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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

BETWEEN

**TERRANCE JAMES BARR and  
SHERRY ELIZABETH FLANNERY**

Grievors

and

**TREASURY BOARD  
(Department of National Defence)**

Employer

**Before:** Guy Giguère, Deputy Chairperson

**For the Grievors:** Andrew Raven and Carolyn LeCheminant-Chandy, Counsel

**For the Employer:** John Jaworski and Karl Chemsy, Counsel

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Heard at Ottawa, Ontario,  
November 22 to 25, 2004.



## DECISION

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[1] The grievors are alleging that it is discriminatory for the employer to require, as a condition of continuing employment, that they complete the employer's Fire Fighters Fitness Test within eight minutes. They explain in their grievances that the eight-minute standard is discriminatory on the basis of age and gender.

[2] There have been several weeks of hearing in these matters since the beginning of this hearing on April 19, 2004. During this period, the grievors completed the presentation of their evidence. This included the testimony of an expert witness, Stephen Brown, who teaches undergraduate courses in the School of Kinesiology at Simon Fraser University.

[3] At the resumption of the hearing, on November 22, 2004, Mr. Raven informed me that the grievors objected to having the next witness of the employer qualified as an expert witness. This decision deals strictly and summarily with the grievor's objections, and fuller reasons for decision will be included in the final decision on the merits of these grievances. This is a brief summary of the evidence and arguments presented at the hearing, on November 22 to 25, 2004.

[4] The employer presented Suzanne P. Jaenen as an expert witness, with her résumé (Exhibit 59), some publications and her testimony presented as evidence. Ms. Jaenen is currently employed by the Canadian Forces Personnel Support Agency (CFPSA), a non-public fund agency under the control of the employer. Previously, she was a captain in the army and had been working for the employer since 1988. From 1981 to 1987, Ms. Jaenen attended Ottawa University, where she graduated with a Baccalaureate of Physical Education and completed one year of a two-year Master of Physical Education. In 1992-1994, she attended Queens University, where she obtained a Master of Science in Exercise Physiology.

[5] In 1992, Queens University was developing the Fire Fighters Fitness Test for the employer. While studying at Queens, Ms. Jaenen was working for the employer as the military officer doing the liaison between the employer and the university on this project. The subject of her thesis at Queens was related to the development of the Fire Fighters Fitness Test. Since then, she has been involved in developing physical fitness standards, tests and maintenance programs for the military and managing the delivery of these programs. She is currently working at the Dwyer Hill Training Centre, a military facility, where she established a human performance laboratory accredited with the Canadian Society for Exercise Physiology.

[6] Counsel for the employer argued that necessity in assisting the trier of fact was the basic criterion that should serve to analyse whether Ms. Jaenen should be admitted to give evidence as an expert witness. The issue of Ms. Jaenen's independence was not tied to the admissibility of her evidence as an expert witness but to the weight to be given to this evidence. In support of those arguments, the following jurisprudence was submitted: *R. v. Mohan*, [1994] 2 S.C.R. 9 (QL); *Kozak v. Funk*, [1995] S.J. No. 569 (QL); *Neudorf v. Netzwerk Productions Ltd.*, [1998] B.C.J. No. 2904 (QL); *Riordon v. Canada (F.C.A.)*, [1986] F.C.J. No. 354 (QL); and *Interamerican Transport Systems Inc. v. Canadian Pacific Express & Transport Ltd.*, [1995] O.J. No. 3644.

[7] Mr. Raven objected to having Ms. Jaenen qualified as an expert witness on the grounds that the evidence showed that she was not independent from the employer, that she would be called to review her own work product and that she is an advocate for the employer's position. Mr. Raven submitted the following authorities in support of his position: *J. Sopinka & S. N. Lederman & A. W. Bryant, The Law of Evidence in Canada*, 2<sup>nd</sup> Ed. (Toronto: Butterworth's, 1999); *R. v. Mohan*, [1994] 2 S.C.R. 9; *National Justice Campania Naveria SA v. Prudential Assurance Co. Ltd.* ("The Ikarian Reefer"), [1993] 2 Lloyd's Rep. 68; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.); *Liverpool Roman Catholic Archdioceses Trust v. Goldberg*, (No. 2), [2001] 4 All E.R. 950; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, [2003] B.C.J. No. 917 (B.C.S.C.); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (Sup. Ct.); *R. v. Inco Ltd.*, [2003] O.J. No. 5364, *Preliminary Ruling #3*; *Human Rights Commission v. Air Canada, Canadian Airlines International Ltd. Transcript of Evidence Before Canadian Human Rights Tribunal* p. 621-630; *Communications, Energy and Paperworkers Union of Canada, Local 1020 v. House of Commons Canada*, NPLL/2000-050; *CAMI Automotive Inc. v. Canadian Auto Workers, Local 88* (Goure Grievance), [1999] O.L.A.A. No. 823; and *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, [2000] M.J. No. 232 (Q.B.).

[8] I heard the arguments of the parties on this objection on November 25, 2004. As requested by counsel, I explained, at the conclusion of the hearing, that I would issue a decision on this objection shortly thereafter, given that Ms. Jaenen was to testify at the resumption of this hearing, on December 6, 2004.

[9] The following principles have guided me in coming to my finding. Admission of expert evidence depends on the application of the following criteria: relevance,

necessity in assisting the trier of fact, the absence of any exclusionary rule and a properly qualified expert. See *R. v. Mohan (supra)*, par. 17 to par. 28.

[10] In most cases, an expert witness should be independent from the party for whom he or she is giving evidence. However, this is not an automatic rule in labour arbitration or administrative law. This is especially true as the Public Service Staff Relations Board (PSSRB), and an adjudicator appointed under the *Public Service Staff Relations Act (PSSRA)*, is master of its own procedure. The criteria of relevance and necessity in assisting the trier of fact can be helpful to determine if a witness that is not independent can still be qualified as an expert witness. If the adjudicator determines such a necessity, the relation of true expert witness will go to the weight of his or her evidence.

[11] Having considered all the evidence before me and the arguments of both parties on the grievors' objection to Ms. Jaenen's qualification as an expert witness, I find that Ms. Jaenen is not to be qualified as an expert witness. Considering her business relationship with the employer, I do not find that it is necessary to have her testify as an expert witness. Ms. Jaenen can still testify to the facts and the employer has indicated that there are two other witnesses who are being presented as expert witnesses. I will provide additional reasons for this finding in the decision on the merits of the grievances.

**Guy Giguère,  
Deputy Chairperson**

OTTAWA, December 3, 2004

