In The Supreme Court of Bermuda

CIVIL JURISDICTION

2003: No. 297

BETWEEN:

MICHAEL ROBERTS

First Plaintiff

and

STEPHEN HAYWARD

Second Plaintiff

-and-

THE MINISTER OF LABOUR, HOME AFFAIRS AND PUBLIC SAFETY

First Defendant

and

THE CHIEF FIRE OFFICER

Second Defendant

Dates of Hearing: 8 – 11 July 2008

Date of Judgment: 15 August 2008

Delroy Duncan and Alan Doughty of Trott & Duncan, for the Plaintiffs;
Gregory Howard of the Attorney General's Chambers for the Defendants.

JUDGMENT

1. The plaintiffs are former fire-fighters with the Bermuda Fire Service. They bring this action under the Human Rights Act 1981 to challenge their compulsory early retirement on health grounds. They assert that they have been discriminated against on the grounds of disability, contrary to section 6 of that Act, and they seek a declaration to that effect and a remedy in damages.

2. Both plaintiffs suffered from heart problems, and were referred to a Staff Medical Board in April 2000. They were subsequently retired with effect from 3 May 2000 on the full pension they had earned to that date.

3. These proceedings were started by a specially indorsed writ issued on 23 July 2003, when the matter was already somewhat stale[1], and after that they were prosecuted in a dilatory manner, so that on 7 December 2006 the defendants applied to dismiss the action for want of prosecution. That application came before Kawaley J, who held that, although the delay was inordinate and excessive, it was "very marginally, not inexcusable". He also considered that the delay had not prejudiced the fair trial of the action. He therefore dismissed the defendants' application on 27 April 2007, and the matter then proceeded, still somewhat slowly, to trial.

4. The plaintiffs' case at trial was essentially that the Bermuda Fire Service[2] ('the BFS') has various non-operational positions, for which they were trained and qualified, and could have retained them in those positions until their ordinary retirement age without inordinate difficulty. The defendants' case is that officers in those positions still had to be operationally fit, which the plaintiffs were not, and that to have retained them in those positions would have imposed an inordinate and unreasonable burden on the service.

THE LAW

5. Section 2 of the Human Rights Act 1981 ('the Act') defines discrimination as follows:

> "(2) For the purposes of this Act a person shall be deemed to discriminate against another person—
>
> > (a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in

[1] In the interim, the plaintiffs had, however, made a complaint to the Human Rights Commission, which was eventually unsuccessful, and it seems that they only turned to legal proceedings after exhausting that process.

[2] The service was re-designated as the Bermuda Fire and Rescue Service in July 2007, when the Fire Services Act 1982 was amended to change the long title. I have, however, retained the designation as it was at the material time.

the case of other persons generally or deliberately treats him differently to other persons because—

. . .

(iiiA) of his disability;"

(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but—

(i) which is such that the proportion of persons of the same . . . disability . . . as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the . . . disability . . . of the person to whom it is applied; and

(iii) which operates to the detriment of that other person because he cannot comply with it.

6. For these purposes 'disability' is defined in section 2(1) of the Act as meaning "the condition of being a disabled person", and a "disabled person" is –

"a person who has any degree of physical disability, [or] infirmity . . . that is caused by illness . . . "

I think it plain that a heart condition would be a disability within the meaning of the statute, and I do not understand there to be any dispute over that.

7. Having defined 'disability', the legislation then makes it unlawful for employers to discriminate in the circumstances set out in section 6 of the Act. The plaintiffs plead reliance on the following provisions of that section, although in my judgment only paragraph 6(1)(b) is really engaged:

"Employers not to discriminate

6 (1) Subject to subsection (6) no person shall discriminate against any person in any of the ways set out in section 2(2) by—

. . .

(b) dismissing or refusing to employ or continue to employ any person;

(c) refusing to train, promote or transfer an employee;

. . .

(e) establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons (as defined in section 2) from employment or continued employment;"

8. However, there are certain exceptions and qualification to that, also contained in section 6, the relevant ones being:

"(9A) For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to employment.

(9B) For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to be given, or to be retained in, any employment for which he is not qualified or which he is not able to perform or of which he is unable to fulfil a *bona fide* occupational requirement, or any right to be trained, promoted, considered or otherwise howsoever treated in or in relation to employment if his qualifications or abilities do not warrant such training, promotion, consideration or treatment.

(9C) Notwithstanding subsections (9A) and (9B), a disabled person shall not be considered disqualified for an employment by reason of his disability if it is possible for the employer or prospective employer ("the employer"), without unreasonable hardship (as defined by rules made under subsection (9D)) to the employer, to modify the circumstances of the employment so as to eliminate the effects of the disabled person's disability in relation to the employment.

(9D) The Minister shall make rules, which shall be subject to the affirmative resolution procedure, defining the expression "unreasonable hardship" for the purposes of subsection (9C) and specifying for those purposes the several circumstances in which the condition of unreasonable hardship does or does not arise."

9. It is common ground that no rules have been made by the Minister to define "unreasonable hardship", and so I am thrown back on the natural and ordinary meaning of those words. There is also a considerable body of Canadian case law, to which I have been referred, on the expression "undue hardship" when used in a similar context. I think that the words "unreasonable" and "undue" are largely interchangeable, and that the Canadian jurisprudence is relevant and helpful in interpreting and applying the Bermuda provisions. Some of the factors relevant to the question of whether hardship is "undue" are listed by Wilson J in Central Alberta Dairy Pool v Alberta (Human Rights Comm.)

(1990) 12 CHRR D/417 (SCC), at [63], but as he notes therein, each case will turn on its own circumstances:

> "This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case."

10. In Canada the concept of a *bona fide* occupational requirement (see section 6(9B) of the Act) was developed in the case law, and not by legislation[3]. Moreover, In Canada the question whether the employment could be modified to accommodate the disabled person is part of the process of ascertaining whether the requirement objected to is a *bona fide* occupational requirement.[4] In Bermuda the approach must be different, at least slightly, because the legislation creates a two step approach: (i) is the requirement a bona fide occupational requirement and so permitted by section 6(9C)? and (ii) if it is, notwithstanding that, could it be modified without unreasonable hardship to the employer to eliminate its effect on the disabled person's disability?

11. There is one further issue, and that is where the burden of proof lies. Again I have been referred to the Canadian cases, where the position is as follows[5]:

> "I agree then with the board of inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the *Etobicoke* rule

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[3] See Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd. (1985), 7 CHRR C/3102 (SCC).

[4] See e.g. Central Alberta Dairy Pool v Alberta (Human Rights Comm. (1990) 12 CHRR D/417 (SCC), at [56] per Wilson J; and see also British Columbia (Public Service Employee Relations Comm.) v BCGE (1999) 35 CHRR C/257 (SCC):

> "Standards may adversely affect members of a particular group, to be sure. But as Wilson J noted in Central Alberta Dairy Pool, *supra*, at 518 [D436, para. 56], [i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands."

[5] Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd & Ors. (1985), 7 CHRR C/3102 (SCC), at [24782], per McIntyre J.

> as to burden of proof, the showing of a *prima facie* case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination . . . Where adverse effect discrimination on the basis of creed is shown and the offending rule is rationally connected to the performance of the job, as in the case at bar, the employer is not required to justify it but rather to show that he has taken such reasonable steps towards accommodation of the employee's position as are open to him without undue hardship. It seems evident to me that in this kind of case the onus should again rest on the employer, for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence."

12. Although the Canadian provisions are not identical, I consider that they are sufficiently similar for that statement to be strongly persuasive, and in any event it accords with the general approach in human rights cases. I therefore hold that, once a *prima facie* case of discrimination is established, the burden of showing that any condition or requirement is a *bona fide* occupational one, and also the burden of showing that it is not possible for the employer to modify the employment without unreasonable hardship, rests on the employer.

THE ISSUES

13. Against that background, the issues in this case are:

> 1. Were the plaintiffs discriminated against on the grounds of their disability? The defendants argue that they were not, if the correct comparator group is identified.
>
> 2. If they were discriminated against, was the requirement of physical fitness a *bona fide* occupational requirement for members of the BFS, within the meaning of subsection 6(9B) of the Act.
>
> 3. If physical fitness was a *bona fide* occupational requirement, have the defendants shown that it was not possible without unreasonable hardship to

modify the circumstances of the plaintiffs' employment so as "to eliminate the effects of [their] disability in relation to the employment".

14. To the extent that the second plaintiff said in evidence that he regarded himself as fully fit and able to meet the BFS's operational requirements, that would give rise to a different cause of action which is not pleaded. If he were correct, he was either wrongly or unfairly dismissed. That would involve a different form of proceedings, with a different burden of proof, which cannot readily be accommodated within the way that this action has evolved. Nor was any amendment to the pleadings sought to allege that, and had it been I would have been loathe to allow it, given that any such cause of action would by now be time-barred. I do not, therefore, regard that as an issue in this action.

(1) WERE THE PLAINTIFFS DISCRIMINATED AGAINST?

15. The defendants maintain a threshold argument that the plaintiffs were not discriminated against. The argument is that the legislation requires the identification of a comparator group to determine whether there has been less favourable treatment. The defendants rely upon the recent House of Lords decision in London Borough of Lewisham v Malcolm [2008] UKHL 43. They say that the appropriate comparator group is fire-officers who have been on sick leave for non-disabling illness, who must be certified fit before they can return to service. The plaintiffs, the argument goes, could not be so certified, and were retired because of that. The retirement was, therefore, related to but not because of the disability.

16. To the extent that the argument is based on an English case, I simply note that the legislation there is worded differently. The decision in the Lewisham case turned on a narrow construction of that wording, which the Bermuda legislation does not contain. Here the statutory comparator is "other persons generally". I suppose that it could be said that other persons generally would be subject to the fitness requirement and test, and that only those who could pass would be accepted into, or retained in, the service. I can see that there may be force in that argument, but I do not think that it ultimately helps the defendants because, if that analysis is right, this case would nevertheless be caught by

section 2(2)(b): the defendants have applied to the plaintiffs a condition, namely the requirement that they are fit or that they pass a fitness test, which is applied equally to other persons generally but which is such that the proportion of persons of the same disability as the plaintiffs who can comply with it is considerably smaller than the proportion of persons not of that description who can do so. It is also plainly a condition which operates to the detriment of the plaintiffs, because they cannot comply with it. In order to avoid it being discriminatory, therefore, the defendants must show (which I take to mean, prove on the balance of probabilities) that the requirement is justifiable irrespective of the disability of the person to whom it is applied (i.e. the test in section 2(2)(b)(ii) of the Act). That seems to be essentially the same thing as demonstrating that it is a *bona fide* occupational requirement.

17. The plaintiffs say, relying on a recent dictum of the Privy Council in Thompson v The Bermuda Dental Board [2008] UKPC 33, that discrimination cannot be both direct (i.e. caught by section 2(2)(a) of the Act) and indirect (i.e. caught by section 2(2)(b) of the Act) at the same time. That may be so. I do not really think that it matters greatly for the purposes of this case, because subsections (9A) to (9C) apply to either form of discrimination equally, and I do not think that the requirement in section 2(2)(b)(ii) that the employer show the condition to be justifiable adds anything to the requirement in section 6(9B) to demonstrate that it is a *bona fide* occupational requirement.

18. It may be, therefore, that I do not have to decide which type of discrimination this was: direct or indirect. The plaintiffs contend that it was direct, because the BFS had not applied the requirements of fitness and the fitness test to all other sick firemen generally, and they call evidence to that effect. That evidence is relevant to two issues: (i) the nature of the discrimination: i.e. whether the fitness condition was in fact applied to other persons generally; and (ii) whether, if the fitness condition was a *bona fide* occupational requirement, the defendants could nevertheless have accommodated these particular plaintiffs. I will deal with that second limb later. At this stage, dealing only with the nature of the discrimination, I consider that the evidence indicates that the fitness condition was applied sufficiently consistently for it to be properly regarded as applied to

other persons generally. I consider, therefore, that the plaintiffs' case does not come within section 2(2)(a), but properly comes under section 2(2)(b), and is an allegation of indirect and not direct discrimination. In my judgment that allegation is made out: the plaintiffs have demonstrated that they have been discriminated against on the grounds of their physical disability (being their heart conditions)

2. WAS THE PHYSICAL FITNESS REQUIREMENT A BONA FIDE OCCUPATIONAL REQUIREMENT?

19. I have no doubt that to be a fire-fighter you have to be physically fit to perform the ordinary duties of the job. I think that that is probably obvious, but I heard evidence as to the normal requirements of the occupation, including the need to climb ladders, wear Self Contained Breathing Apparatus, carry victims and so on. The level of fitness is that required to perform the physical fitness test specified in paragraph 8.1.28 of the Fire Service General Orders[6]. As former Chief Fire Officer, Mr. Reginald Rawlins, explained, this is a safety issue not only for the individual fire-fighter himself and his colleagues, but also for members of the public. To the extent that the plaintiffs, and particularly Mr. Roberts, have argued that command personnel, such as lieutenants, did not need to be physically fit, as they did not actually fight fires but rather directed the operations at a fire scene, I do not accept that. I prefer the view of the BFS that all those attending a fire scene need to be physically fit and capable of dealing with any contingency which may arise. I therefore find that the physical fitness requirement of the BFS is both 'justifiable' within the meaning of section 2(2)(b)(ii) of the Act, and is also a *bona fide* occupational requirement for the purposes of section 6(9B).

3. COULD THE FIRE SERVICE NEVERTHELESS HAVE ACCOMMODATED THE PLAINTIFFS WITHOUT UNREASONABLE HARDSHIP?

20. This is really the crux of this case. As noted above, in the Canadian cases whether or not an individual's disability could be accommodated by the employer without undue hardship was a component is the assessment of a *bona fide* occupational requirement. The Bermuda legislation has broken this out, as a separate consideration, which only arises

[6] See paragraph 39 below.

once a decision has been made as to whether the requirement itself is a *bona fide* occupational requirement. To my mind, the Bermuda approach makes more sense.

21. It is the plaintiffs' case that the BFS has non-operational divisions, whose members are not required to attend fire scenes or fight fires, to which they could have been assigned. These include the Fire Prevention and Training Divisions. Indeed it was the plaintiffs' case that they were well suited to such work by virtue of their previous experience in the service: Mr. Roberts had done short periods as Station Officer and within the Training Division, and a longer period of about four years in Fire Prevention; Mr. Hayward had also spent four years and three months in Fire Prevention following his promotion to sergeant. The defendants' response to that is that even officers in non-operational positions are required to be operationally fit, and that there is no room in the BFS for officers who cannot pass the physical fitness test.

22. I turn, therefore, to a detailed consideration of the evidence on this question. I heard evidence from the plaintiffs themselves, and from three other members of the Fire Service who had been retained notwithstanding various physical disabilities. Various other individuals were also identified by the plaintiffs, and, although they did not give evidence personally, a certain amount of evidence from both sides was given in respect of them. The defendants called evidence from the management of the service, both past and present, being the immediate past Chief Fire Officer, Mr. Reginald Rawlins; the present Chief Fire Officer, Mr. Vincent Hollinsid; and the present Deputy Chief Fire Officer, Mr. John Pacheco. They also called Mrs. Judith Hall-Been, who was secretary of the Public Service Commission ('the PSC') at the material time, to deal with the question of alternative employment within the civil service.

23. Neither side called expert medical evidence, although there are various medical opinions in the contemporary documents. I have had, therefore, to assess the degree of the plaintiffs' disability on their own evidence and on the written material. Such an assessment was only necessary in respect of some points of detail on the defendants' case, it being put in cross-examination that the plaintiffs could not perform all the duties

of the Fire Prevention or Training Divisions, in that they could not climb stairs up tall buildings which were under construction and had no lifts, and could not accompany trainees into the 'heat chamber' (an underground room used to test a trainee's resistance to high temperatures). The conclusion that I have come to on those points is that it is correct that the plaintiffs could not safely do these things. However, any problem with stairs in high buildings would not arise very often in Bermuda, and I accept Mr. Roberts' evidence that in many cases building sites would have construction lifts in place, which could be used. As to training, I also accept Mr. Roberts' evidence that things could be arranged so that the training officer did not have to subject himself to the rigours of the heat chamber.

The First Plaintiff

24. The first plaintiff joined the Fire Service in 1971, and became a Lieutenant on 1 December 1985, when he was given command of an active fire-fighting crew. Subsequently he had short assignments as Station Officer, and in the Training Division, and he was then assigned to the Fire Prevention Division, where his functions included inspection of buildings and equipment, investigation into the causes of fires, and the provision of consultative services to other government departments, such as Planning. He was there for about four years and was then rotated back to leading an active fire-fighting crew. It was his case that, while in the Fire Prevention Division, he was not expected to respond to emergency calls.

25. The first plaintiff suffered a heart attack on 3rd March 1999, and was sent overseas. He subsequently required surgery in June of that year to remove an aneurysm and repair his mitral valve, after which his prognosis was thought to be good, and he resumed an active lifestyle. However, in October 1999 he had further problems, and in November he had further surgery, this time to replace his mitral valve, after which his abilities were much reduced. I think that he accepts, but in any event I find, that after that he was and remains incapable of assuming active fire-fighting duties. However, he considered that he was fit for non-operational duties, such as Fire Prevention at which he had experience. He also considered that he was fit to lead a fire crew, because of his opinion that that did

not require the lieutenant to engage in active fire-fighting. I do not think that that latter was a realistic expectation, and (as noted above) am quite satisfied that it was entirely reasonable and proper for the Fire Service to require lieutenants on active duty to be fully fit.

The Second Plaintiff

26. The second plaintiff's history is slightly different. He joined the full-time Fire Service in 1977, although he had been a volunteer member since 1970, and he eventually rose to the rank of Sergeant. In December 1999 he was diagnosed with a heart condition known as hypertrophic cardiomyopathy. He was not exhibiting any overt symptoms, but it was spotted on a routine ECG by his GP, and he was referred to a cardiologist, and eventually fitted with a pace-maker/defibrillator at the Cleveland Clinic on 28th December 1999. As noted above, I have not had the assistance of any expert medical evidence in assessing the effect of this. In a report of 15 December 1999 to the second plaintiff's GP [324[7]], the cardiologist, Dr. Doherty, said:

> "Recent evidence has suggested that patients who have programmed, electrical stimulation and who have sustained ventricular tachycardia, are at risk of sudden death. These patients have defibrillators that may improve the outcome since defibrillators also act as backup pacemakers . . . the patient has been advised that he cannot undertake strenuous exercise. As he works as a fireman, this probably means that he will have to find alternative employment."

27. That pre-dated the fitting of the pacemaker, and it is the second plaintiff's view that that has entirely resolved his problem, and he says that the defibrillator has not kicked-in since it was fitted. That is not, however, how I read the cardiologist's report. Moreover, in a letter to the BFS of 28th January 2000 [p. 240], after the installation of the pace-maker, Dr. Doherty stated:

> "**Re: Stephen Hayward – DOB: 26th December 1946**
> This patient has asked me to write to you. He has hypertrophic cardiomyopathy and had an implantable defibrillator at the Cleveland Clinic in December of last

[7] References in square brackets are to the sequential page numeration that was used throughout the documentary evidence (witness statements and exhibits) of both parties. I found this approach very helpful.

> year. He is unable to undertake any physical work, as this would put him at risk of sudden death.
>
> I would be grateful if you could consider Mr. Hayward for light duties or a desk job for the remainder of his working career. If you require further information, please let me know."

28. In any event, if this plaintiff wishes to say that the medical board was wrong (and, as noted in paragraph 14 above, that is not really an issue in this case) the burden would be on him to adduce expert medical evidence to demonstrate that. In the absence of such evidence I find that at the time of his retirement he was unfit for active duty as a fire-fighter because physical exertion put him at risk of sudden death.

The Plaintiffs' Retirement on Medical Grounds

29. As a result of their medical histories both plaintiffs were eventually referred to a Staff Medical Board, that being the procedure established by regulation 29 of the Public Service Commission Regulations 2001. The Board convened on 10 April 2000, and both men attended. In letters of 12 April 2000 the Chief Medical Officer ('the CMO'), who is chairman of any such Board, reported to the Secretary of the PSC in identical terms in respect of each of the plaintiffs[8]:

> "The Board interviewed Lt. Roberts [Sgt. Hayward] and reviewed his medical history. Members of the Board agreed that while he could return to non-operational duties he is not fit for continued employment involving full operational duties. The Board recommends that Lt. Roberts [Sgt. Hayward] be retired early on medical grounds if the Chief Fire Officer is unable to assign him to non-operational duties."

30. It is, of course, that final proviso which is at issue in this trial. Mr. Rawlins then wrote on 14 April [253] to the Secretary to the PSC, addressing the unavailability of non-operational duties:

> "I write to confirm that all uniformed Fire Service personnel are required to be operationally fit to undertake the full range of their duties regardless of where they may be posted from time to time. This is necessary to maintain operational

[8] See the letters of 12th April 2000 at [255] and [256] respectively.

efficiency on training and emergency incidents, where they may be required at any given time.

The Fire Service establishment does not allow us to accommodate anyone who cannot meet the physical demands of a Fire Officer's role."

31. The PSC then met on 24 April, and recommended the retirement of the plaintiffs on medical grounds, and that they receive a pension with effect from 28 April 2000.[9] That decision was then conveyed to the plaintiffs by letter of 3 May 2000 [257], although it omitted any reference to the Board's qualification about non-operational duties, saying only:

"The Staff Medical Board agreed that you are unfit for continued employment and recommended that you be retired early on medical grounds."

32. At that point neither man was far from his ordinary retirement date. The compulsory retirement age for members of the Bermuda Fire Service is 55[10]. The second plaintiff's evidence is that he was due to retire on 26th December 2001, and that accords with his date of birth of 26 December 1946 as shown on medical reports.[11] The first plaintiff does not deal with this in his evidence, but his medical reports give his date of birth as 6 December 1951,[12] so he had longer to go, as he would not have attained age 55 until 6 December 2006.

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[9] This was expressed to be in accordance with section 19(1)(g) of the Public Service Superannuation Act 1981, which provides:

"Circumstances entitling contributor to payment

19 (1) Subject to this Act every person in the public service who has contributed continuously to the Fund for 8 years or more shall be entitled to a pension upon his retirement from the public service in any of the following circumstances namely —

. . .

(g) on medical evidence to the satisfaction of the Governor that he is incapable by reason of some infirmity of mind or body of discharging the duties of his office and that such infirmity is likely to be permanent;"

[10] See section 22(1) of the Public Service Superannuation Act 1981. In fact a Fire Officer may be required to retire at any time after having completed 25 years service: see Ibid. 22(4)(a). However, no reliance was placed upon that section in this action.

[11] See e.g. [325]

[12] See [326] and [329]

33. It is the plaintiffs' case that numerous persons were treated more favourably than them by being allowed to return to the BFS despite being unfit for active duty, and then being assigned to non-operational duties. Three of these people gave evidence for the plaintiffs, being Nakia Pearson, Carlton Watson and Robert Davis. I have dealt with each separately below. In general terms the defendants' response to this is that the Service was prepared to retain officers who presented a fair prospect of recovery, and to make allowances for them during their progress towards a return to full fitness by assigning them to non-operational duties. However, it is their case that the Service was not prepared to retain officers who could never again achieve full operational fitness.

34. There is a certain amount of terminological inexactitude over the expressions 'light duties' and 'non-operational duties'. In the past, firemen who had been off sick were sometimes given 'light duties' during a period of further recovery on their return. In these cases 'light duties' seems to refer to a patchwork amalgam of odd-jobs, such as painting, minor repairs and station maintenance.[13] It is the defendants' case that 'light duties' in this sense were done away with in or about September 1999[14], when for operational reasons it was decided that such persons should remain on sick leave until fit to return to work. However, that does not appear to have been the final word on the subject, as the minutes of the Joint Consultative Committee for 21 October 1999 at item 4 [137] record a Mr. Hutton, who was a representative of the Fire Service management, as saying "for the time being it is difficult to accommodate 'light duties' and each request would be treated individually." Indeed, Mr. Rawlins when cross-examined on that said that after that time light duties remained within the Chief Fire Officers' discretion, and were not completely abolished.

35. There was much evidence about the cost of having an inactive fire-fighter on the roster, and particular the cost of overtime to cover for his duties. However, it seems to me that that applies to the practice of having recuperating fire-fighters assigned to make-work jobs, while still retaining positions in fire-fighting crews. I accept that 'light duties'

[13] See for instance para. 13 of Mr. Hayward's witness statement.
[14] See the minutes of the Joint Consultative Committee of 9 September 1999, at item 6 [146].

in this sense were a burden on the service because they took an operational fireman out of his crew, with a resultant cost in overtime for his replacement. They were also a general strain on the system. To the extent that it might be suggested that the plaintiffs could have been accommodated by being assigned to such work, I reject that. I accept the evidence of the defendants' witnesses that no such make-work position was possible. Whether or not the practice of assigning recuperating officer to 'light duties' had been wholly discontinued in favour of sick-leave, I do not have to determine. It plainly does not represent a long term solution, for all the reasons advanced by the defendants' witnesses.

36. The management representatives seemed to treat light duties and non-operational duties as interchangeable. However, I find that there is a distinction between the sort of make-work 'light duties' described above, and 'non-operational duties'. The latter are a real and important part of the business of the BFS, but do not require the officers assigned to them to work shifts in an operational fire-fighting crew. Moreover, officers can be assigned to these divisions on a long term basis, as illustrated by the fact that both plaintiffs had served in Fire Prevention for approximately four years before their illnesses. Non-operational duties include positions in Fire Prevention, Training and Administration. Fire Prevention is staffed by a divisional officer, two lieutenants and a sergeant. Training, according to Mr. Rawlins, had three officers. Administration was eventually civilianised, but there remained a position of staff or special projects officer, who reported direct to the Chief Fire Officer. There was also Despatch – originally this was staffed by fire officers from each shift, but was eventually civilianised, although the evidence suggests that at least two full-time fire officers were assigned to this function even after that time[15].

37. The question is, could the plaintiffs have been assigned to such duties after their illness? It is the defendants' case that, although the officers in these non-operational areas were not normally required to attend fires, they had to be fit to do so should the

[15] See the evidence concerning Gibbons and Richardson, below.

need arise. In support of this they rely on the provisions of s. 6A of the Fire Services Act 1982,[16] which provides:

> **"Duties of fire officers and obedience to lawful orders**
> 6A (1) A fire officer, unless duly excused or interdicted from duty, shall at all times be bound, when required by the Department, to discharge any of the duties imposed upon officers of the Department by or under this Act or any other statutory provision.
>
> (2) Every fire officer shall for the purposes of this Act and any other statutory provision be deemed to be on duty when required by the Department to act as such.
>
> (3) Every fire officer shall obey all lawful orders of his superior officers whether given verbally or in writing and shall obey and conform to all regulations and orders made under this Act."

38. While the defendants' witnesses accept that unfit officers might on occasion be assigned to non-operational duties, it is their case that was only done to accommodate recuperating officers who were expected to make a full recovery and return to full operational status. Such duties, they said, would not be appropriate for the plaintiffs, who were not expected ever to be able to return to full operational status. The heart of the dispute in this case is the extent to which that is in fact true, the plaintiffs saying that as a matter of practice the BFS did continue to employ firemen who were unfit for active service.

39. A final point on this is the extent to which firemen returning to duty after a period of sickness were required to take a fitness test. Such a test is required by the Fire Service Department General Orders,[17] which specify:

> "**8.1.28 Resumption of Duty**
>
> (1) Members of the Service who have submitted medical evidence of unfitness for duty are not to resume duty without producing a medical certificate specifying that they are fit to resume duty.

[16] The Act is now known as the Bermuda Fire and Rescue Service Act 1982, following amendment by the Fire Services Amendment Act 2007.
[17] General Orders are made by the Chief Fire Officer under the authority of section 18 of the Fire Services Act 1982.

. . . .

(2) When a physical fitness test is required, the following shall apply:

(a) The Head of Division is to arrange for the member to complete S.A. form 111a by his Medical Practitioner prior to the resumption of duty on the date from which they are certified by the Medical Practitioner as fit to resume duty.

(b) On completion of form S.A. 111a by the Medical Practitioner, the individual will be required to undergo a fitness test.

(c) From the time the Service receives the medical certificate of fitness from a medical practitioner until the member is scheduled to under go the physical fitness test, that member shall resume non-operational duties.

If the member is unsuccessful, he/she shall be referred back to his/her Medical Practitioner, if the member is successful, the member shall resume operational duties as directed.

(4) **Physical Fitness Testing**

Physical fitness testing may be required for members of the Service for the following reasons:

a. physical injury/s – surgery – prolonged illness
b. secondment
c. any other reason as directed by the Chief Fire Officer"

40. The defendants contend that the discretion whether to require such a test is vested in the Chief Fire Officer, but it seems to be the normal course after any serious or lengthy illness. It is also plain that the General Orders recognise a distinction between operational and non-operational duties, and that in the scheme of things the latter can be undertaken without a fitness test. The components of the test itself are set out in the General Orders[18], and it is fair to say that they are exacting.

41. Against that background I now turn to consider the evidence on each of the persons identified by the plaintiffs as constituting instances where officers who were physically unfit were nevertheless retained within the service and placed on non-operational duties.

[18] See paragraphs 8.1.29 – 8.1.32 [27 – 29].

(i) Nakia Pearson

42. Mr. Pearson gave evidence for the plaintiffs. In 2001 he was removed from duty on full pay after an allegation on mental unfitness, but he was eventually reinstated in October 2006, when he was assigned to non-operational duties, doing administrative work. He says that he was told that he could not engage in active fire-fighting duties until he had recertified, and that he was disputing what was required in order to do that. He said that he had been told that if he opted not to recertify he could continue his employment but could not engage in active fire fighting. He wishes to recertify, and become an operational fire-fighter, but cannot do so until a recruit course is run, and that has not happened yet, at least not for duty as a general fire-fighter as opposed to an airport fire-fighter, which he does not wish to be. Mr. Hollinsid says that he was certified as fit by the CMO in October 2004, and that appears to have been as the result of a Staff Medical Board.[19] His evidence was that he questioned that decision but got no suitable answer from the CMO, and so was forced to take him back. He also confirms that Mr. Pearson has been assigned a non-operational position pending his re-qualification, and asserts that he was not given a choice whether to recertify or not, but was simply told he had to recertify, even if he wished to remain in Fire Prevention.

43. It is somewhat difficult to disentangle all of this in Pearson's case, but I reject his assertion that he was told he could continue with the Fire service without recertifying, and accept Mr. Hollinsid's evidence that he was told he had to recertify whatever he chose to do thereafter. I think it important point that he has been to a Medical Board, who found him fit for continued service. That differentiates him from the plaintiffs' case. However, as he returned to duty in October 2006, his case does demonstrate the ability of the BFS to hold an officer in a non-operational post for over 18 months.

(ii) Carlton Watson

44. Mr. Watson gave evidence for the plaintiffs. He said that he became a lieutenant in 1991, and was put in charge of an operational crew. However, from 1993 he was assigned

[19] See Dr. Cann's letter to the PSC of 26 January 2004 [347].

to Fire Prevention, although he remained fit and considered himself fully operational, and was still required to take command of his crew if it was called to an emergency. Then in 1995 he suffered a serious stroke which impaired his language abilities. He returned to work half-time on 27th February 1995, and full-time in or about June 1995, when he was assigned to Fire Prevention, but he was unable to resume active duties as head of a crew. He remained in the service for a further six years, during which time he was in Fire Prevention and never again attended an emergency. He says that he was eventually pressured into retiring in December 2000. He accepted in cross-examination that initially the speech therapist expected him to continue to improve until he had made a full recovery, and he expected that himself. He also accepted that the Fire Service continued to work with him on that basis in the hope of getting him back to operational duties.

45. Mr. Rawlins says that the service was working with Mr. Watson with a view to a full recovery, and that initially he was recovering and making progress, but there came a point where he became concerned and suggested early retirement. That is born out by the letter of 5th July 1999 [p. 222], which shows that Mr. Rawlins was then "having discussions" with Mr. Watson about his possible retirement on medical grounds. Mr. Watson's own recollection is that the BFS were about to refer him to a Medical Board, but gave him the option of leaving voluntarily. The reality, however, appears to be that he had been referred to the Board and was in the process of being retired compulsorily when he submitted his voluntary resignation. The documentation shows that he was referred to a Staff Medical Board on 28 September 2000, who found that he was "unfit to fully carry out his current duties". The Board therefore recommended:

> "In light of the Fire Department's policy that all uniformed Fire Service personnel are required to be operationally fit, the Board agreed that Lt. Watson is not fit for continued employment as a Fire Officer."[20]

46. The PSC accepted that recommendation, and on 4th October wrote to Mr. Watson informing him that he was to be retired early on medical grounds. Mr. Watson then responded on 10th October, apparently agreeing to take early retirement as of 1st

[20] See the CMO's report of 25 September 2000, at [227].

December 2000. His date of birth was apparently 20 August 1950[21] so that at the time of his early retirement he would have been 51, and more than four years short of the mandatory retirement age.

47. The fact that initially the BFS was hopeful of a full return to active duty is born out by a report from a speech therapist, which records that Mr. Watson was assessed on 30 April 1998 "at the request of the Fire Department who wish to return Mr. Watson to active duties instead of a desk job." I consider, therefore, that Mr. Watson fits the defendants' template of an unfit officer held on non-operational duties in the expectation of an eventual return to full fitness. When that expectation failed, steps were taken to retire him on medical grounds. On the other hand, his case does indicate that the BFS could hold an unfit officer in a non-operational position for over five years, without any great hardship.

(iii) Robert Davis

48. Mr. Davis gave evidence for the plaintiffs, and said that in 1988 he had triple by-pass surgery to replace a blocked artery without having had a heart attack. He was then on sick-leave for approximately two and a half months, and then returned to non-operational duties, first of all doing administrative work, and then in the training department as an assistant driving instructor until his retirement in 1999 on reaching the mandatory age of 55. He said that he was never asked to take the fitness test, nor recertified to return to operational duties. It is his evidence that he was not asked to return to full duties as his employers were well aware of his heart condition[22]. He accepted that he might occasionally have been asked to drive a support unit to a fire scene, but not to actually fight a fire. He considered his work light duties. Mr. Rawlins said that he was assigned operational duties on the certificate of his doctor, after a period of light duties, and he produces a report to the Fire Service from the head of cardiology at Johns Hopkins of 10 January 1989 which records:

[21] See the pension calculation at [225].
[22] Witness Statement, para. 9.

> "Mr. Davis has had a superb operative result. It is my opinion that he can eventually resume complete activities with respect to his job.
>
> I recommend that he have light duties for one month . . . At the same time, if circumstances were such that Mr. Davis was needed to participate fully in fighting a fire, I consider this to be safe and satisfactory."

49. Mr. Rawlins also said that Davis would on occasion be required to fill in on an operational shift, but he accepted he was not tested because he did not think that the requirement for a test was in place at that time. The General Orders themselves do not help on that, as they do not show when the test was established. I think that the burden is on the defendants on this, and I am not willing to assume that the provisions governing the test were as not in force then. I consider that Mr. Davis's case does indicate that the BFS could keep a technically unfit officer on non-operational duties for a long period, and that this was not affected by the 'abolition' of light duties which, for the reasons given above, were something else entirely.

(iv) William Glasford

50. This man is now deceased. The first plaintiff says that he returned to the Fire Service after cancer treatment and was assigned to administrative duties, where he remained until his death. Mr. Hollinsid, the current Chief Fire Officer, says that Mr. Glasford was on light duties after his treatment and was to be assessed, but he had a relapse before that could be done. I have insufficient information to make any relevant findings in respect of this officer.

(v) Malcolm Johnson

51. This man was not called by either side to give evidence. The first plaintiff says that he returned after heart surgery, and was ultimately assigned to Fire Prevention, where he was retained until past his retirement date on the basis that there were no other suitably qualified officers to take his position. Mr. Rawlins said that he was assigned operational duties on the certificate of his doctor, after a period of light duties, and he produces a certificate from a Dr. Siddle dated 6th June 2000 [p. 202]:

> "Malcolm Johnson is fit to return to work on a part time basis. After 3 weeks he may be fit to return on a full time basis."

He had read "full-time" as meaning full operational duties. However, he said that Mr. Johnson had been in Fire Prevention before his illness and that is where he returned. He was never required to perform fire-fighting duties after that as that would have required the test, and he was not tested. Again this demonstrates that the BFS could retain technically unfit officers in a non-operational position.

(vi) Michael Gibbons

52. This man was not called by either side to give evidence. The first plaintiff says that he was re-assigned to the despatching unit after he became unfit, and this occurred after the plaintiffs' forced retirement. Mr. Rawlins said that he had a variety of conditions and there was a spell when he was off for short periods, and he did not return to full duties under his tenure. The present Chief Fire Officer, who took over from Mr. Rawlins in 2002, said only that he had no permanent disability, but was assigned to despatch after it was civilianised in 2002/03, as only twelve civilian posts had been created, which were not enough and the long shifts required were causing union problems.

(vii) Kevin Richardson

53. The first plaintiff says that this man was also referred to a medical review board at about the same time as the plaintiffs, but he was not required to retire but was instead assigned to the despatching unit of the Fire Service. The evidence about him is similar to that in respect of Gibbons (*supra*). His problem was obesity, according to Mr. Rawlins, which was getting no better by the end of his tenure. By then Richardson had returned to non-operational duties but was in no condition to take the fitness test. Mr. Hollinsid said that it was possibly not in his best interests to perform fire-fighting duties. He also said he had been assigned to despatch in 1999, but not then on account of his condition, but simply because at that time they picked people to be trained for despatch, and then, when despatch was civilianised, he was retained as there were insufficient civilians for those duties.

MISCELLANEOUS ISSUES

54. A further point made by the defendants is that, prior to their Medical Board and while the BFS was considering what to do with them, the plaintiffs were not co-operating and were unwilling to release their medical records[23]. I do not think anything turns on that. The records are unlikely to have assisted the plaintiffs, and there is nothing to suggest that, had they been forthcoming, the outcome of the Staff Medical Board would have been any different.

55. There was also a suggestion in the evidence that there was bad blood between the plaintiffs management, arising out of past disciplinary issues. That was denied by the defendants' witnesses, after which Mr. Duncan, very properly, did not pursue it.

56. It was also the plaintiffs' case that no sufficient effort was made to employ them elsewhere in the Civil Service. Mrs. Hall-Bean addressed that in her evidence, which was to the effect that the plaintiffs did not personally approach her about it at the time, but that in telephone discussions with Mr. Rawlins she had informed him that there were no suitable postings within the Civil Service, given the plaintiffs' education and experience. In cross-examination she said that that was based on her knowledge of the posts then being advertised, and that she had not conducted an in-depth examination of the issue. In my judgment, in the absence of something concrete to the contrary, her evidence disposes of the issue. If the plaintiffs are to gainsay it they must point to some available position for which they might have been suited but were not considered. That does not impose an undue burden on them, as civil service vacancies are advertised. Nor could they simply be shoe-horned into any position: the PSC is under a statutory obligation to prefer the best candidate for any post[24] and the plaintiffs' experience and seniority might make them hard to fit into the general civil service, particularly given that the BFS has its own pay scale that does not necessarily match that of civil service posts.

[23] See [249] for Mr. Roberts' refusal by letter of 2 February 2000; and also Mr. Rawlins' letter of 7 March 2000 at [250].
[24] See PSC Regulations 2001, reg. 19(2).

CONCLUSIONS

57. When considering the other cases relied upon by the plaintiff, it is necessary to bear in mind the issue. It is not incumbent on the plaintiffs to show that other disabled fire-fighters were retained in the BFS on non-operational duties while they were not. It is true that the case is pleaded that way in the alternative[25], but it is not how the argument was put. The real function of the evidence relating to the retention of other fire-fighters is to demonstrate that the BFS could also have retained the plaintiffs without unreasonable hardship, because they have retained others.[26] I think those cases do demonstrate that it is possible for the BFS to have unfit officers in non-operational posts. This might not be optimum, and management may not particularly welcome it. It may even be a hardship to management, but as a Canadian judge pointed out –

> "It is important to recall the words of Sopinka J who observed in Central Okanagan School District No. 23 v Renaud [1992] 2 SCR 970 at 984 [16 CHRR D/425 at D/432, para. 19, that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test". It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship."[27]

58. It follows from this that the fact that the BFS may have resisted retaining some of the plaintiffs' witnesses is not decisive. Thus, they may only be retaining Nakia Pearson under protest because the Staff Medical Board found him fit, but they have nevertheless been able to assign him non-operational duties that did not require him to fight fires. Similarly, it may well be that there came a time when the BFS determined that Carlton Watson would never return to full operational fitness, and started the process for

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[25] See paragraphs 23 and 44 of the amended Statement of Claim, which plead a rather tortuous claim based on 'legitimate expectation'. This abandoned by Mr. Duncan at the outset.

[26] It is pleaded this way in the case of Roberts –

> "Notwithstanding that the 1st Respodnent/1st Defendant and 2nd Respodnent/2nd Defendant have employed other disabled members of the Fire Services Department on "light duties" they have sought to aver that such duties do not exist."

[27] British Columbia (Public Service Employee Relations Comm.) v BCGEU (1999) 35 CHRR D.257 (SCC), at para. 62, per McLachlin J.

compulsory early retirement, but they were nevertheless able to retain him for at least five years before they got to that position.

59. I consider, therefore, that on the evidence the defendants have failed to discharge their burden of proof and demonstrate that the retention of these particular plaintiffs until their normal retirement date on non-operational duties would have caused them unreasonable hardship. Both plaintiffs were trained and experienced in Fire Prevention, and I find that they could adequately discharge those duties despite their heart conditions. It has not been demonstrated that there were no available posts in that division, or that the existing incumbents of those posts could not be rotated back without difficulty to operational duties to make way for the plaintiffs. Similar considerations apply to the Training Division, the duties of which I also find that the plaintiffs were capable of discharging. There may have been other realistic possibilities, as the cases of Gibbons and Richardson show. I certainly do not consider that the defendants have demonstrated that there were not.

60. I find, therefore, that these plaintiffs were discriminated against on the grounds of their disability, being their heart conditions, and that the defendants have not succeeded in bringing themselves within the exceptions established by section 6(9C) of the Act. However, I think it important to say that this outcome is fact specific to these plaintiffs, and is coloured by their length of service, their experience and the relatively short time left to their normal retirement date. As noted above, I do consider that physical fitness is a *bona fide* occupational requirement of the BFS, and nothing in this judgment should be taken as suggesting that they could be compelled to recruit an unfit person, or to retain someone who became unfit early in their career.

61. That leaves the assessment of damages. Section 20A of the Act provides –

> "**Claims under Part II**
> 20A (1) A claim by any person ("the claimant") that another person ("the respondent")[28] has committed an act of discrimination against the claimant which is made unlawful by virtue of Part II may be made the subject of civil proceedings in like manner as any other claim in tort."

The plaintiffs did plead a claim for injury to their feelings, but I am not clear as to the extent to which that is pursued. Subject to that, it is likely that the figure will be arrived at by an arithmetical calculation, based on loss of earnings down to their normal retirement date at age 55, plus any diminution in the value of their pensions. Subject to further argument, I would have thought that in calculating loss or earnings they should give credit for pension payments actually received. I would also have thought that the diminution in the value of their pensions would be a lump sum figure based on the difference between their actual annual pension and the pension which they would have received had they worked until age 55, times an appropriate multiplier. If those propositions are accepted it may be possible for the parties to agree the appropriate damages, but if not I order that damages should be assessed, in which case argument as to the appropriate principles can be entertained at that time.

Dated the 15th of August 2008.

Richard Ground
Chief Justice

[28] It is no doubt because of these rather odd provisions as to nomenclature that the parties are designated on the writ as 'Claimant/Plaintiff' and 'Respondent/Defendant'. However, I think that the parties to a writ action are properly 'plaintiff' and 'defendant' and that is how I have referred to them throughout.