued under s. 29(3) of the GAIN Regulations. The fact the client was pregnant would be all an FPW had to establish to issue coverage under this section of the regulations. Mist maintained that confirmation of a specific medical procedure was not required.

[27] Moore testified that after she refused the client the temporary medical coverage, she advised the client about the process for appealing that decision.

[28] Section 25 of the *GAIN Act* provides for the appeal of decisions involving the issuance of benefits under this *Actor* the GAIN Regulations. The appeal process is specified in s. 34 of the GAIN Regulations (Exhibit No. 6.2, p. 17). Decisions can be appealed within a thirty-day period to regional directors or their designate. At this stage of the appeal, an attempt is made by the regional director or designate to resolve the matter.

[29] In this case, the client filed an appeal within the requisite period. Temple, the designate of the regional director, was the recipient of the appeal. Temple decided to overturn the complainant's refusal to grant coverage to the client.

(30) On March 5,1985, Temple advised the complainant of his decision. He asked the complainant to sign the authorization for temporary coverage. She questioned the decision on

the basis that it was contrary to policy but was advised "not to worry about that." The complainant explained that even if the policy supported the coverage, she still could not grant it because to do so was against her beliefs and her conscience. The complainant said she was told to issue the coverage, and that if she refused this direct order, her job could be in jeopardy.

[31] On March 6, 1985, Temple signed the authorization for coverage "A. Temple for C. Moore" (Exhibit No. 12). Temple based his decision to issue the coverage on what he thought was in the best interests of the client and the entitlement with respect to pregnancy. Temple explained that on confirmation of pregnancy the client's status changes from employable to unemployable and the client then becomes entitled to coverage. Temple maintained that further information was not required because "it is not for us to decide how that coverage is to be used."

[32] Temple was unable to readily recall which section of the Regulations he applied in allowing the appeal. He thought he allowed the coverage under s. 29(3). However, under questioning, he said that he did not consider pregnancy to be an acute illness.

[33] On March 18, 1985, the complainant and Temple met to discuss the complainant's refusal to issue coverage. Karen Arlene Rash, a BCGEU representative, was also present at this meeting. The complainant restated her reasons for not issuing the coverage. She said that she refused the client's request and Temple's order to issue coverage because it was contrary to policy and because it violated her beliefs and conscience.

[34] Temple's main concern at the meeting was the complainant's refusal to follow his instructions. He said he "needed to establish whether she was prepared to follow a request of mine or not ... because what is raised was whether within the Ministry, and this being the first occasion in my knowledge, whether workers could elect, for grounds such as Ms. Moore's, to not deliver a service. And have that work which would normally fall on her shoulders go to someone else." Rash suggested that the case could be dealt with by someone else. However, Temple maintained that it was the complainant's responsibility. His view was that "workers are engaged on the basis that they are able to execute all areas of the work that normally falls on a financial aid worker."

[35] The complainant said that she left this meeting in "disbelief-I actually really felt crushed-I— couldn't believe that, even if it were in policy, why my conscience couldn't be, at the very least, respected. That my beliefs could be respected and I could be exempted. I couldn't believe that I was being forced to make a decision between my job and conscience."

(36] On April 11, 1985, the complainant and Temple met again. The complainant reminded Temple that her assignment at his office ended on April 15, 1985. Temple said that he would complete a performance evaluation for the complainant. He told the complainant that she was an "excellent worker" but he would have to attach an addendum to the evaluation. The complainant testified that Temple said "[her] religious and moral beliefs interfered with [her] job." She said Temple knew she was a Catholic.

[37] On April 15, 1985, the complainant started a split assignment at the Sunset West and Sunset East offices of the respondent. The complainant was supervised by Bill Little at Sunset West and by Bill Dubenski at Sunset East.

[38] The complainant testified that, on the first day of her assignment, Little raised the issue of her moral stand on abortion. She said Little told her the district managers in the Region had met to discuss this issue and had all agreed that they "couldn't allow this kind of action in the Ministry."

[39] On May 8, 1985, the complainant received her performance evaluation from Temple (Exhibit No. 5.10). Temple attached an addendum to the evaluation which indicated that her ability to fully carry out her duties as an FNV was affected by her moral stance on abortion. In the addendum, Temple acknowledged that the complainant's assessment of the client's request for medical coverage was "correct on technical grounds as the client is employable ... " However, he did not find the complainant's "rejection of abortion on moral grounds" to be an acceptable reason for refusing his request to issue the coverage. Temple also noted that another office of the respondent had issued medical coverage to this client for abortion costs on a previous occasion.

[40] The complainant signed the assessment on May 9, 1985, and attached a response in which she restated her position on abortion (Exhibit No. 5.10). Later the same day, the complainant received a telephone call from her Ff:W float supervisor, Robert Wilmot.

[41] Wilmot had received a copy of Temple's performance evaluation. He arranged to meet with the complainant on May 14, 1985, to discuss the contents with her. Wilmot advised the complainant to bring her shop steward to the m~ting "because there was a possibility that disciplinary action may flow from the meeting."

[42] Wilmot became aware of the complainant's refusal to issue medical coverage to a client at a district managers' meeting in the spring of 1985. He said that, as the complainant's direct administrative supervisor, it was his responsibility "to deal with the ramifications of that action." Wilmot was responsible for completing a probation evaluation for the complainant and would be required to make a recommendation on whether or not the complainant should pass her probation.

[43] The complainant, Rash and Wilmot met on May 14, 1985. The complainant explained that her Catholic faith provided the basis for her refusal to issue coverage. Rash raised the question of accommodating the complainant's requirements. Wilmot maintained that it would be inappropriate for him to send an Ff:W to an office "with certain limitations on their ability to fulfill or not fulfill their full duties."

[44] Following the meeting, Wilmot sent a memorandum to Ken Derby, the Regional Manager, dated May 14, 1985 (Ex-

hibit No. 16). Wilmot stated in part:

> At the meeting of May 14 with Cecilia and Shop Steward Karen Rash, I informed her that her probationary period was nearing the end, and that though her performance was satisfactory the issue of refusing a direct order required clarification in light of her written statement. I requested that should a similar situation arise, hem would she respond. Cecilia responded in a clear fashion that she would refer the issue to her Supervisor and if instructed to assist the client, that she would not comply with those instructions. The question was asked several times without a change in Cecilia's response.
>
> It is my recommendation that as a result of Cecilia's past insubordination, her stated intent not to comply in the future and her inability to carry out the full range of duties and responsibilities of a Financial Assistance worker, that she be rejected from her probation prior to May 21,1985 when the six month probationary period expires.

[45] Under s. 6(3) of the *Public Service Act,* S.B.C. 1979, c. 15, the Deputy Minister is vested with the authority to reject an employee during the probationary period. John Noble was the Deputy Minister for the respondent from 1976 until 1987. Noble testified that the procedure at the respondent for the rejection of a probationary employee involved a review of the recommendation of the regional manager and any additional information provided by the personnel department.

[46] The complainant was advised of her dismissal by letter dated May 21,1985, from the Office of the Deputy Minister (Exhibit No. 5.14):

> Dear Ms. Moore:
> As you are aware, you have been on probationary status with the Ministry of Human Resources. I have reviewed and considered your potential for employment as a Public Servant. Pursuant to the Public Service Act, this is to advise that effective immediately, you are dismissed as you have not proven suitable for continued employment in the capacity of an auxiliary Financial Assistance worker 1.
>
> This action is being taken because you have, on at least two occasions, advised supervisors that under certain circumstances you will not follow their instructions to perform specific duties related to your position. It is essential that Financial Assistance workers have the ability to provide a full range of services to their clients. Given your statements to your supervisors, I have concluded that you are unable to meet this expectation of the job.

[47] Noble testified that this letter was signed on his behalf by the Assistant Deputy Minister. He said that he did not recall dealing with the rejection of the complainant. Noble confirmed that there was no policy under the GAIN Regulations for the funding of abortion. He also indicated that the respondent had not previously had a request for an exemption from duties for religious reasons and that there was no policy at the respondent for accommodating such requests.

[48] In other testimony on the question of accommodation, both Temple and Wilmot maintained that it would be difficult to provide the complainant with an exemption for files that dealt with issues which offended her religion, or allow her to pass such files to her supervisor for reassignment. Wilmot noted that supervisors would not always be available to make an immediate response and that this could have a detrimental effect on the delivery of services to clients. Temple estimated that he was in the office about 90 percent of the time.

DECISION

[49] In *O'Malleyv. Simpsons-5ears Ltd.*, (1985), 7 CHR.R. 0/3102, the Supreme Court of Canada made a distinction between the concepts of direct discrimination and adverse effect discrimination in employment (at 0/3106 [para. 24772]):

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

[50] The Supreme Court of Canada clarified these concepts further in *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)(1990),* 12 C.H.R.R. 0/417. In that decision, the Court identified the difference in the consequences to an employer of a finding of direct discrimination as opposed to a finding of adverse effect discrimination. The Court stated at 0/434 [para. 49]:

> By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck demn if the employer fails to establish the BFOQ. This is distinguishable from a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to which the rule applies. On the facts of many cases the "group" adversely affected may comprise a minority of one, namely the complainant. In these situations the rule is upheld so that it will apply to everyone except persons on whom it has a discriminatory impact, provided the employer can accommodate them without undue hardship.

[51] In this case, a conflict developed between a requirement of the complainant's job to administer the health care

benefit provisions under the *GAIN Act* and Regulations and her religiously-based opposition to abortion. The concept of adverse effect discrimination applies to this situation.

[52] In *O'MaJley, supra,* the Supreme Court of Canada concluded that the assignment of the burden of proof in cases of adverse effect discrimination should be the same as that already established for cases of direct discrimination. That is, the initial burden of proof rests with the complainant to establish a *prima facie* case of discrimination on a prohibited ground.

[53] In this case, the sincerity and genuineness of the complainant's commitment to the Roman Catholic religion, and her opposition to abortion on that basis, was not at issue. There is, however, some question about when the respondent's job requirement had an adverse impact on the complainant because of her religion.

[54] It was not disputed that on February 27, 1985, the receptionist advised the complainant in the reception area that a client had made an appointment with the complainant about funding for an abortion. According to the evidence of the complainant, , Temple was in the reception area and overheard her comment that she did not believe in abortion. It was Temple's evidence that he did not recall this situation.

[55] People oppose abortion for different reasons, some of which have no basis in religion (Exhibit No. 11.5, p. 1). Even if I accept the complainant's evidence that Temple was present during the conversation with the receptionist, the complainant did not advise Temple that the reason for her opposition to abortion was her religion, nor did she request an exemption on that basis. The evidence shows that she left the reception area with the client file.

[56] The client's request was not specifically addressed in the policy manual or during the F/WVtraining program. The complainant refused to authorize coverage because the client's request did not comply with policy. The respondent disputed the complainant's interpretation of the regulations and policy.

[57] The evidence of Mist, in particular, suggested that the client was eligible for coverage on the basis of pregnancy. Mist also maintained that documentation for a specific medical procedure was not required to issue coverage for an acute illness. However, Temple acknowledged on more than one occasion that the complainant had been correct on "technical grounds." There was also some confusion in Temple's evidence about the basis for his application of the provisions to meet this particular client's request..

[58] The complainant's refusal to authorize coverage was challenged under the respondent's appeal process. The complainant was ordered by Temple, the District Supervisor, to authorize medical coverage to the *GAIN* client for an abortion. Although the complainant explained that facilitation of an abortion was contrary to her beliefs and her conscience, the complainant was threatened with job loss if she refused to follow the order. The respondent's requirement that the complainant authorize medical coverage to the client under *GAIN* for an abortion had, at that point, an adverse impact on the complainant because of her religion. The ultimate impact on the complainant was the loss of her employment with the respondent. .

[59] Most cases of adverse effect discrimination on the basis of religion in employment have involved a "neutral" work scheduling rule and the religious observance of a sabtJath or holy day (see, for example, *O'MaJley, supra; Central Alberta Dairy Pool, supra;* and *Gohm* v. *Domtar* (1990), 12 C.H.R.R. 0/161 (Ont.. Bd.Inq.). However, in *Warfordv. CarbonearGeneral Hospital* (1988), 9 C.H.R.R. 0/4947 (Nfld. Comm.Inq.), the complainant, Warlord, refused to sell tickets for a social event at the respondent because a tenet of his Pentecostal faith prohibited him from consuming alcohol or encouraging its use in any way. This refusal resulted in a two-day suspension. The Newfoundland Commission of Inquiry found that there was adverse effect discrimination on the basis of religion. In *Tramm* v. *Memorial Hospital* (U.S. District Court, Northern District of Indiana, 21 December, 1989, unreported), the complainant, , Tramm, a workroom instrument aide, requested an exemption from cleaning instruments used in abortion procedures because as a Roman Catholic, abortion was contrary to her religious beliefs. This request resulted in the termination of Tramm's employment by the hospital.. The Court found that Tramm had established a *prima facie* case of religious discrimination.

[60] In this case, the complainant's refusal to issue medical coverage for an abortion because of her religious beliefs resulted in the termination of her employment. .

[61] In these circumstances, the complainant has established a *prima facie* case of discrimination on the basis of religion under the *Act.*

[62] However, in reaching this conclusion I am aware that the complainant's decision to take the client file, and deal with the client, rather than to request an exemption at the outset, contributed to the subsequent sequence of events. I am also aware of the need for a balancing of interests in cases such as this one between the religious beliefs of the complainant and the entitlement of clients of the respondent to decision makers that are impartial and unbiased. The onus on public servants to act in an impartial and unbiased manner is a particularly high one. (See *Fraser* v. *Public Service Staff Relations Board,* [1985] 2 S.C.R.. 455.)

[63] In *Haring* v. *Blumenthal,* United States District Court, District of Columbia, Civil Action No. 78-0085, April 10, 1979, the Court addressed this type of conflict in the context of religious discrimination. That case also involved a decision-making position in the Public Service and a Roman Catholic opposed to abortion. The Court stated:

> Decision-makers at all levels not infrequently face conflicts of interest-financial, family-related, or concerning matters of conscience or fixed opinion. Officials are justly criticized when they make decisions notwithstanding interest or bias, particularly when there is no disclosure. Law and public policy encourage disclosure and disqualification, and public confidence in our institutions is strengthened

> when a decision-maker disqualifies himself on account of financial interest, insuperable bias, or the appearance of partiality. In a very significant sense, therefore, public policy favors the course of disclosure of bias and disqualification. . .

[64] In this case, there was an obvious conflict b~tween the client's request and the complainant's strongly held religious beliefs on abortion. Nevertheless, the complainant met with the client.. She discussed her opposition to abortion with the client and then rendered a decision that was consistent with her position. From the client's perspective, the complainant would not have given the appearance of being an impartial decision maker. It is my view that voluntary disqualification would have been the appropriate course of action in this type of situation. In this case, the complainant did not recognize her duty as a public servant in that regard. However, any consequences flowing from the complainant's decision to deal with the client are a matter for remedy, and not for the merits of the complaint. .

[65] As noted earlier, in cases of adverse effect discrimination the requirement in question is upheld in its general application. The duty on the employer becomes one of accommodation. The criteria for establishing the defence of accommodation were outlined by the Supreme Court of Canada in *Central Alberta Dairy Pool. supra,* at 0/437 [para. 59]):

> VVasthe rule rationaliy connected to the performance of the job and, if so, did the respondent employer accommodate the employee up to the point of undue hardship?

[66] The authorization of medical coverage for clients of the respondent under the *GAIN Act* was within the job duties of an FM. The requirement that the complainant issue coverage to the client following the outcome of the appeal was rationally connected to that job.

[67] The responsibility rests with the respondent to show that efforts were made to accommodate the religious beliefs of the complainant up to the point of undue hardship. In this case, no such efforts were made. It was the respondent's evidence that accommodation of the complainant's religious beliefs by a general exemption, or the reassignment of files by the complainant to a supervisor, could have a detrimental impact on service delivery. The respondent argued that. in addition to requests involving abortion, the complainant's Catholic religion would require accommodation for requests involving contraceptives or sterilization.

[68] I do not find any of these arguments persuasive. The evidence does not address the frequency of requests for contraceptives or sterilization at either of the offices where the complainant worked during her employment at the respondent. . The evidence also indicates that the respondent had received only two requests, both initiated by the same client, under *GAIN* involving medical coverage for an abortion. The second request is the subject of this complaint. . An exemption or a reassignment of files could be undertaken without an increase in the caseloads of other workers by assigning an equivalent number of files from those caseloads to the complainant. .

[69] In the circumstances of this case, I find that the respondent has not established the defence of accommodation. I find this complaint justified. The complainant was discriminated against by the respondent during her employment at the respondent and the respondent refused to continue to employ her because of her religion contrary to s. 8 of the *Act.*

REMEDY

[70] The remedies available to me, as the member of council designated under s. 14(1)(d) of the *Actto* hear this complaint. are specified in s. 14(1)(d)(ii):

> (ii) where he [the member designate) considers the complaint is justified, shall make an order described in section 17(2)(a) and may make an order described in section 17(2)(b).

Section 17(2)(a) and (b) state the following:

> 17 (2) Where a board of inquiry considers that a complaint is justified, it
>
> (a) shall order the person who contravened the Act to cease the contravention and to refrain from committing the same or a similar contravention, and
>
> (b) may order the person who contravened this Act to
>
> (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the board he was denied contrary to this Act. and
>
> (ii) compensate the person discriminated against for all, or a part the board determines, of any wages or salary lost, or expenses incurred, by the contravention,
>
> and, in addition to or instead of any other order under this paragraph, may order the person who contravened this Act to pay to the person discriminated against an amount not exceeding $2,000.

[71] Counsel for the complainant made several requests for monetary compensation under s. 17(2)(b)(ii) of the *Act.* Counsel requested $100.000 for past income lost, $175,000 for future income loss, interest, legal costs and $75.000 for hurt and humiliation.

[72] In this case, the respondent terminated the complainant's employment on May 21, 1985. By letter dated October 17. 1985, this complaint was filed with the Council. . In this same letter the complaint was placed in abeyance pending an action under the *Charter.* The complaint was filed within the six-month time period referred to under section *[sic]* of the *Act.*

[73] By letter dated April 14, 1989, the complaint with the Council was reinstated. The delay in proceeding with this complaint was at the request of the complainant without any apparent notification to, or concurrence at the time from, the respondent. . In these circumstances, and with the discretion

given to me under s. 17(2)(b)(ii) of the *Act* to make a partial award for wage or salary loss, I have decided to restrict any award to the period between the complainant's termination and the placement of the complaint in abeyance, and the period after the reinstatement of the complaint, subject to the complainant's duty to mitigate.

(74) Having reviewed the complainant's testimony on the issue of mitigation, I am satisfied that the complainant made reasonable efforts to mitigate her losses between May 1985 and October 1985 (see *Torres* v. *Royalty Kitchenware* (1982), 3 C.H.R.R. 0/858 (Ont.. Bd.Inq.) (at 0/871)). By the time the complaint was reinstated in 1989, the complainant was employed. Although her employment was not full-time, I am not satisfied that the complainant continued to make further reasonable efforts to pursue other alternatives. In these circumstances, it is not necessary for me to consider the issue of wage or salary loss beyond the date when the complaint was reactivated. However, in passing, I note that in the few human rights cases where prospective awards beyond the time of the hearing have been granted, the circumstances involved reinstatement, (see, for example, *!v1organ* v. *Canada (Armed Forces)* (1990), 13 C.H.R.R. 0/42 (Can. Rev.Trib.) (at 0/42) or exceptional circumstances *(Rajput* v. *Algoma UniversityCollege,* May 12,1976, unreported, Ont.. Bd.Inq.).

(75) In this case, I have concluded that the complainant is entitled to wage or salary loss for a five-month period from mid-May to mid-October, 1985. In May 1985, the complainant's salary was $770.38 bi-weekly. According to my calculations the complainant is entitled to salary loss of ten bi-weekly payments for a total award of $7,703.80.

(76) Interest is to be paid on this amount from April 1989, the time when the complaint with the Council was reinstated, until the date of this order. (See *Mohammad* v. *Mariposa* (1990),14 C.H.R.R. 0/215, B.C.H.R.C. (at 0/220)). The interest is to be calculated at the prime rate charged by one of the chartered banks *over* the relevant period of time.

(77) My authority under s.14 (1)(d)(ii) of the *Act* does not extend to the provision under s. 17(3) for the award of legal costs.

(78) In view of my earlier comments concerning the impact of the complainant's decision to deal with the client file on the subsequent sequence of events, and with the discretion given to me to make an additional award of up to $2000 under s. 17(2)(b)(ii) of the *Act,* I have decided to compensate the complainant for injury to feelings in the amount of $1000.

ORDER

(79) Pursuant to s. 17(2)(a) of the *Act,* larder the respondent to Cc,8se the contravention and refrain from committing the same or similar contravention, namely discriminating against a person on the basis of religion.

(80) Pursuant to s. 17(2)(b)(ii) of the *Act,* larder the respondent to compensate the complainant for salary loss in the amount of $7,703.80 with interest calculated as specified above.

(81) Pursuant to s. 17(2)(b)(ii) of the *Act,* larder the respondent to compensate the complainant for injury to feelings in the amount of $1000.