Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

TERRY BUFFETT

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN FORCES

Respondent

REASONS FOR DECISION

MEMBER: Athanasios D. Hadjis

2006 CHRT 39
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I. FACTS

A. Mr. Buffett's complaint

[1] The Complainant, Terry Buffett, is a member of the Canadian Forces (CF). He holds the rank of Warrant Officer. He alleges that the CF denied him an employment benefit by refusing to grant him funding for a reproductive medical procedure (*in vitro* fertilization). He claims that this refusal constituted adverse differential treatment based on his disability (male factor infertility), his sex, and his family status, in breach of s. 7 of the *Canadian Human Rights Act.* He also alleges that the CF's refusal was made in furtherance of a discriminatory policy, contrary to s. 10 of the *Act*.

[2] The CF, for its part, contends that discrimination was not a factor in its decision to refuse funding. The CF provides publicly funded health care coverage to its members only. The medical procedure in question would have to be performed on Mr. Buffett's wife, who is not a member of the CF. He is therefore not entitled to receive funding for this procedure under the CF's health plan.

[3] For the reasons set out below, I find that Mr. Buffett's complaint is substantiated.

B. Why did Mr. Buffett require funding for the reproductive procedure?

[4] Mr. Buffett is 44 years of age. He enrolled in the CF in 1979. He has been married to his wife, Rhonda Buffett, since 1985. She is now 45 years old. The couple had problems conceiving, so they sought the assistance of professionals in the field of fertility. In 1995, Mr. Buffett was diagnosed with male factor infertility. He was found to have a low sperm count with below normal motility in the sperm. The morphology (i.e. the form and structure) of the sperm was also determined to be well below normal.

[5] Mr. Buffett underwent a medical procedure known as varicocele embolization in July 1995 in an effort to improve the sperm quality. The procedure is intended to treat a dilated

vein around the testicle, the presence of which may affect sperm parameters. Follow-up semen analyses of Mr. Buffett, however, showed only mild improvement in sperm motility, morphology and count. In February 1996, Dr. Mark Nigro, who is Mr. Buffett's urologist and an expert in male factor infertility, recommended the use of "advanced reproductive technologies", namely *in vitro* fertilization (IVF) and intra-cytoplasmic sperm injection (ICSI), as the "next logical step" in the couple's efforts at conceiving a child.

C. What are IVF and ICSI?

[6] IVF is the process by which a woman's eggs are fertilized in a dish and then placed in her uterus. The first stage of the process (or "cycle") involves the woman giving herself injections of a medication, over a period of 10 days, to stimulate her ovaries and mature several of her eggs and egg sacs (follicles). An ultrasound is conducted every 2 to 3 days to monitor the growth of the eggs in her ovaries. When at least three follicles of a certain size develop, the woman self-injects a drug that causes the eggs to advance to a final stage of maturation. Thirty-six hours later, the woman undergoes a procedure known as transvaginal egg recovery. The woman is sedated, and a needle is passed into the ovary. The eggs are removed from the follicles. The eggs are then combined with the sperm (comprised of about 6,500 individual sperm) in an incubated dish. They are allowed to join (fertilize) naturally. The eggs are checked daily and if fertilization occurs, a catheter is used to place the resulting embryos into the woman's uterus three to five days after the fertilization. If menstruation does not occur within 17 days thereafter, a pregnancy test is conducted.

[7] When the sperm used contains too few normal, motile sperm, IVF has proven to have very little success, ranging from 4 to 6 percent. Dr. Nigro testified that reproductive endocrinologists do not recommend IVF alone where there are abnormalities in the sperm. In these cases, a combination of IVF and ICSI is the preferred course. In this procedure, normal-looking, active sperm are isolated from the sample provided by the man. Using a microscope and a delicate micromanipulation needle, one of these isolated sperm is injected directly into the egg. Thereafter, the same IVF process of incubation and transfer of embryos to the woman's body is employed.

[8] Dr. Arthur Leader, a professor of obstetrics, gynaecology and medicine (endocrinology) at the University of Ottawa, testified as an expert in reproductive endocrinology and infertility. He explained that it takes a team of up to 30 people to conduct one cycle of IVF treatment. The cost is therefore not insignificant. Dr. Leader estimates the current cost for IVF at about $5,500-$6,000 per cycle, and an additional $1,100 to $1,300 per cycle if ICSI is also used. He noted that the cost in 1997, shortly after the procedure was first recommended to the Buffets, was about $3,000 per cycle of IVF and an additional $1,500 per cycle of IVF with ICSI. Dr. Nigro's estimates of current costs for the procedures were similar to Dr. Leader's ($6,000 per cycle of IVF and an additional $1,500 per cycle of IVF with ICSI).

[9] Dr. Leader does not generally recommend more than three cycles of IVF or IVF with ICSI treatment for his female patients, who are on average 35 years of age. With women who are well into their 30's or older, research has shown that unless pregnancy is achieved within three attempts, it is unlikely the procedure will ever be successful.

[10] According to Dr. Leader, with the introduction of ICSI, the pregnancy rate when using poor quality sperm has now reached the same level as that for standard IVF performed with normal quality sperm, about 30% per cycle.

[11] A child is born in about 30% of cases where an embryo is implanted in the woman. This rate drops as the age of the woman, or the man who provides the sperm, increases, due to an increased risk of miscarriage, particularly after age 40. Dr. Leader indicated that IVF and IVF with ICSI are not recommended for women over 42. He testified that there are no recorded instances of women over age 43 undergoing a successful treatment.

D. Do provincial health care plans fund IVF and IVF with ICSI treatments?

[12] When Dr. Nigro made his recommendation for the IVF with ICSI treatment, Mr. Buffett was stationed at Canadian Forces Station Aldergrove in British Columbia. The Buffetts were therefore residing in that province at the time. In 1996, Mr. Buffett was transferred to the CF base in Gagetown, New Brunswick, where the couple took up new residence. The government-run

health care plans of both British Columbia and New Brunswick did not pay for the cost of IVF treatments. In fact, none of Canada's provincial health plans have ever funded IVF treatments, with the sole exception of Ontario.

[13] Until 1993, the Ontario Health Insurance Plan (OHIP) paid for the cost of IVF treatment for women, irrespective of the cause of the infertility necessitating its use. In 1993, Ontario de-listed IVF as an insured service except in situations where both of the woman's fallopian tubes were obstructed, known as bilateral fallopian tube obstruction.

[14] No provincial plan has ever paid for the cost of IVF with ICSI. However, all provinces cover the cost of testing in relation to fertility issues.

[15] Thus, any persons seeking IVF and IVF with ICSI treatments who reside outside Ontario, and any Ontarians seeking these treatments other than persons with bilateral fallopian tube obstruction, will be required to pay for these fertility procedures. Dr. Leader testified that the procedures are usually conducted in private clinics, of which there are 24 across the country.

E. The CF's health care plan

[16] Canada's system of publicly funded health insurance is, by virtue of the *Constitution Act, 1867*, a matter of provincial jurisdiction. The Government of Canada contributes, however, to the cost of providing health services in every province, subject to certain criteria and conditions, as set out in the *Canada Health Act*, R.S.C., 1985, c. C-6. One of these conditions is that any resident of a province shall be considered an "insured person" under that province's health plan, with the exception of certain designated classes of persons. Members of the Canadian Forces form one of these exempt classes of persons (s. 2). Accordingly, they do not receive health care coverage under any of Canada's provincial health care plans.

[17] To ensure that its members are not deprived of publicly funded health care coverage, the CF has assumed the responsibility of providing health care to its members. According to Chapter 34 of the *Queen's Regulations and Orders* (*QR&O*), issued pursuant to s. 12(2) of the

National Defence Act, R.S.C., 1985, c. N-5, the CF must provide medical care, at public expense, to its members. The "medical care" provided encompasses medical and surgical treatment, diagnostic and investigative procedures, hospitalization, preventive medicine procedures, patient transportation, and the supply and maintenance of prosthetic appliances (art. 34.01 of the *QR&O*). In effect, the CF provides health care to its members on a scale similar to provincial health care plans. The scope of coverage under the CF's plan could be viewed as being even broader than that typically found under provincial plans. For instance, the CF provides full pharmaceutical coverage, as well as coverage for physiotherapy, social work and dental care. The plan is so comprehensive that some have described it as the 14th health services plan of Canada, after those of the ten provinces and three territories.

[18] The Canadian Forces Health Services (CFHS) is a group operating within the CF as the designated provider of medical services to CF members. The CFHS has developed a large infrastructure for the delivery of services inside and outside Canada. The CFHS contains a core of uniformed medical professionals, including general physicians, specialists, nurses, pharmacists, administrators, social workers, medical assistants, and medical technicians. In addition, the CF employs a number of civilian medical experts on a contractual basis to provide care for its members.

[19] Where it is necessary for a CF member to utilize the services of a civilian medical professional, the civilian health care provider submits an invoice to the CF for payment of the services provided. Thus, for instance, in Mr. Buffett's case, a CF physician employed at the Base Hospital located at Canadian Forces Base Chilliwack referred him to Dr. Nigro, who is a Vancouver-based specialist. Dr. Nigro is not employed by the CF. He billed the CF for his professional services, including the costs relating to Mr. Buffett's treatment and testing.

[20] Brigadier-General Hillary Frances Jaeger testified at the hearing with respect to the CF's health care plan. She is the CF's Surgeon-General, with responsibilities that include looking after professional standards and ethics, assigning duties amongst medical staff, and developing clinical policy. She described her role as being analogous to that of a Chief of Medical Staff of a typical civilian hospital. She explained in her testimony that the CF's health plan has two principal goals.

The first is to provide a degree of health care to CF members that is "roughly comparable" to that to which they would have been entitled were they not CF members. The second goal is to ensure that members are "as operationally fit as they can be", in order to perform their duties at the level expected of them by the CF.

F. Does the CF provide any health services to persons like Rhonda Buffett, who are family members of CF members?

[21] The CF does not generally provide publicly funded health care to families of CF members. Pursuant to art. 34.23 of the *QR&O*, medical services may be provided to dependents of CF members (i.e. their spouses or children) in certain exceptional circumstances, such as in the case of an emergency, or where the dependents accompany the CF member to locations where adequate civilian medical facilities are unavailable, like Goose Bay, in Newfoundland and Labrador, for example. Given the relatively small size of that community and its geographic isolation, the dependents of CF members stationed there routinely receive health care from the CFHS. These family members are residents of Newfoundland and Labrador while living at the base, so the CF bills the cost of the health services provided to them directly to the province's health care plan.

[22] Aside from these exceptional circumstances, dependents of CF members must access insured health services through the provincial government of the province in which they reside. Family members of CF members are, however, eligible for supplemental third party insurance coverage through the Public Service Health Care Plan (PSCHP). The PSHCP is an employer sponsored medical insurance plan that all CF members are eligible to join, and which offers additional coverage of medical services for their family members. The plan is funded through contributions from the employer and the CF Members. The plan provides additional partial insured coverage for services not covered under provincial health care plans, such as prescription drugs, dental work and eyeglasses. Mr. Buffett has purchased this coverage for Ms. Buffett.

G. Does the CF's health care plan fund IVF or IVF with ICSI treatments for CF members?

[23] Until 1997, the CF's health care plan did not fund IVF and IVF with ICSI treatments. This policy changed in September 1997. A female CF member stationed in Ontario had requested reimbursement for the cost of her IVF treatment, claiming that as a civilian residing in Ontario, she would have been entitled to have the procedure paid for at public expense. She argued that it was unfair for the CF's health care plan to have a policy that was more restrictive than that applied by the corresponding provincial health care plan, namely OHIP.

[24] The CF member's funding request was initially turned down, so she filed a grievance, which was ultimately successful. The funding was awarded to her. Thereafter, the CF expanded its list of insured procedures to include IVF treatments. The CF takes several factors into account before expanding its list of insured services to add a particular health service. One of these factors consists of the availability of funding under provincial health plans for the service in question. As BGen. Jaeger explained, this is to ensure that members of the CF do not become disentitled to health services that would otherwise be available to them, merely because they happened to join the CF.

[25] According to BGen. Jaeger, this factor was a principal reason for the CF's decision to add IVF treatment to its list of insured services. The grievance brought to the fore the fact that OHIP was already funding this treatment in certain specific circumstances (bilateral fallopian tube obstruction). The CF amended its policy to provide equal coverage to its members.

[26] Details about this change in the CF's policy were made known to health care providers in the CF, by way of a message in writing that was circulated by the Chief of Health Services at National Defence Headquarters, on September 15, 1997. The message stated that IVF procedures were now authorized and could be approved at unit level if IVF had been recommended by a reproductive technology specialist. A maximum of three sessions would be funded, which accords with OHIP's policy as well. Interestingly, the message did not specify whether funding of

the treatments would be restricted to patients with bilateral fallopian tube obstruction, as was the case under OHIP's post-1993 policy.

H. What steps did Mr. Buffett take when he learned of the change in CF's policy?

[27] Shortly after Dr. Nigro suggested, in February 1996, that the option of IVF treatment with ICSI be explored, Mr. Buffett met with a CF physician to discuss the matter. The CF physician informed Mr. Buffett that the CF's health plan did not provide any funding for this procedure. At the time, the Buffets were residing in British Columbia. Later that year, they moved to New Brunswick. Since the provincial health plans of both provinces did not fund the procedure, the couple could only have obtained it by paying for it themselves. They decided that they just could not afford the expense and resigned themselves to the likelihood that they would never have any biologically related children.

[28] Their expectations changed dramatically, however, when one of Mr. Buffett's acquaintances, who was a CF medic serving at CFB Gagetown, forwarded to Mr. Buffett a copy of the message that National Defence Headquarters had circulated in September 1997, announcing the change in policy regarding funding for IVF treatments. With this news in hand, Mr. Buffett contacted a CF physician on the base and made a formal request for funding. The request was forwarded to the base surgeon, who refused to grant it. The grounds given for the refusal were that "IVF is only provided in one province" (i.e. Ontario), and that the funding was available "only with respect to bilateral tubal obstruction".

[29] On November 10, 1998, Mr. Buffett filed a grievance contesting this decision. He noted that the original message from National Defence Headquarters announcing the change in policy did not mention that coverage was restricted to patients with bilateral fallopian tube obstruction. He argued that this restriction was discriminatory, based on gender. Male CF members were being effectively denied benefits that female members were receiving, since men could not physiologically have tubal diseases.

[30] In accordance with CF procedure, Mr. Buffett's grievance was reviewed and commented upon by his superior officers at various levels. The authority to grant the redress being sought, however, ultimately rested with the Chief of Defence Staff. Some of Mr. Buffett's superior officers who reviewed his grievance endorsed his claim. His commanding officer, Lieutenant-Colonel J.M. Duhamel wrote, on November 30, 1998, that Mr. Buffett's argument had merit, adding that "basing eligibility for publicly funded IVF on a condition applicable solely to female soldiers amounts to excluding male soldiers on the basis of gender".

[31] A similar position was adopted by BGen. D.W. Foster, Commander of Land Force Atlantic Area, in his subsequent review of the grievance. He found that Mr. Buffett's "point of dual standards is well-taken", adding that he believed "in all fairness" that IVF should be offered to Mr. Buffett "as it would to a female member's family".

[32] Others disagreed. Lieutenant-General W.C. Leach, Chief of Land Staff, for instance, did not view the issue as being a matter of gender equality, but rather "simply a medical reality that only women can have fallopian tube obstruction". In his opinion, the purpose of the CF policy of funding IVF for servicewomen was to address that condition "and nothing else".

[33] While the review of Mr. Buffett's grievance was progressing up through each of the various levels, a noteworthy development took place regarding the CF's health care policy. Until December of 1998, the only way to determine if a given medical procedure was covered by the CF's health plan was to consult the numerous messages that were sent from National Defence Headquarters, like the one circulated in September 1997 regarding IVF treatments. Some medical officers had taken to organizing the messages in binders, in order to assist them in making such determinations. To better enable CF members to understand the scope of the coverage to which they were entitled, the CF released its Spectrum of Care policy on December 21, 1998. The Spectrum of Care was essentially a compilation, in a single document, of the various health services decisions and messages issued over the years.

[34] In the process of putting together the Spectrum of Care, the CF took the opportunity to clarify certain ambiguities regarding the services covered. BGen. Jaegar acknowledged in her

evidence that there may have existed some ambiguity in the message that National Defence Headquarters had circulated in September 1997 setting out the restrictions associated with the funding of IVF treatments. Therefore, the Spectrum of Care now explicitly stated that funding for IVF treatments would only be provided,

a) if the infertility was the result of fallopian tube obstruction,

b) for a maximum of three cycles, and

c) to serving members of the CF, not to their civilian dependents, spouses or partners.

These requirements had not been mentioned in the September 1997 message. BGen. Jaegar hastened to add in her evidence, however, that while the original message that was circulated may have lacked these details, one aspect of the policy was always clear: Pursuant to Chapter 34 of the *QR&O*, only serving CF members are entitled to CF's health care benefits. She pointed out that this is an "order" set down from the highest level (i.e. the *QR&O*s), which "trumps" all others.

[35] In June 2000, Mr. Buffett's grievance was referred to the Canadian Forces Grievance Board (CFGB) to review and provide findings and recommendations to the Chief of Defence Staff, in accordance with art. 7.12 of the *QR&O*. The CFGB released its findings and recommendations on April 4, 2001. It recommended that the grievance be denied, noting that dependents of CF Members are not generally covered under the CF's health policy and that the refusal of Mr. Buffett's IVF funding request was in accordance with the policy. The CFGB found that the lack of access to IVF coverage for "most members of groups other than those specified [in the policy] may be discriminatory under the *Canadian Charter of Rights and Freedoms*". But the CFGB went on to find that the restricted access to funding in this area was justified as a reasonable limit, under s. 1 of the *Charter*.

[36] On January 30, 2002, the Chief of Defence Staff, General R.R. Henault, issued his findings regarding Mr. Buffett's grievance. Gen. Henault stated that he concurred "with the

essence" of the CFGB's findings and that therefore, he did not support Mr. Buffett's application for redress.

[37] On May 23, 2002, Mr. Buffett filed his human rights complaint in which he alleged that he had been discriminated against, under s. 7 of the *Act*. He amended his complaint on February 3, 2004, to add the allegation that the CF had applied a discriminatory policy, within the meaning of s. 10 of the *Act*.

II. ANALYSIS

A. What must Mr. Buffett demonstrate to establish discrimination in this case?

[38] Complainants in human rights cases must first establish a *prima facie* case of discrimination. A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")). In the present case, the Commission and the Complainant must establish that:

a) in denying him funding for the IVF treatment, the CF differentiated adversely in relation to Mr. Buffett on a prohibited ground, in the course of his employment (s. 7), or

b) in deciding not to fund this treatment, the CF established or pursued a policy or practice that deprived or tended to deprive Mr. Buffett or a class of individuals, of an employment opportunity on a prohibited ground (s. 10).

For the purposes of the *Act*, members of the CF are deemed to be employed by the Crown (s. 64).

[39] Once the *prima facie* case is established, it is incumbent upon the respondent to provide a reasonable explanation for the otherwise discriminatory practice (*Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 18). An employer's conduct will not be considered discriminatory if it can establish that its refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is based on a *bona fide* occupational requirement (BFOR) (s. 15(1)(*a*) of the *Act*). For any practice to be considered a BFOR, it must be established that accommodation of the needs of the individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost (s. 15(2) of the *Act*).

B. Has a *prima facie* case of discrimination based on sex pursuant to s. 7 of the *Act* been established?

(i) Mr. Buffett's and the Commission's position

[40] According to Mr. Buffett and the Commission, it is clear that the CF's health care plan adversely differentiates against him and other men with male factor infertility who are members of the CF, on the basis of sex. The plan provides coverage for IVF treatments to its female members with bilateral obstruction of their fallopian tubes, a uniquely female form of infertility. At the same time, the plan denies coverage to Mr. Buffett, a male CF member with male factor infertility.

[41] The Commission and Mr. Buffett submit that the medical services provided under the CF's health care plan constitute an employment benefit for CF members, which must be offered to all members in a substantively equal and non-discriminatory manner. As was stated by the Supreme Court in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at para. 34, once an employer decides to provide an employee benefit package, it cannot make exclusions from such schemes in a discriminatory fashion.

(ii) The CF's position

[42] The CF contends that the benefit in question is, in fact, provided in a non-discriminatory fashion to its members. Since CF members are excluded from coverage under provincial and territorial health care plans, the CF has established its own program to provide publicly funded health care to *its members only*, not to their families. The CF does not have a legislative mandate to provide medical coverage for non-members and, pursuant to art. 34.23 of the *QR&O*, medical services may be provided to dependents (spouses and children) but only under certain exceptional circumstances, such as in emergencies or at remote locations. These services are eventually billed back to the non-members' provincial or territorial health care plans. Thus, they are not truly funded by the CF.

[43] The CF points out that IVF and IVF with ICSI are medical procedures that enable a woman to become pregnant. Aside from the sperm that is provided by the male partner, the procedure solely involves the woman. OHIP (the only provincial health care plan that funds the procedure) bills the treatment against the woman's health insurance number, not the male partner's. In Mr. Buffett's case, when it became evident that IVF treatment with ICSI was the next available option for the couple, *Mr. Buffett's* urologist, Dr. Nigro, ceased dealing with the matter. Instead, Dr. Nigro advised the couple to consult with *Ms. Buffett*'s reproductive endocrinologist about the possibility of obtaining IVF treatment with ICSI. Mr. Buffett acknowledged in his testimony that although he accompanied his wife on her visits to her endocrinologist, he was never that physician's patient.

[44] Dr. Leader testified that before commencing treatments, he usually meets with both partners. He needs to be familiar with any allergies that the male partner may have. He must also test the man's semen. It could be infected, in which case he would have to prescribe treatment before proceeding any further. Dr. Leader referred to infertility as a "couple problem". He noted, however, that despite the male partner's participation, it is ultimately only the woman's consent that is required before initiating the treatments.

[45] The CF therefore argues that the evidence is clear: IVF treatment, with or without ICSI, is a medical service that is received *exclusively* by a woman. In the present case, the woman who would be receiving the medical service being sought by Mr. Buffett is his wife, who is not a member of the CF. As a non-member, she is not eligible under the CF's health care program for coverage of her treatment. The distinction being made in the provision of the medical service is based on whether or not the recipient is a member of the CF, not on the basis of his or her sex.

(iii) A comparative analysis

[46] The CF submits that in assessing whether a discriminatory practice has taken place, within the meaning of s. 7, a comparative analysis should be conducted, the outcome of which must demonstrate differential treatment compared to another relevant group.

[47] I am prepared to accept that in the context of this complaint and the manner in which the allegations have been framed, conducting a comparison between relevant individuals or groups is helpful in determining whether a *prima facie* case of adverse differential treatment has been established. As the Federal Court of Appeal noted in *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154 at paras. 23 *et ss*., the legal test for establishing a *prima facie* case of discrimination is flexible and will vary depending on the fact patterns of each case. In the present case, Mr. Buffett has alleged that the CF treated him differently than female CF members who have a form of female-factor infertility. Accordingly, a comparison between him and his female colleagues would be appropriate and instructive.

[48] It is necessary to identify the appropriate comparator in order to be able to determine the existence of any differential treatment, as well as the grounds for the distinction (*McAllister-Windsor v. Canada (Human Resources Development)* (2001), 40 C.H.R.R. 48 at para. 40 (C.H.R.T.)). In defining the comparator group, one must take into account the purpose of the scheme that confers the benefit in issue (*Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 S.C.R. 566 at para. 33).

[49] According to the CF, the purpose of its health care plan is to provide medical care to CF members. The CF suggests that Mr. Buffett should be compared to female members who would be seeking fertility treatments for their non-member spouses or, in the alternative, to male and female members seeking treatment for their spouses with respect to non-fertility related conditions. In either case, the outcome of the comparison would be the same; the non-member spouses would not be entitled, under any circumstances, to receive publicly funded medical services from the CF. Regardless of the gender of the spouse, the nature of the condition, or the type of treatment sought, coverage for medical treatment of spouses is not permitted. Mr. Buffett was therefore not treated any differently under the health plan than any other CF members, male or female. The distinction in coverage is made on the basis of membership in the CF, which is not a prohibited ground under the *Act*.

[50] The CF contends, in addition, that if any distinction is being made between men and women under its health care plan, it is a distinction based solely on biological differences between the two sexes. It is only a woman who is physically able to become pregnant. Therefore, providing funding to women only, for a treatment that causes pregnancy, cannot be discriminatory. Conversely, the CF health plan funds comparable fertility treatments for men in accordance with their physiological realities. An example from the present case would be the CF's funding of Mr. Buffett's varicocele embolization, which would have reversed his male factor infertility, had it been successful. The CF submits, therefore, that the limitation it has set on funding for IVF recognizes the biological reality that only women can receive the treatment and become pregnant. The policy is not, as a result, discriminatory.

[51] I disagree. In my view, a distinction can be drawn between procedures that *reverse infertility* and procedures that *induce or assist conception*. Procedures that are intended to reverse a person's infertility are clearly medical procedures that are performed exclusively on that person. This would include, for instance, surgery to reconstruct a woman's obstructed fallopian tubes. According to Dr. Leader, this was a procedure that was opted for quite readily in the past, prior to the development of advanced reproductive technologies. The varicocele embolization procedure that Mr. Buffett underwent would constitute another example of these types of medical procedures.

[52] IVF and ICSI, on the other hand, are entirely different in nature. These treatments do not reverse the patient's male or female factor infertility. Instead, the treatments offer the couple the opportunity to conceive and have a child that is biologically theirs, irrespective of who has the infertility problem. As Dr. Nigro stated in his evidence, "you don't use IVF unless you want a baby". In my view, the CF has construed the facts of this case too narrowly. The CF takes the position that since nearly all aspects of the IVF and IVF with ICSI treatments involve the woman, they are medical procedures that only relate to her. But this fails to take into account the fact that assisted conception procedures are different from all other medical procedures, including procedures to reverse infertility, in that by biological necessity, two individuals must be involved.

[53] The CF's health care policy is structured in such a way as to provide the female member who has a form of female factor infertility with a publicly funded service that will afford her the opportunity to have a child. Physiologically, this procedure can only be completed with the contribution of a person of the opposite gender. The CF funds the service for the female member, even if the opposite-gender contribution comes from a non-member of the CF. On the other hand, the CF does not provide the equal benefit to a male member with male factor infertility, merely because the contribution from the opposite-gender non-member is much more medically complex. And yet, the same physiological reality exists that conception can only occur with the participation of both partners.

[54] This reality is a key factor in making an appropriate comparison in this case. The fact is that IVF is not merely a medical procedure that is being offered to female CF members. These women are being given a real opportunity to have a child. That is the essential purpose of this treatment. In my view, given this context, the proper comparative question to pose is, does the CF offer the same benefit to its male members with infertility problems that it is offering to its female members with infertility problems?

[55] The answer is clearly no. It does not matter that the CF's original motivation for adding IVF treatment to its list of medical services for its female members who have a certain medical condition, was so as to ensure that the coverage provided under its health care plan was equal to that of a provincial scheme (in this case, OHIP). Considering the policy's true purpose and its

effect, the result is that Mr. Buffett is denied a benefit that is at the same time being provided to female CF members, i.e. access to assisted conception by IVF. As such, the treatment is unequal.

[56] The CF points out that since Mr. Buffett cannot benefit from the standard IVF procedure, he cannot claim to have received unequal treatment from the CF. While standard IVF will assist women with bilateral fallopian tube obstruction to become pregnant and have children, IVF alone would be of virtually no assistance to men like Mr. Buffett who have severe male factor infertility. The pregnancy rate in these instances is no higher than 6%. Dr. Nigro and Dr. Leader both testified that standard IVF is not recommended in such cases. Consequently, the CF contends that its female members with bilateral fallopian tube obstruction are not receiving a benefit that is being unfairly denied to male members. These men would not stand to gain any benefit from standard IVF treatment, so they are not being denied anything in effect.

[57] Mr. Buffett indicated to the Tribunal at the hearing that he was willing to accept funding for standard IVF treatment for himself and his wife, even if it afforded them only a minimal possibility of achieving a pregnancy. In my view, however, this assertion does not help to advance the analysis of this case. While Mr. Buffett may be willing to accept any attempt made in the hope of having a child, the medical evidence before me is clear; IVF alone is medically impractical at achieving this result for a person with his condition. Both experts said that they would not recommend the treatment in Mr. Buffett's case. It would be a futile effort.

[58] Mr. Buffett could only achieve the result he seeks through treatments of IVF with ICSI. According to the CF, if these treatments are to be funded, Mr. Buffett would in effect receive an *additional* benefit that is not available to any other CF members, whether male or female. Indeed, not a single publicly funded health plan in the country offers coverage for IVF with ICSI. If Mr. Buffett was successful in his claim, therefore, he would be obtaining coverage that is more than equal to that which is available to women CF members.

[59] However, equal treatment does not always mean identical treatment (see *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872). Occasionally, a different treatment may be called for in order to achieve substantive equality between the comparator groups. Dr. Leader's

testimony is very instructive in this respect. He noted that until the ICSI technique was developed, there existed a wide gap in the effectiveness of IVF between cases of female factor and male factor infertility. With the introduction of ICSI, the pregnancy rates with respect to both forms of infertility were "normalized" to a level of about 30% per cycle.

[60] Thus, in order for male CF members to receive a benefit that is equal to the benefit being offered to female members with bilateral fallopian tube obstruction, IVF treatments with ICSI would need to be made available to them. Of course, I am mindful of the increased costs associated with ICSI (ranging from $1,100 to $1,500, according to the expert witnesses). In my view, however, it is more appropriate to take these additional costs into account at a later stage, during the undue hardship analysis that is conducted in assessing CF's justification for its policy.

[61] Counsel for the CF suggested in her final submissions that the inequality created by offering publicly funded IVF with ICSI treatments to male members is akin to providing them "gold standard" service that would be unavailable to female members. Women would also benefit from the addition of ICSI to their IVF treatments as the additional procedure would assure them of a pregnancy. With respect, I did not find any evidence to this effect anywhere on the record in this case. On the contrary, the only discussion regarding this matter came up in Dr. Leader's testimony, in which he indicated that ICSI levels the playing field, so to speak, between male and female factor infertility. He did not indicate that women would gain any benefit from having ICSI added to their standard IVF treatments, where the sperm used is normal.

[62] To sum up, in my opinion, the Commission and Mr. Buffet have adduced evidence demonstrating that an adverse differentiation was made between Mr. Buffett and his female colleagues, on the basis of his sex. A *prima facie* case of discrimination has therefore been established.

C. Does the CF have a reasonable explanation for its otherwise discriminatory practice?

[63] As I mentioned earlier, once the *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable explanation. In this particular case, the CF must demonstrate

that its refusal to provide Mr. Buffett with the employment benefit at issue (funding for the IVF treatment with ICSI) was based on a BFOR (s. 15(1)(*a*) of the *Act*). To do so, the CF must establish that accommodating his needs or the needs of the class of individuals like him would impose undue hardship on the CF, considering health, safety and cost (s. 15(2) of the *Act*).

[64] The Supreme Court has articulated a three-step approach to be followed in determining whether a BFOR has been established (see *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("*Meiorin*"); and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*")). A respondent may justify the impugned standard by proving, on the balance of probabilities, that:

> (1) The respondent adopted the standard for a purpose or goal that is rationally connected to the job or function being performed;
>
> (2) The respondent adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose or goal;
>
> (3) The standard is reasonably necessary to the accomplishment of that purpose or goal. To show that the standard is reasonably necessary, the respondent must demonstrate that it is impossible to accommodate the complainant or persons with the complainant's characteristics without incurring undue hardship. It is incumbent on the respondent to show that it considered and reasonably rejected all viable forms of accommodation.

(i) Did the CF adopt its policy for a purpose or goal rationally connected to the job or function being performed?

[65] The CF submits that the standard or policy at issue in the present case is rationally connected to the goals and purposes of the CF's medical coverage under its health care plan. Its policy on fertility treatment was changed to include IVF coverage for female CF members with bilateral fallopian tube obstruction for the purpose of ensuring that members within the CF received the same level of care as non-members covered by provincial plans, namely OHIP.

[66] I accept that the CF's policy was rationally connected to its goal of satisfying its obligations to provide publicly funded health care to its members that is equal to the level of health care available under Canada's provincial health care plans. The first step of the defence has been established.

(ii) Did the CF adopt its standard in good faith?

[67] I am satisfied that the CF adopted its policy in good faith. Its intention was to match the level of health services available under the provincial health plan in Ontario. The decision was taken following a successful grievance filed by a female CF member residing in Ontario. Rather than treat the grievance as specific only to that member's case, the CF opted to modify its policy and effectively extend the redress of that grievance to other members as well. In my opinion, these actions were clearly taken in good faith. The second step of the defence has been established.

(iii) Is the standard reasonably necessary to accomplish its goal such that the CF cannot accommodate Mr. Buffett and other CF members with male factor infertility without incurring undue hardship?

[68] The CF contends that the financial impact of changing the level of health coverage would be "significant" and would affect its ability to offer medical services to its members. Considering the cost involved, the CF submits that funding IVF treatments with ICSI would impose undue hardship on the CF.

[69] Commodore Margaret Kavanagh is the Commander of the CFHS and Director General of Health Services. She testified that the CFHS receives its funding from the Department of National Defence. The sum provided in 2004-05 was $270 million of which approximately $193 million was spent on direct patient care or "service delivery", which would include performing operations, buying health services from the civilian sector, and purchasing drugs. The remainder went to operational costs such as the training of staff, technology support, comptrollership, and other matters relating to "overhead". The $270 million budget, however,

excludes the cost of salaries for the CFHS's full-time health professionals and other staff. These costs are subsumed in other CF budgets. When all of the costs are put together, the CF's total budget for the delivery of medical care totals over $700 million.

[70] Cmdre. Kavanagh testified that if the CFHS was required to fund IVF treatments or other procedures that cost a "significant amount of money", the level of services available would be affected. She pointed out that the CFHS's funding is not a "bottomless pit" and consequently, some choices would have to be made on what could be funded. Medical treatments would not likely be removed from the list of available services for members, but training for health care professionals might have to be reduced. She added that even if the Department of National Defence increased the CFHS funding to cover the additional costs for IVF treatments, it would result in fewer funds being made available for the operational budgets of the CF.

[71] In the CF's submission, the evidence before the Tribunal demonstrates that the change in policy being sought by the Commission and Mr. Buffett would impose a significant additional cost on the CF, which in turn would have a direct and detrimental impact on the services that the CF is able to provide. Tough decisions based on the resulting "financial restraint" would have to be made and would diminish other current areas of funding. According to the CF, this impact would cause it undue hardship.

a) The evidence of Major Weisgerber

[72] But what evidence did the CF lead regarding the actual impact of such funding? Major Chris Weisgerber was called as a witness by the CF. Until recently, he was serving within the Health Services Delivery Directorate of CFHS, Primary Care Services Section. He prepared a report documenting the financial impact of policy changes that would extend coverage for IVF treatments to all CF members and their partners "in all cases". He concluded that the "initial" cost to the CF of such a change would be "as high as" $180 million.

[73] Before making his calculations, Maj. Weisgerber consulted an Internet website known as "myfertility.ca", which stated that the cost for IVF in 2003 was between $6,000 and $8,000 per

cycle including medications. The website apparently also indicated that infertility rates are estimated to be "up to 15% for couples overall".

[74] Based on these figures, Maj. Weisgerber proceeded with his calculation. He estimated the number of persons eligible to receive CF health care benefits at 50,000. This number is intended to encompass the substantial Reservist population that is constantly rotating on and off contracts with the CF. He testified that "to try to figure out how many uniformed CF members at one point in time would qualify for fertility services would be very difficult to do". In his opinion, however, this estimate is "reasonable and conservative".

Maj. Weisgerber then performed the following calculation:

50,000 eligible personnel x 15% infertility rate x $24,000 (3 IVF cycles @ $8,000/cycle) = $180,000,000.

[75] In cross-examination, Maj. Weisgerber acknowledged that his estimate was based on a "worst-case scenario". I find that there are several significant flaws in Maj. Weisgerber's analysis, which in my view render the report of little value in determining the potential impact on CF of a change in the policy.

[76] First of all, it is assumed that each IVF treatment will require three cycles. The medical expert evidence before me is clear, however, that there is a good possibility of a woman's becoming pregnant from her very first cycle of IVF treatment. The average rate of pregnancy *per cycle* of IVF is about 30%, according to Dr. Leader. Thus the cost per couple will probably turn out to be significantly less than the $24,000 proposed by Maj. Weisgerber. There is, in fact, some indication to this effect in a table that he incorporated in his report, which documents the "professional fertility fees" paid by the CF to treat its female members who were already eligible for standard IVF treatments and had received funding under the existing policy, between 2001 and 2005. The average cost per year to treat each person appears to have varied between $3,375 and $5,738. These sums are significantly lower than those employed by Maj. Weisgerber in his report. These figures do not include the cost of medications, ancillary investigation costs, travel costs, or work productivity costs, but in the case of non-member spouses, many of these items

would be covered by their provincial health plans or their third party insurer (e.g. the PSHCP). It is not evident that any portion of the cost for these items would be borne by the CF, and certainly no evidence was led by the CF detailing what these additional items would cost to the CF.

[77] In addition, Maj. Weisgerber relied on data that is not contemporaneous with the date of the alleged discriminatory practice. He assumed that the cost of each cycle of IVF treatment in 2003 would be $8,000, a figure that he found on an Internet website. Yet, Mr. Buffett's complaint relates to the CF's denial of his funding request that occurred five years earlier, in 1998. Dr. Leader's evidence was to the effect that in 1997, the cost per cycle of IVF treatment was about $3,000.

[78] Furthermore, Maj. Weisgerber has assumed in his calculations that every couple with an infertility problem will opt for IVF treatment. It is unrealistic, however, to take it for granted that all persons with this condition will want to have a child, or one that is biologically related to them. For instance, not all women may be willing to undergo the treatment, even if it was fully funded by the health care plan. The procedure involves the woman self-injecting herself for days with medications that Dr. Leader characterized as "very potent". The eggs must be physically removed from her and the embryos must be subsequently placed into her uterus with a catheter. Dr. Leader described this procedure as an "emotional roller-coaster" for the woman. He explained that there are certain physical risks involved with the procedure (e.g., an over stimulation of the ovaries; haemorrhaging, bacterial infections). The likelihood of these physical risks is fairly low, but the emotional risk to the patient can be significant. If she does not become pregnant after having made such a physical and emotional investment, it can be "quite devastating" psychologically for her, according to Dr. Leader. Given these risks and other considerations, it is far from certain that every woman with access to full public funding for this procedure will opt for it nonetheless.

[79] In addition, as the evidence of both Dr. Nigro and Dr. Leader indicated, there are several options available to achieve pregnancy other than advanced reproductive procedures. For instance, some men may manage to resolve their infertility problems with varicocele embolization, which is already funded under the CF's health plan and provincial health plans. In other cases, where the sperm has relatively few abnormalities, a couple may successfully

conceive a child through the use of artificial insemination, the cost of which is also covered by the CF's health plan and provincial health plans. Dr. Leader testified that some fertility problems can be treated with hormone treatments, administered to both men and women, or even through lifestyle changes, such as weight loss, cessation of smoking, and the elimination of certain occupational hazards.

[80] Thus, it has not been established that every couple who experiences infertility will inevitably seek IVF treatments.

[81] Maj. Weisgerber's estimate seems to also presuppose that every couple will request IVF treatments at once, within the first year of the change in policy. This is highly improbable. As Cmdre. Kavanagh testified, whenever the CFHS changes a policy, not every possible beneficiary of the change immediately claims the service. She stated quite candidly that "I am not going to have to suddenly spend $180 million if we change this policy tomorrow". Indeed, when the CF changed its policy to include coverage of IVF treatments for women with bilateral fallopian tube obstruction, every female CF member with this condition did not immediately request the treatment. The table from Maj. Weisgerber's report indicates that a fairly consistent number of female CF members sought this coverage from year to year. Seven women received funded treatment in the 2001-2002 fiscal year, six women in 2002- 2003, two women in 2003-2004, and seven women in 2004-2005.

[82] In addition, Maj. Weisgerber has assumed, for the purposes of his calculations, that the policy would be expanded to allow all members, male and female, who are having difficulty conceiving a child with their partners, to receive funding for IVF treatments. This would include women with infertility problems that are not due to bilateral fallopian tube obstruction. In the human rights complaint, however, Mr. Buffett did not impugn the lack of access to IVF in these circumstances. Rather, he only alleged that the CF had discriminated against him and other men like him who are affected by male factor infertility. This is the only issue for which he seeks redress.

[83] Finally, as Maj. Weisgerber acknowledged in his evidence, his calculations were basically "guesstimates". He added that in his opinion, no one could really estimate the costs reliably, given the variables and unpredictability of the ultimate utilization of the service. He stated that therefore, the actual cost of changing the policy could be higher or lower.

[84] He nuanced his comments by pointing out that he had not placed too much emphasis in his report on the costs arising from a change in the policy. He focussed more on "some of the other issues associated with expanding the policy". Yet, in terms of content, most of the report is devoted to analyzing the "direct financial costs" to the CF. There is some slight mention made elsewhere in the report of the "other issues", with respect to the "indirect impact and costs". These costs would include the possibility of additional expenses relating to the supplementary maternal health and neonatal services, "due to the increased complication rate associated with IVF". Maj. Weisgerber acknowledged, however, that since in cases like Mr. Buffett's, it would be a non-CF member who would be receiving these services, the provincial and territorial health plans would incur these costs, not the CF.

[85] He also expressed some concern in the report about the precedent that a change in policy would set for those who might demand coverage for additional "couple related" services from the CF, such as family counselling. Maj. Weisgerber did not elaborate any further on the magnitude of these possible additional costs to the CF.

[86] Based on all of the foregoing, I do not find that Maj. Weisgerber's report provides any reliable indication of the additional costs associated with the change in policy regarding the funding of IVF by the CF and the extent of their impact, in the circumstances impugned by Mr. Buffett.

b) The evidence of BGen. Jaegar

[87] BGen. Jaegar, in her testimony, recognized that Maj. Weisgerber's figures were demonstrative of a "worst-case scenario", in which it was assumed that everyone who was

potentially infertile would seek IVF treatment at once. She therefore undertook to come up with a figure that would be "as realistic…as you are likely to get".

[88] She began by taking the number of CF members who were under the age of 45. As the medical experts who testified had indicated, IVF is not recommended for persons beyond their mid-40's. Brig. Gen Jaegar then multiplied that figure by the percentage of CF members who were married, which she claims is about 67%. The product from this calculation was about 39,000 people. She then multiplied this number by the "expected percentage" of married persons who have fertility problems. She did not indicate in her testimony what percentage she used other than to say it was "between 10 and 15 percent". She testified that the product of this calculation was 5,000 persons, which would suggest that she made this calculation using 13% as the percentage of persons with fertility problems.

[89] For the next phase of her calculations, she needed an estimate of the likely "uptake rate" for the newly available IVF treatment. To determine this figure, she consulted the data regarding the number of women who had sought IVF under the existing policy. At the time she made her calculations, of the 9,600 female members of the CF, she estimated that 5,900 would have been under age 45, as well as married (assuming a marriage rate of 67%). Using an infertility rate at the "low end of the range" (10%), she concluded that there are about 600 infertile women in the CF. She asserted that in the case of 10% of those women, the infertility problem was attributable to bilateral fallopian tube obstruction, although it was not made clear where she drew this figure from. She mentioned having consulted websites on the Internet. The result therefore would be that 10% of the 600 infertile women (i.e. 60 persons) would have been entitled to receive IVF treatment under the CF's existing Spectrum of Care.

[90] Maj. Weisgerber's actual figures show, however, that over the four years from mid-2001 to mid-2005, only 24 women sought IVF treatment, or an average of 6 per year, which means that only 10% of eligible women sought the treatment each year.

[91] Brig. Gen Jaegar therefore applied this same 10% figure to the number of eligible members, male and female, who would be entitled to receive the IVF infertility treatment, for

themselves or their partners, under an expanded policy (i.e. 5,000 eligible persons x 10% = 500 persons). She then multiplied this figure by $24,000 (i.e. three cycles of IVF treatment x $8,000). The resulting overall annual cost of expanding the CF's policy on IVF treatment would be $12 million, which BGen. Jaegar opted to pare down to $10 million to reflect the fact that her figures were so "rough".

[92] While this figure may be more "realistic" than that put forth by Maj. Weisgerber, some significant errors are repeated in BGen. Jaegar's calculations as well. She relied again upon the $8,000 estimate per cycle, which reflects the supposed cost in 2003, five years after Mr. Buffett's funding request. BGen. Jaegar also assumed, as did Maj. Weisgerber, that three treatments of IVF would be required in every case. As I discussed earlier, this is not necessarily the case, and the statistics from previous IVF treatments funded by the CF show that the average cost per member treated was about $4,800, which works out to 20% of the $24,000 figure utilized in BGen. Jaegar's calculations. If one were to discount BGen. Jaegar's estimation of the total cost by the same percentage, the annual cost arising from the change in policy regarding IVF treatments would be around $2 million.

[93] Admittedly, BGen. Jaegar's calculations did not factor in the additional cost of ICSI, which on the evidence of Dr. Nigro and Dr. Leader, comes in at up to $1,500 per cycle. However, even if we were to take BGen. Jaegar's approach and assume that three cycles would be required by each of the estimated 500 persons seeking coverage annually, the impact of adding the cost of ICSI would be an additional $2.25 million to the IVF cost of $10 million. But I believe this figure to be exaggerated. At the risk of repeating myself, it is unlikely that three treatments would be required in every case. Furthermore, ICSI will not necessarily be employed in every case. BGen. Jaegar formulated her calculations based on the same assumption regarding an expanded health care policy as Maj. Weisgerber, to the effect that the policy would be expanded with regard to all CF members, male and female. Under such an expanded policy, there may be instances where female CF members with forms of female factor infertility that did not entitle them to funded IVF treatments under the existing policy, will now seek out such funded treatments. In these cases, ICSI will not be required. According to the medical expert evidence in this case, ICSI

is only called upon to supplement standard IVF treatment when the male partner presents with severe male factor infertility.

[94] In addition, just as in the case of Maj. Weisgerber, BGen. Jaegar appears to subsume all forms of infertility into a single group, for which IVF will be a choice that will always be opted for. Yet, as I have already explained, there may be instances where although a CF member may become eligible under an expanded policy to receive IVF treatment, other options will be pursued to help resolve the infertility issues. Thus, the annual "uptake" may, in fact, be less than the 500 individuals estimated.

[95] In my view, therefore, CF's cost estimates, whether based on Maj. Weisgerber's figures or those of BGen. Jaeger, are unreliable.

c) Will the additional cost impose undue hardship?

[96] As I have just indicated, I find Maj. Weisgerber's and BGen. Jaegar's estimates of the additional costs associated with an expansion of the policy to cover IVF treatments for Mr. Buffett and others like him unreliable and exaggerated. However, even if BGen. Jaegar's more conservative figures were as "realistic" as she claims, what evidence is there that it would be impossible to make this accommodation for the complainant and others like him without imposing undue hardship on the CF?

[97] The CFHS spent $193 million on direct patient care in 2004-05. Of this amount, $15 million was spent on all mental health services, $2 million on orthopaedic care, and $22 million on all medications. With these sums in mind, BGen. Jaeger's $10 million estimate for the cost of expanding the IVF coverage, with an additional $2.25 million for ICSI treatments, would appear to be quite significant. The CF argued that this additional expense would have a direct and detrimental impact on the services it would be able to provide.

[98] But would it be impossible for the CF to absorb this additional cost without incurring undue hardship? Cmdre. Kavanagh testified that while financial considerations are a factor in

decisions regarding which medical services to cover under the plan, they are not the "prime reason" for the decisions. The members' health care needs and well-being are the most important factors. She noted that her budget has increased at a significant but steady rate over the last few years, on average 5 to 6 percent per year, which is consistent with health care inflation. The CFHS has managed to receive the additional funding to cover its increased costs because, according to Cmdre. Kavanagh, "we have proven to the organization that we need more money".

[99] The effect of the increased costs associated with an expanded IVF policy on the CF's overall budget was not demonstrated in the evidence. There was no clear evidence adduced of the CF's previous or current total overall budget. Cmdre. Kavanagh testified that she did not know the "exact number" but that it was "in the billions". She was able to confirm that the CFHS's $270 million funding represents "less than 10 per cent" of the CF's total budget. More importantly, the CF did not lead any evidence with respect to its funding or budgets at the time when Mr. Buffett was refused coverage for the treatment in 1998, and it is impossible to reliably assess the impact at the time of any additional costs arising from an expanded range of health coverage.

[100] In my view, the evidence does not establish that it is impossible for the CF to accommodate Mr. Buffett and other male CF members with his characteristics, without incurring undue hardship. BGen. Jaegar described the $10 million estimate of additional annual costs, a sum that I have determined to be exaggerated, as being "not insignificant", compared to the CFHS's spending on other forms of services. That might be the case, but it was incumbent upon the CF to prove that the additional cost would be so high as to impose *undue hardship* on the CF. It failed to do so.

[101] For all of these reasons, I find that the CF's refusal to grant Mr. Buffett funding for *in vitro* fertilization constituted adverse differentiation on the basis of sex, in the course of his employment. Mr. Buffett's complaint in this respect has been substantiated.

D. Has a discriminatory practice based on disability been established, pursuant to s. 7?

[102] Mr. Buffett's claim that his male factor infertility constitutes a disability was not challenged by the CF.

[103] The Supreme Court, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal City and Boisbriand (City)*, [2000] 1 S.C.R. 665 at para. 79, noted that a handicap or disability, within the meaning of human rights legislation, may be the result of a physical limitation, an ailment, a social construct, a perceived limitation, or a combination of all of these.

[104] In the present case, Dr. Leader testified that most people are "hard-wired" to want to have children. Infertility denies them this need. In his view, treating people's infertility is a necessary component of health care, adding that there is also a significant psychological impact on both the male and the female partner when they are unable to achieve pregnancy. Indeed, Mr. Buffett spoke in his testimony of how his infertility problem has so troubled him and his spouse emotionally, that they avoid interacting with colleagues and friends who have children. In cross-examination, Dr. Leader agreed with the proposition that infertility is an illness and a disability, pointing out that it has been so defined by the World Health Organization.

[105] In light of the foregoing, I am satisfied that Mr. Buffett's infertility constitutes a disability within the meaning of the *Act*.

[106] The reasoning that gives rise to a finding of discrimination on the basis of sex in this case, can apply equally to the claim of discrimination based on disability. The CF's policy has the effect of providing a benefit in the course of employment (i.e. funding for IVF treatments) to CF members with a form of disability that prevents them from conceiving a child (bilateral fallopian tube obstruction). At the same time, the same benefit is denied to CF members with a different form of the disability (male factor infertility). The proper comparative question to pose in this context does not differ greatly from that used in conducting the analysis of discrimination based on sex: Does the CF offer the same benefit to its members with male factor infertility that it offers

to its members whose infertility is caused by another disability (bilateral fallopian tube obstruction)?

[107] The answer to this question is also no. A *prima facie* case of adverse differential treatment between persons with different forms of disability has been established. The CF's submissions in favour of a reasonable non-discriminatory explanation for such a finding do not differ from those made in regard to the claim of discrimination on the basis of sex. There is no distinction to be drawn between the two grounds of discrimination, with respect to the CF's assertion that it would suffer undue hardship if required to expand its IVF funding policy. In effect, the CF presented and relied upon the same evidence and arguments with respect to the disability complaint as it did with respect to the allegations of discrimination on the basis of sex.

[108] The CF's defence can therefore be considered in the same manner in both instances and my findings are similar as well. The same flaws in the evidence regarding the estimates of the cost of expanding the policy emerge in both cases and my finding is likewise the same: any additional expenses associated with an expanded IVF funding policy would not be excessive to the point of imposing undue hardship on the CF.

[109] I therefore find that CF's refusal to provide funding to Mr. Buffett for IVF differentiated adversely against him on the basis of his disability. His complaint in this respect has been substantiated as well.

E. Allegation of discrimination on the basis of family status

[110] Neither the Commission nor Mr. Buffett made any significant submissions regarding this alleged ground of discrimination at the hearing, other than a general statement made by Commission counsel in closing arguments that the IVF funding policy was discriminatory on the basis of family status "to a certain extent". I was not directed to any evidence that would support or relate to this allegation, and it would be a breach of fairness and natural justice for me to try to formulate arguments in support of this portion of the complaint and make findings thereon. The allegation of discrimination on the basis of family status has not been substantiated.

F. The Section 10 complaint

[111] Given my findings regarding the s. 7 complaint, I do not believe it is necessary to address the claim that the CF's policy that resulted in the denial of funding for IVF treatment, was also in breach of s. 10. The evidence adduced in this case has led to a finding of discrimination under s. 7. Where a complaint has been substantiated, the tribunal is authorized to issue remedial orders, including all of those being sought by the CHRC and Mr. Buffett in the present case, pursuant to s. 53 of the *Act*. One of the specific orders being sought in this case, requesting a change in the CF's IVF funding policy, can be made whether the complaint is substantiated under s. 7 or s. 10 (see *Moore v. Canadian Grain Commission*, 2006 CHRT 38 at paras. 5, 7-10; *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at paras. 15-16). I do not see the necessity, therefore, to address Mr. Buffett's allegation of discrimination pursuant to s. 10 of the *Act*.

[112] I would note in passing, however, that a question could be raised about whether CF's denial of coverage for IVF treatments can be construed, pursuant to s. 10 of the *Act*, as a potential deprival of an "employment opportunity" or "les chances d'emploi ou d'avancement", in the French version of the *Act*. This question was, however, not brought up or debated by the parties at the hearing into the complaint, and given my earlier findings, I do not believe that any s. 10 finding is required.

G. What remedial orders are Mr. Buffett and the Commission seeking?

(i) An order that the employment benefit be provided to Mr. Buffett

[113] The Tribunal may, pursuant to s. 53(2)(b), order a respondent to make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that were denied the victim as a result of the practice. Accordingly, Mr. Buffett and the Commission request that the CF be ordered to provide him with funding for IVF treatments with ICSI for himself and his spouse, Rhonda Buffett.

[114] The evidence of the medical experts who testified in this case suggested that IVF treatments may not be suitable for some patients. The age of both the man and the woman may be an important factor in the decision to prescribe these treatments. In the present case, Mr. and Ms. Buffett are both in their 40's. Keeping this in mind, any order from the Tribunal regarding the funding of such treatments should of course be conditional on the recommendations and advice of the couple's reproductive technology specialist. Consequently, if their specialist continues to recommend that Mr. and Ms. Buffett obtain IVF treatments with ICSI, and they opt to do so, the CF is ordered to fund these treatments, to a maximum of three cycles. The CF's obligation is to provide employment benefits to its employees in a substantively equal and non-discriminatory manner. Under the existing policy, women with bilateral fallopian tube obstruction are offered coverage for up to three cycles of IVF treatment. Mr. Buffett is entitled to an equal number of cycles of IVF treatment with ICSI.

(ii) Compensation for pain and suffering – s. 53(2)(*e*) of the *Act*

[115] Mr. Buffett testified that what he has experienced has taken an "extreme toll" on him. Of course, as the CF pointed out in final arguments, much of this toll was due to the simple fact that his infertility problems have prevented him and his wife from having children. He testified of the pain both of them have felt witnessing the joy that relatives and others around them were sharing with their children, a joy in which they were not able to partake. The CF argues that consequently, Mr. Buffett's pain and suffering is not linked to the CF's IVF funding practices, which I have determined to have been discriminatory, but rather to his own personal situation and fate.

[116] Yet, the expert evidence would suggest that had the CF provided Mr. Buffett with the employment benefit of funding for the treatments that he had requested as early as 1998 (when he and his wife were still in their 30's), it is very possible they would have had children years ago. Had they undergone a successful treatment, the pain and suffering that he continues to experience would have ceased. Of course, it is not certain that the treatments would have yielded a successful pregnancy, but the possibility exists just the same.

[117] In my view, Mr. Buffett is entitled to compensation for the pain and suffering that might have ceased had the CF not denied him funding in a discriminatory manner.

[118] In addition, Mr. Buffett testified as to the emotional highs and lows that he experienced because of the contradictory decisions and opinions that he received as his grievance progressed through the ranks until it reached the Chief of Defence Staff. The happiness that Mr. Buffett enjoyed whenever he received endorsements for his position from a senior officer would later be completely displaced by utter sadness when the next reviewing officer would turn his request down.

[119] Taking all of these circumstances into account, I order the CF to pay Mr. Buffett $7,500 in compensation for his pain and suffering.

(iii) Interest

[120] Interest is payable in respect of the monetary award made in this decision (s. 53(4) of the *Act*). The interest shall be calculated in accordance with Rule 9(12) of the Tribunal *Rules of Procedure*, and it shall run from the date of Mr. Buffett's initial grievance, November 10, 1998.

(iv) An order that the CF cease its discriminatory practice

[121] The Commission and Mr. Buffett have requested that the Tribunal order the CF to cease its discriminatory practice and take measures to redress the practice or prevent it from occurring in the future. The Commission seemed to suggest that the CF should be required to amend its policy so as to make funding available for IVF treatment for all its members on an indefinite basis.

[122] In my view, such an order would be inappropriate. The CF has been found liable for having failed to provide an employment benefit to all its employees in a substantively equal and non-discriminatory manner. It is not for the Tribunal in this case to dictate which procedures the CF should be funding. However, for as long as the CF maintains its policy of funding IVF

treatments for the benefit of any of its members who experience infertility, it must do so in a non-discriminatory fashion, in accordance with the findings in this decision.

[123] With this understanding in mind, and pursuant to s. 53(2)(*a*), I order the CF to take measures, in consultation with the Commission on the general purposes of the measures, to amend its policy for the funding of IVF treatments, such that CF members with male factor infertility receive substantively equal benefits as either CF members with double fallopian tube obstruction, or all female CF members, as the case may be.

(v) Sensitivity training

[124] The Commission has requested an order to the effect that members of the CF who are responsible for the development and administration of its health care policy receive sensitivity training in respect of human rights law issues to the extent that they relate to the decisions that these individuals make. The Commission alluded specifically to the evidence before the Tribunal that at no time during the development of the policy for IVF funding nor during the development of the Spectrum of Care policy in general, did the CF seek the opinion of legal counsel. The Commission appeared to suggest that the CF's decision-making process in this regard failed to take into account the legal, and particularly human rights law, implications.

[125] While it may be that the present dispute could have been avoided had the CF sought advice from legal counsel prior to adopting its IVF funding policy, I am not persuaded that this constitutes sufficient cause to order the sensitivity training that is being sought by the Commission. Undoubtedly, the CF and its staff will derive a good measure of understanding of the factors that should be taken into account when administering its health care policy, from the reasons of this decision alone. The Commission's request for sensitivity training is denied.

"*Signed by*"

Athanasios D. Hadjis

OTTAWA, Ontario
September 15, 2006

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

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APPEARANCES:	
Terry Buffett	For himself
Giacomo Vigna	For the Canadian Human Rights Commission
Elizabeth Richards	For the Respondent