

T.D. 12/90
Decision rendered on October 1, 1990

THE CANADIAN HUMAN RIGHTS ACT

S.C. 1976-77, c 33, as amended

HUMAN RIGHTS TRIBUNAL

BETWEEN

JACQUES BOUCHARD

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL: Pierrette Sinclair

APPEARANCES BY: René Duval,
Counsel for the Canadian Human
Rights Commission

Suzanne Gouin,
Counsel for the Respondent

DATES AND PLACES OF HEARINGS: January 30 and 31, 1989,
February 1, 1989 in Quebec City, Quebec;
March 6 and 7, 1989 in Ottawa, Ontario

TRANSLATION

COMPOSITION OF TRIBUNAL

On June 9, 1988, the President of the Human Rights Tribunal Panel, Mr Sidney Lederman, appointed this Tribunal to examine the complaint filed by Mr Jacques Bouchard, dated November 8, 1984, against the Department of National Defence. The document appointing the Tribunal was filed under number T-1.

Mr Bouchard's complaint alleges that the respondent practised discrimination based on disability in the course of employment, contrary to the provisions of the Canadian Human Rights Act (SC 1976-77, ch 33, as amended), particularly sections 3 and 7 of the Act. The text of the complaint, as it appears in the complaint form filed under CHRC-1, alleges as follows:

[TRANSLATION]

"In September 1972, I was enlisted as a cook ("cook 861") in the Canadian Armed Forces. From 1973 onward, I had kidney stone and urinary problems which resulted in weight gain and a rise in my blood pressure. However, this did not prevent me from serving on ships and in field units. In August 1983, when I was practising my trade as cook in the Debert Detachment on the Halifax Base, Nova Scotia, I was operated on for kidney stones. My health improved and, with an appropriate diet, my blood pressure and weight decreased.

However, in accordance with certain policies of the Department of National Defence, because my kidney stone problem was considered chronic, my medical category was lowered to the G4-03 level. On February 2, 1984, the Department of National Defence decided to discharge me from military service, effective August 27, 1984, giving as the reason that my medical category of G4-03 was below the minimum medical standards for the trade group to which I belonged and for all the other trade groups in the Army.

Nevertheless, I am qualified to perform my work as cook in a satisfactory manner, and my medical problem does not affect my work performance in any way.

I therefore believe that the Department of National Defence, by establishing and applying guidelines based on differentiation according to physical disability, is discriminating against me and against all other individuals in the same circumstances as mine (kidney diseases) and that, by refusing to continue to employ me on this ground of discrimination, it is contravening sections 7 and 10 of the Canadian Human Rights Act."

THE FACTS

The facts giving rise to the complaint filed by Mr Jacques Bouchard are as follows:

Mr Bouchard was a member of the Armed Forces from 1972 to his discharge on August 27, 1984. Mr Bouchard joined the Armed Forces in 1972 as a private. He then took normal military training at St-Jean d'Iberville in 1972 and 1973, and in 1973 took a cook's course at the Canadian Armed Forces base at Borden. The evidence shows that, from that moment on, Mr Bouchard practised his trade as cook at Gagetown, New Brunswick for three years. Gagetown is a land operations base of the armed forces, and Mr Bouchard belonged to Field Ambulance I when the unit was replaced by the Combat Arm School, where he also performed his duties as cook.

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After this period, Mr Bouchard was transferred to a naval ship, the HMCS Saguenay, for a period of two years. He was transferred from the Saguenay to the Bagotville military base at 433 Tac F Sqn, a CF-5 unit, where he also practised his trade as cook for two years, as a supervisor. In fact, he also took part in two exercises in Norway, the first time with 433 Tac F Sqn as head cook, and the second time with 434 Cold Lake, also as a cook. From Bagotville, Mr Bouchard was transferred to the Canadian Armed Forces station of Mont Apicat in the Laurentians, a semi-isolated station of the Canadian Armed Forces, a radar station. His duty there was to supervise the kitchen staff as second in charge of the kitchens. From there, Mr Bouchard was transferred to the Debert military base in Nova Scotia, a telecommunications station. He was again second in charge of the kitchen and responsible for the civilian staff. He served at Debert from April 1983 until his discharge from the Armed Forces, except for the two

months preceding his discharge, when he was transferred to the Halifax base.

During his period with the Armed Forces, Mr Bouchard rose to the rank of Master Corporal, a position he held upon his discharge. He was informed of his discharge in February 1984, which was to take effect on August 27, 1984. When he was informed of his discharge, Master Corporal Bouchard filed a grievance against the Armed Forces; he received a reply to this grievance, signed by General G C E Thériault on January 30, 1985, in a letter informing him that his grievance was denied. The reasons for the decision conveyed by General Thériault were expressed as follows:

"30 January, 1985

Mr J J H Bouchard

APPLICATION FOR REDRESS OF GRIEVANCE

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General Thériault's letter was produced as Exhibit CHRC-3.

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It should be mentioned that, during his period in the Armed Forces, Master Corporal Bouchard suffered several episodes of kidney problems, and this is amply demonstrated by the evidence.

The facts just described are not contested. A summary of the evidence follows.

THE EVIDENCE

In very detailed and very lengthy testimony, the Armed Forces counsel endeavoured to demonstrate that Master Corporal Bouchard had a medical history full of problems. There is no doubt that, during his period in the Army, Mr Bouchard suffered episodes of problems which were characterized as kidney problems, and that he was hospitalized several times and was unable during certain periods to perform his duties. Several very credible witnesses appeared before the Tribunal to demonstrate the extent of Mr Bouchard's illness, on the basis of his medical records, and explained in great detail the various episodes of Mr Bouchard's disease. This is sufficiently illustrated by the testimony of Commander Taillon, an Army

internist, who provided the Tribunal with the necessary elements to understand Mr Bouchard's medical record; Commander Taillon interpreted the notes in the record, as he had not had the opportunity to give Mr Bouchard a medical examination.

Moreover, none of the physicians who attended Mr Bouchard or who signed his reports were called to testify, nor were any of the persons who issued the decision resulting in Mr Bouchard's discharge.

The Tribunal was also given an elaborate explanation of the

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structures of the Canadian Armed Forces, the reason for them, their objectives and the purpose they serve. Evidence was also given concerning the training a soldier receives, the dangers he faces, the role of Mr Bouchard's position and the various tasks a soldier must carry out.

In his testimony, Mr Bouchard explained in his own terms the episodes of illness he had suffered, and the Tribunal has also noted from his testimony the will he expressed to serve his country, despite certain periods when his health was not the best. The Tribunal cannot fail to note the loyalty which Mr Bouchard revealed in his testimony toward his former employer, the Canadian Armed Forces, despite the difficulties he had faced. It also appeared from the evidence that Mr Bouchard had never refused to serve and that, in spite of his failing health at certain times, he had always been available to his employer. Moreover, his file testifies to this fact, and it must be emphasized that, in a report dated November 7, 1983, in a document entitled [TRANS] "Notice of change of medical category or medical limitations", produced in document R-8 of the respondent Commander Taillon, under number R-8, we find the following note in box IV, [TRANS] "Recommendations of unit or base", signed by Major Muise:

"MCpl Bouchard has proved to be an excellent Cook and supervisor, Medical problems have not been apparent in his performance. Recorded Warning issued 07 Nov 83 in accordance with CFAOs 19-34, 26-17.

Retention recommended."

I will return to this document later.

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From the evidence submitted, the Tribunal concludes that Mr Bouchard occasionally became ill and was hospitalized. Obviously, it is impossible to make a judgment about the diagnoses that were made or the care he received. I conclude that he was discharged because of a physical disability. Does this discharge constitute a discriminatory practice? If so, was the employer justified in committing it? This is what we will examine by analysing the law.

THE LAW

Section 3(e) of the Canadian Human Rights Act (the Act) stipulates that prohibited grounds of discrimination are, among other things, those which are based on disability. Section 7 of the Act provides that "it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual ... on a prohibited ground of discrimination."

In my opinion, Mr Bouchard was excluded from the Canadian Armed Forces for a reason based on a prohibited ground of discrimination, and there is no doubt that a discriminatory practice, within the meaning of sections 3 and 7 of the Act, was committed in regard to him.

Moreover, section 15(a) of the Act reads as follows:

"15. It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;"

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What has to be determined, therefore, is whether the discharge of Mr Bouchard resulted from a bona fide occupational requirement.

A bona fide occupational requirement has been defined by the Supreme Court, in *The Ontario Human Rights Commission v The Borough of Etobicoke*, 1982 (1) SCR 202. Even though that decision was based on The Ontario Human Rights Code, its application to the federal Act was recognized by the Supreme Court in the case of *K S Bhinder v The Canadian National Railway Company*, 1985 (2) SCR 561. In the Etobicoke decision, McIntyre J wrote on page 208:

"To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

The Supreme Court thus recognizes two tests for determining a bona fide occupational requirement. The first, which is an objective test, is to ascertain whether the limitation has been imposed honestly, in good faith and in the sincerely held belief that the limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy. I will examine the application of the first test and return to the second test later.

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After hearing and reviewing the evidence, the Tribunal is not convinced that the limitation on Mr Bouchard was imposed in the sincerely held belief that it was in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy. This evidence, which must be prima facie evidence, was not established before the Tribunal.

If we go back to the document signed by Commander J D Smith on October 26, 1983, entitled [TRANS] "Notice of change of medical category or medical limitations", referred to above, we see that Mr Bouchard had been assigned a geographical factor category of 2 (former category) and that the current category, category 2, was crossed out and replaced by a category 4, which is the deciding number for Mr Bouchard's discharge. Dr Chalmers, a civilian physician, signed this first part of the report, which was reviewed by Commander Smith. In fact, the crossed-out part, which is so important in this case, was not initialled. Commander Smith, who according to the testimony did not examine Mr Bouchard, made the command surgeon's remarks which led to the discharge of Mr Bouchard. Oddly enough, Part II of the report, which is reserved for the physician who makes the diagnosis and bears the words [TRANS] "Reserved for the physician, who is to indicate

in detail all limitations relating to employment", was not completed by Dr Chalmers, who examined Mr Bouchard.

It has not been established, to the satisfaction of the Tribunal, that according to the balance of probabilities the person whose decision led to Mr Bouchard's discharge imposed the medical category limitation in the sincerely held belief that this limitation was imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy.

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With regard to the objective criterion mentioned by the Supreme Court in the Etobicoke decision, this criterion requires that the limitation "be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

Very elaborate testimony was presented to the Tribunal in an effort to demonstrate that an adequate physical condition was required for members of the Armed Forces, especially for the trade of cook (see Exhibit R-2).

While I will not review all the elements of this evidence, the testimony of Captain Anne-Rachel Loesch seems particularly important. Captain Loesch is responsible for personnel management in the steward and cook trades, including the assignment of staff in accordance with approved policies and priorities. In lengthy testimony, she explained the process of management and assignment of cook positions. Master Corporal Bouchard, in fact, had been pronounced "unfit for sea, field, U.N.E.F. and medically isolated duties" because of his G4-03 category.

When she reviewed the list of possible assignments and places where Master Corporal Bouchard could or could not be assigned, she said he could not be sent to Trenton or Ottawa, for the following reason: [TRANS] "and for those two, I think, it would more likely be because of the problem of obesity, as those are positions where they must serve dignitaries and since they are always, always in the public eye ..."

During cross-examination, counsel for the respondent objected to the questions by counsel for the Canadian Human Rights Commission. The questions which led to the objection were as follows:
[TRANS]

"Q. Could you take the last page, the last appendix, the list of bases and so on, and repeat to me at what place obesity causes a problem.

A. At what place ...?

Q. You said -- it was in the third column, you said: he will not be transferred there because of the problem of obesity.

A. Ah! Here.

Q. You spoke of dignitaries.

A. Yes.

French "Et c'est (sic) deux là" (presumably for "Et ces deux là"). - Translation

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Q. What was that called?

A. Squadrons 437 and 412.

Q. Are 412 and 437 in Ottawa the squadrons which provide the "executive flight" service?

A. That's right, the Cosmos and the Challengers, yes.

Q. Those are the ones who transport our ministers and deputy ministers, is that correct?

A. Yes.

Q. So why is obesity a problem there?

A. It's written in the administrative orders that you must be presentable.

Q. You've got to be good-looking, right?

A. Presentable."

The Tribunal does not sustain the objections of counsel for the respondent, while reserving judgment, and allows the evidence.

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This evidence belongs within the more general context of policies and a bona fide occupational requirement. The Tribunal cannot conclude that lack of obesity is a reasonably necessary limitation for assuring the efficient and economical performance of the job of cook. It is true that this evidence must be placed in the context in which it was given, that is, the assignment of cooks and the impact of the lack of mobility on the careers of the other cooks. However, it is just as true that, in the circumstances of this particular complaint, the Tribunal is not convinced that the limitation imposed meets the objective test of performance of the job.

THE DECISION

Having heard the evidence, listened to the arguments of both parties and studied the cases, the Tribunal:

FINDS for the complainant, Jacques Bouchard;

DISALLOWS the discharge of the complainant dated August 27, 1984;

ORDERS the reinstatement of the complainant in his position, effective on the date of his discharge, which was August 27, 1984;

ORDERS the Canadian Armed Forces to pay the complainant the equivalent of the salary he would have earned and of the privileges he would have received since his discharge, less all money he has earned or collected since that date, with interest;

THE TRIBUNAL RESERVES the authority to set the amount of compensation owed to the complainant should the parties not agree on this matter; the parties must therefore appear again before the Tribunal for this question to be decided.

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THIS DECISION takes effect within thirty days of the date it is released to the parties.

SIGNED AT: Montreal, August 14, 1990

(sgd)

Pierrette Sinclair

Chairman of Tribunal