

T.D. 8/93

Decision rendered on April 23, 1993

THE CANADIAN HUMAN RIGHTS ACT R.S.C. 1985, c.h.-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JAMES RUSSELL LAMBIE

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

CANADIAN ARMED FORCES

Respondent

DECISION OF TRIBUNAL

Tribunal:

James D. Turner, Chairperson

Murray D. Kulak, Member

Appearances:

Daniel Russell and Eddy Taylor

Counsel for the Canadian Human Rights Commission

Brian Saunders and Meg Kinneer Counsel for the Respondent

Dates & Location September 8, 9, 28 and 30, 1992

of Hearing:

October 1, 1992

January 20-21, 1993

Ottawa, Ontario

The Tribunal agrees with counsel for the Commission when he states that this case is not a matter full of legal twists and turns. It is a matter where the Law to be applied is simple and the complexity of the case arises in the determination of the facts.

That is not to say that the Law is not important because ultimately it is the Law that produces the decision. The Law sets out the framework upon

which the decision is founded. In this case, as in all cases, the relevant Law is determined by the complaint.

## COMPLAINT

The Complainant, James Russell Lambie, in a complaint to the Canadian Human Rights Commission dated December 12, 1988, alleges that the Canadian Armed Forces discriminated against him by denying him a promotion to Colonel and an appointment as a Base Commander because of his marital status contrary to sections 7 and 10 of The Canadian Human Rights Act. The reference to section 10 was subsequently withdrawn at the commencement of the hearings and was not further considered in the hearings.

The relevant portions of the Act to this complaint are:

s.3(1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability, and conviction for which a pardon has been granted are prohibited grounds of discrimination.

s.7 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.

## FACTS

This matter was heard before the Tribunal at 3 sessions: September 8 and 9, 1992; September 28, 30, October 1, 1992; and January 20, 21, 1993, all at Ottawa, Ontario.

It is well established on the evidence that was presented that the events in question occurred in late May and early June of 1987 and involved the appointment of a new Base Commander for C.F.B. Greenwood.

The incumbent Commander Colonel O'Donnell had been unexpectedly promoted to General (outside of the normal promotion cycle) and prior to the completion of the normal tenure as Base Commander. The documentary evidence establishes that his appointment was submitted for approval on May 11, 1987 and was approved on May 21, 1987, thus creating the vacancy which precipitated the chain of events that has culminated in this hearing.

Much evidence was placed before the Tribunal from both the Complainant and the Respondent as to the sequence of events that usually occurs in the

process of promotions and appointments within the Military hierarchy. This information, for the most part, is not contradictory and is a matter of the record. It will not be extensively reviewed as a part of the decision, but the Tribunal found it extremely useful in providing us with a background against which to view the events of concern in this matter and is prepared to accept as a fact that there is a protocol to be followed in the process of promotions and appointments in the C.A.F.

The next event of significance is the contact between General Garland and Lieutenant Colonel Lambie on May 28, 1987 and the following day. There is, unfortunately, little agreement between the two parties as to what was actually said in the course of those two conversations.

The Tribunal must therefore decide what most likely occurred based on the evidence that was submitted before us. The content of these conversations is significant in terms of what eventually unfolded in this matter, but the content itself does not advance, nor does it hinder the Complainant's case.

The Tribunal accepts Lieutenant Colonel Lambie's version of the content of the conversations as being believable and consistent with the events that followed. We find that General Garland erred in the manner in which he advised Lieutenant Colonel Lambie of the potential promotion and appointment during these conversations as it was clearly premature given the manner in which the system worked.

The Tribunal finds that Lieutenant Colonel Lambie, given his long experience within the system, should have been much more cautious in his acceptance of General Garland's conversations as evidence of a "done deal". Lieutenant Colonel Lambie must have known that General Garland, as "acting" Commander would not have had the authority in ordinary circumstances to make the final decision on the matter and that no promotion or appointment in the C.A.F. is certain until the orders are released.

The Tribunal finds that General Garland clearly came across to Lieutenant Colonel Lambie that the promotion and appointment was a sure thing with mere formalities left to clear up. The Tribunal finds support for this view in the testimony of Lieutenant Colonel Lambie and in the testimony of General Patrick in reference to his conversation with General Garland regarding the appointment.

The Tribunal also accepts the evidence of Lieutenant Colonel Lambie regarding the conversation with General Ashley wherein he recalls the General made a reference to "someone making promises they couldn't keep". This is entirely consistent with the Tribunal's findings with respect to

the Garland/Lambie conversations of May 28 and 29, 1987.

We are now at a position where the vacancy has occurred and Lieutenant Colonel Lambie has been (prematurely) advised by General Garland that the position was his.

The Tribunal accepts as a fact that General Ashley was advised of the vacancy while on a trip and upon his return to work on Monday was advised of the potential candidates for the position through General Garland. The Tribunal also accepts as a fact that General Garland endorsed Lieutenant Colonel Lambie as the top pilot candidate for the position at this time.

At this point in time, it appears that matters came to an abrupt halt and proceeded on a new tangent. The Tribunal accepts as a fact that at this point in time General Ashley was aware of the concerns raised by General Curleigh and General Patrick with respect to the process of picking suitable candidates for appointments.

The Tribunal accepts the evidence of General Curleigh that he had forwarded a list of potential candidates for the position and furthermore that there was a short-list attached which placed Lieutenant Colonel Lambie as the third or fourth candidate.

General Ashley took great pains in his testimony to establish that he was specifically concerned with filling the C.F.B. Greenwood position with a navigator and that as a result, he never considered Lieutenant Colonel Lambie for the position. Indeed, he alleges that he was not even aware of Lieutenant Colonel Lambie's eligibility for the position.

The Tribunal does not accept General Ashley's evidence on this latter point. We have already found as a fact that Lieutenant Colonel Lambie had been endorsed by General Garland and was highly placed on General Curleigh's short-list of candidates which had been communicated to General Ashley.

The Tribunal was puzzled as to why General Ashley would choose to present his evidence in this manner. If the preference was for a navigator, which appears reasonable given the explanations for the preference, then why try to establish that Lieutenant Colonel Lambie was not even considered for the position? If he was considered and rejected for that reason, then so be it.

There are clearly some inconsistencies on this point. The Tribunal finds that General Ashley had to be aware of Lieutenant Colonel Lambie's eligibility for the position and that a choice was made by him not to consider Lieutenant Colonel Lambie for the position. This decision not to

consider Lieutenant Colonel Lambie for the position is clearly the crux of this complaint.

The question before this Tribunal is whether or not a proscribed ground of discrimination was a factor in the decision that was a proximate cause of the Complainant's failure to obtain the appointment as Base Commander, C.F.B. Greenwood and the requisite promotion to Colonel.

#### PRIMA FACIE CASE

It is well established in Human Rights cases that the Complainant has to make a prima facie case which simply means that at the conclusion of the Complainant's case there must be sufficient evidence before the Tribunal in support of the allegations which if credible and believed would support a decision in the Complainant's favour. Support for this proposition is found in *Ontario Human Rights Commission v. Simpsons Sears Limited*, [1985] 2 S.C.R. 536.

The Respondent has quite correctly pointed out in Argument that in order to establish a prima facie case the complainant must establish (1) that the C.A.F. discriminated against him; (2) that the discrimination was in the course of his employment; and (3) that the discrimination was based on a prohibited ground of discrimination.

The mere fact that a choice was made indicates that some form of discrimination occurred and it was obviously in the course of employment. The crucial factor in this matter is then whether or not that discrimination was on a prohibited ground. The Complainant has adduced sufficient evidence on this point to support his allegations in the absence of any response from the Respondent.

The Tribunal finds that the Complainant has therefore met the requirement of establishing a prima facie case. It is clear on the evidence that the factor of marital status has been a factor in the progress of an officer's career in the C.A.F. historically and given that this Tribunal has accepted Lieutenant Colonel Lambie's testimony with respect to his conversations with General Garland at which the Complainant's marital status was discussed the question becomes whether or not the issue of marital status was a proximate cause of the denial of the Complainant's appointment and consequent promotion and whether or not it was a proximate cause of General Ashley's decision not to consider the Complainant for the position of Base Commander C.F.B. Greenwood. *Foster Wheeler Ltd. v. Ontario Human Rights Commission* (1987), 8 C.H.R.R. D/4179 (Ont. Div. Ct.).

It is also well established in Human Rights cases that once the

Complainant establishes a prima facie case the onus shifts to the Respondent to provide a legitimate explanation in order for the behaviour complained of to be acceptable. *Israeli v. Canadian Human Rights Commission* (1984), 5 C.H.R.R. D/2147 (C.H.R.T.).

### SIMILAR FACT EVIDENCE

The Tribunal found the evidence presented regarding mixed-rank marriages to be useful in terms of general background only. It simply establishes that the C.A.F. considers marital status in posting decisions where spouses may be in the same chain of command. This proposition is not directly relevant to the matter before this Tribunal and was given appropriate consideration by us.

The Complainant also adduced evidence with respect to several situations where it was alleged that an individual's marital status had been taken into consideration in their postings. The occurrence of these events, while not strenuously disputed by the Respondent, does not of themselves advance the Complainant's case in the matter before this Tribunal.

The events were not contemporaneous with the matter before us and most importantly did not involve the same players. This Tribunal accepts that those events occurred and that marital status was likely a factor in the decisions made. In accepting them, this Tribunal is not prepared to go further and draw the conclusion that in all other posting decisions and at all other times the posting decisions made by all officers in the C.A.F. improperly considers marital status.

The Tribunal does, however, acknowledge that the occurrence of those events does mean that this Tribunal must be extremely critical in its evaluation of the evidence presented to it on this matter.

### RESPONDENT'S CASE

The Respondent must establish on the balance of probabilities that the consideration of marital status was not a proximate cause of the denial of the Complainant's promotion and appointment or of General Ashley's decision not to consider the Complainant for the position of Base Commander, Greenwood.

It is clear on the evidence presented by both the Complainant and the Respondent and the Tribunal accepts it as a fact that Lieutenant Colonel Lambie's marital situation was no secret and that his future plans were well-known, those plans being that he was going to finalize his divorce and then marry his fiancée.

It was also clear that Lieutenant Colonel Lambie was somewhat concerned with regard to his marital status and the Tribunal finds that on the balance of probabilities the detailed references to his marital status in his conversations with General Garland were at the Complainant's instigation.

It is also accepted as a fact by the Tribunal that Lieutenant Colonel Lambie was endorsed as the "pilot" candidate by General Garland in his recommendation to General Ashley and that he was also highly placed on the candidate list supplied by General Curleigh.

The Tribunal does not find that there was any discrimination against the Complainant to this stage of the events in question. The evidence presented by both the Complainant and the Respondent indicates that Lieutenant Colonel Lambie was well thought of and certainly would have received the next promotion awarded on the basis of the merit list. The Tribunal notes that it appears that the initial dispute in this matter was concerned with the merit list rankings and promotions. This issue was not pursued before this Tribunal and does not concern us further.

As previously stated, the crux of the issue before this Tribunal is the decision that was made by General Ashley in the staffing of the position of Base Commander, Greenwood. The Respondent took substantial time before the Tribunal to elaborate upon General Ashley's decision-making process in terms of who was consulted, why they were consulted, the degree of influence they may have had in the process, and most importantly for our purposes what factors were considered in making this decision.

The Tribunal accepts the Respondent's evidence in this regard. The process described by the Respondent's witnesses is logical and reasonable in the circumstances. The procedures and processes outlined are consistent with what would be expected of the process. It is clear that many factors are considered and all things being equal, marital status may become a factor in discriminating between candidates. This Tribunal, however, does not find that the Complainant's marital status was a factor in this case.

The Tribunal wishes to point out that if marital status had been used to decide between two otherwise equal candidates, that a contravention of the Act would have occurred.

The Tribunal was curious about General Ashley's insistence that he had not even considered Lieutenant Colonel Lambie and was not even aware of his candidacy for the position. This point was strenuously explored by Counsel and the Tribunal was asked to attribute sinister motive to this factor.

The Tribunal, while curious, is unable to draw the inference suggested. The Respondent has presented a reasonable explanation for the events that occurred and most importantly for why they occurred. The Tribunal is satisfied that there was no inappropriate consideration of the Complainant's marital status in this matter.

It was well-argued before the Tribunal that in most cases of discrimination there is no overt fact or event to point to as the proscribed activity. The usual occurrences are subtle and an insidious invasion of our sensibilities. The Tribunal has had the benefit of a thorough examination and cross-examination of the witnesses on both sides of this matter and does not believe it inconsistent to find that Lieutenant Colonel Lambie was essentially correct in his version of the events that culminated in the advice to him that someone else had received the Greenwood job and also to find that there had been no discrimination against him by the Respondent and that there was no improper consideration of marital status by General Ashley in making that decision.

Notwithstanding the foregoing, the Tribunal must now consider whether or not the explanation given by the Respondent was true or fabricated to cover-up the real reasons for what occurred. The most important element in this determination is the creditability of the witnesses and their nexus to the decision-making process. In this case it becomes a question as to whether or not the Tribunal accepts the evidence of General Ashley that marital status was not a factor that was considered in the decision.

Counsel for the Commission spent a great deal of time in cross-examination and in argument exploring inconsistencies and contradictions in General Ashley's evidence and while it is clear that they exist, the Tribunal is not prepared to find that there has been a deliberate plan to cover-up any wrongdoing or improper consideration of marital status on the part of General Ashley.

The Tribunal therefore dismisses the complaint.

Dated the 23 day of March, 1993.

James D. Turner, Chairman  
Murray D. Kulak, Member