

T.D.-8/83

Decision rendered on June 16, 1983

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, C.-33 as amended
And in the Matter of a Hearing Before a Human
Rights Tribunal Appointed Under Section 39 of
the Canadian Human Rights Act.

BETWEEN:

GORDON WAMBOLDT,
Complainant

-andDepartment
of National Defence
Respondent

HEARD BEFORE: Susan M. Ashley
Tribunal

APPEARANCES: Richard Murtha, Counsel for the Complainant
Martin Ward, Counsel for the Respondent

Heard at Halifax, Nova Scotia, March 15, 16 and 29, 1983.

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This case involves a complaint of discrimination by Mr. Gordon Wamboldt against the Department of National Defence, on the grounds of physical handicap in employment. The complaint form, dated December 1, 1981, states the particulars of the complaint as follows:

"I was forced to resign after 28 years employment at the Halifax Dockyard due to the refusal of the Department to allow me to park my car within the industrial area of the Dockyard. My medical condition is aggravated by walking to the parking lot during rush hour and if I wait until other employees have left, I have to drive home during the time when traffic is heaviest. This also aggravates my condition. I allege that this action by the Department is contrary to Section 7 of the Canadian Human Rights Act and that issuance of a permit to park within the industrial area should be considered reasonable accomodation."

There is no real dispute as to the facts. Mr. Wamboldt began his employment at the Halifax Dockyard in 1952 and from that time until the time of his retirement was employed in electronic-related work, based in Halifax. During the time of this complaint, Mr. Wamboldt made his home in Lewis Lake,

approximately 20 miles from his place of work. He testified that he usually came to work at around 7 a.m. in order to avoid traffic, regular

working
hours being 8 a.m. to 4:30 p.m. The hours of work are set by collective
agreement. He has been working in the building known as D-20 since
1963, and
has parked outside this building for 18 years, until the Dockyard
parking
policy was changed in 1981. Having a parking space directly outside D-
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permitted him to leave almost immediately at 4:30, since his seniority
allowed him to punch out

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- 2 before
the others with less seniority. He felt that this parking spot helped
him to avoid some of the heavy supper-hour traffic.

Mr. Wamboldt's health suffered some deterioration in the 1960's. He
suffered heart muscle damage in 1964, but lost no work time as a result
of
this. Duodenal ulcers and ulcerated colitis were diagnosed in the late
1960's. He still takes medication for the former, and does so for the
latter
when the condition flares up. He suffers from hypertension, which was
also
diagnosed in this period, for which he still takes medication. It is
Mr.
Wamboldt's submission that these conditions are aggravated by tension.
He
feels that the employer's new parking policy which no longer permits
him to
park outside D-20 meant that he would no longer be able to "beat the
traffic". He also felt that having to walk in the crowded pedestrian
tunnel
at 4:30 to get to his car on the other side of the tunnel increased his
tension. He submits that the employer's refusal to grant him a parking
spot
adjacent to D-20 on medical grounds constitutes discrimination in
employment
on the grounds of physical handicap, contrary to section 7 of the
Canadian
Human Rights Act.

The Halifax Dockyard employs approximately 8000 people, at a location
on
the Halifax waterfront. It is bounded by the harbour on one side and
railway
tracks and then the city proper on the other. A small pedestrian tunnel
leads
from the industrial complex to the bus routes and the new parking
areas.
Prior to the change in the parking regulations, employees with
seniority

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permitted to park within the industrial complex, on a first come -

first served basis. Since it was Mr. Wamboldt's practice to arrive early in the morning, he parked directly outside D-20. The change in the Dockyard parking regulations required that all employees park in the new parking area outside the industrial complex, which necessitated their passing through the tunnel to get to their cars. Permits within the industrial complex were granted only on medical grounds, and the granting of these medical spots within the complex was under the jurisdiction of the Car Pass Committee.

Major Bernie Richardson, Base Security Officer of CFB Halifax, testified as to the reasons for the changes in parking policy (transcript page 183). Massive construction was planned for the Dockyard, some of which is now completed, and it was felt that the number of cars within the industrial complex caused a great deal of congestion, as well as security problems. As a result, the Dockyard began to phase out parking within the complex. Exceptions to the new policy forbidding parking within the complex were made for those that lived within the Dockyard complex or who carried a certain rank, for those who used their cars on government business, and for those

with medical problems which required parking within the Dockyard. It is the last which concerns us.

These "medical" parking spots were located both inside the complex and close to the tunnel on the outside of the complex.

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wishing medical parking permits were required to submit applications, supported by medical evidence, to the Car Pass Committee. Mr. Wamboldt did so, and submitted a medical statement prepared by Dr. Enid MacPherson (Exhibit C-2) which stated as follows:

" This patient suffers from hypertension with impaired E.G.G. tracing, colitis and chronic duodenal ulcer disease.

I should be grateful if he could continue to park in his present place to avoid further stress to his health."

Also attached was an electrocardiogram report prepared by Dr. Paul Landrigan.

Mr. Wamboldt appeared before the Car Pass Committee on January 28, 1981. He stated that he explained to the committee that traffic buildup caused his ulcer and colitis to worsen, and that if he were permitted to park inside the complex he would not have to go through the pedestrian tunnel, and could therefore be out of the Dockyard before the traffic buildup. There were no doctors on the committee. Major Richardson testified that the committee accepted that there was a medical problem, on the basis of Dr. MacPherson's certificate, but questioned the significance, in light of the wording of the letter ("... I would be grateful if..."). They didn't see this as a recommendation, but merely as a request. They did not go to Dr. MacPherson for clarification, nor did they ask Mr. Wamboldt to do so. His request was denied. Dr. MacPherson did not give evidence before the Tribunal.

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The matter was reheard at a meeting of the Car Pass Committee held on August 6, 1981. At this meeting, they considered a further medical statement from Dr. MacPherson, and a letter from Dr. R. M. Sinclair, the doctor for National Health and Welfare.

Dr. MacPherson's letter, dated June 5, 1981 (Exhibit C-4) states: "This patient has high blood pressure and a heart condition for which he takes Inderal 10 mg. q.i.d. I strongly recommend that he be given a temporary medical pass until his case is reviewed."

The Committee did not find this letter helpful to the second application; in fact since Mr. Wamboldt had been given a temporary pass pending final disposition of his case on August 6, they thought that they had complied with the letter.

Dr. Sinclair's letter (also Exhibit C-4) is dated July 22, 1981, and states that

"Mr. Wamboldt was examined here today, and it is recommended that, for medical reasons, he be provided a parking billet close to his

place of work."

Major Richardson testified that the committee felt Dr. Sinclair's request that he be provided a space "close to his place of work" could be complied

with by giving Mr. Wamboldt a spot outside the complex immediately adjacent to the tunnel. In his evidence (at page 205) he said

"Considering some committee members knew of the man's mobility and, by his own admission, mobility wasn't a problem, close we considered to be outside adjacent to, immediately adjacent to, the tunnel gate. The committee considered that to be close.

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was not acceptable to Mr. Wamboldt, who wanted a space adjacent to D-20, where he had parked for the last 18 years. Major Richardson testified that the committee questioned Mr. Wamboldt about whether he had any physical difficulty in walking, and was satisfied that he had no mobility problems. It should be noted that there were no guidelines to assist the committee in making these decisions. Mr. Wamboldt's request for a medical parking pass within the complex was once again denied.

Shortly after the August 6 meeting, Mr. Wamboldt went back to Dr. Sinclair, and explained that further clarification might be needed. As a result, Dr. Sinclair sent a letter dated August 31, 1981 to the Base Commander (Exhibit C-5) stating as follows:

"Further to my letter of 22 July, 1981, Mr. Wamboldt feels unable to continue work using his present parking place. If he had the parking billet which he used up to 31 January, 1981, he feels he could carry on until June, 1982, when he plans to retire."

Mr. Wamboldt grieved the denial of the parking permit. The grievance was denied. The reply to the grievance from Captain Bolt to Mr. Wamboldt, dated September 11, 1981 (Exhibit C-6) states as follows:

" Your grievance pertaining to the denial of a medical car pass by the car pass committee was presented to me at the second level of the grievance procedure on 3 September 1981.

I have carefully reviewed all the evidence presented to me by yourself and your representative. Your medical certificate states that you are Class A (fit for work). It

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appears that you have difficulty coping with the crowded tunnel when you depart from work. I would suggest you go through the tunnel when it isn't crowded, possibly a few minutes later than usual; this would stop the rush of people around you.

I was not presented with sufficient information to warrant my interceding to the car pass committee. Therefore, I must deny your grievance."

The fact that Mr. Wamboldt was classified Class A (fit for work) was a

significant factor in not being awarded a pass, that is, since his medical problems did not affect his ability to do the job, it was felt there was little justification for giving him a medical car pass within the complex. Members of the committee conceded in their testimony that mobility was the primary factor in granting passes; if an employee had some problem which made walking to his car difficult, a medical pass might be granted.

Dr. Sinclair attempted to clarify what he meant when he stated in his letter that Mr. Wamboldt should be given a parking spot "close to his place of work". The following excerpt from cross-examination is telling (at page 349):

(Mr. Ward) Q. "Dr. Sinclair, in the two letters which you wrote to the Base Commander I note that in neither one of them do you say that Mr. Wamboldt for medical reasons must be given a parking place immediately adjacent to his place of work in order to continue his employment. You would agree with me that that is not in those letters?"

(Dr. Sinclair) A. Yes

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Q. Doctor, you could have written a letter like that. Can you explain why you did not write such a letter?

A. I felt that it wasn't, as far as my findings went, I didn't feel it an absolute necessity that he have a parking place next door to his workplace."

It should be noted that the employer made various attempts to accommodate Mr. Wamboldt's needs, short of giving him his old parking spot, and that Mr. Wamboldt also attempted to alleviate the situation by such means as going on flexible hours. A solution could not be reached that was acceptable to both sides.

Section 7 of the Canadian Human Rights Act, under which this complaint is brought, provides that

"It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

Section 3 of the Act sets out the prohibited grounds of discrimination, which

include physical handicap in relation to employment. Section 20 defines "physical handicap" to include "... a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect

or illness...". I am satisfied that Mr. Wamboldt's medical conditions fall

within the definition of "physical handicap" under section 20 of the Canadian Human Rights Act.

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I am not satisfied that the facts set out a refusal on the part of the employer to employ or continue to employ Mr. Wamboldt on the grounds of physical handicap under section 7(a). Mr. Wamboldt was scheduled to retire in

November, 1983, but in fact retired in December, 1981. He alleges that his

early retirement was precipitated by his inability to cope with the tension

caused by the traffic buildup, and would not have been necessary if he had

been permitted to continue to use his old parking spot outside D-20.

However,

there is testimony from Dr. Sinclair that Mr. Wamboldt advised him that he

intended to retire early in June 1982 in any case, and this is noted in Dr.

Sinclair's letter to the Base Commander (Exhibit C-5). Also, there was evidence to suggest that Mr. Wamboldt's job was being phased out, and that if

he wished to continue to be employed it might be necessary for him to update

his skills. It is relevant that in the fall of 1981, Mr. Wamboldt underwent

an operation to remove lumps from his neck, and was on sick leave from November 16 to December 30, at which point he retired. This leads me to the

conclusion that other factors led to the decision to retire. It is my view

that the decision to retire early was voluntary, and was not brought about by

actions of the employer in regard to his physical handicap, either

directly
or indirectly.

There were suggestions that the Car Pass Committee dealt with the medical evidence in such a way as to disadvantage Mr. Wamboldt's applications. There was no doctor on the committee,

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even though they found the certificates of both Dr. MacPherson and Dr. Sinclair vague, they did not ask the doctors for clarification, or request

that Mr. Wamboldt do so. However, in light of Dr. Sinclair's testimony that

his letter was purposely vague, because he wasn't convinced that a parking

spot immediately adjacent to the building was an absolute necessity, this

criticism cannot stand. Nor do I find that the committee's emphasis on mobility was unreasonable. Their decision was based on the fact that Mr.

Wamboldt was categorized as Class A (fit for work), and the medical evidence

did not suggest that it was imperative for him to have a parking spot immediately adjacent to his building, on medical grounds. I do not find that

their decision was unfair or unreasonable in any way, or that it was discriminatory in any sense.

Nor was there any suggestion of adverse differentiation under section 7(b) of the Act. As all of the special parking permits were given to people

with medical problems, there was no differentiation in that sense. Nor do I

find adverse differentiation in that those with walking problems were granted

medical car passes while Mr. Wamboldt, with a different type of medical problems, was not, in light of the ambivalent medical certificates and the

testimony of Dr. Sinclair.

In conclusion, I find that a prima facie case of discrimination has not been established. It is therefore not necessary to deal with Mr.

Wamboldt's

claim for damages.

Halifax, Nova Scotia
June, 1983

Susan M. Ashley
Tribunal