

DECISION RENDERED ON MAY 6, 1981  
T.D. 5/81

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 35 of the Canadian Human Rights Act

BETWEEN:

George E. Richards,  
Complainant  
-and-  
The National Harbours Board  
Respondent

HEARD BEFORE: Susan Mackasey Ashley  
Tribunal

Appearances:

Richard Murtha Counsel for the Complainant  
John Feehan and the Canadian Human  
Rights Commission

Douglas Campbell Counsel for the Respondent  
Fred Crooks

Michael Glynn - Tribunal Officer  
>Complaint:

This hearing relates to a complaint brought under section 7(a) of the Canadian Human Rights Act, i.e, that the National Harbours Board did discriminate against George Richards in refusing to employ or continue to employ him on the basis of his physical handicap.

Some of the facts of the case are in dispute. The complaint form filed by Mr. Richards and dated November 6, 1979, states as follows:

"I was discharged from employment without my knowledge at the termination of my sick leave. My letter stating that I was applying for disability benefits was taken as notice of retirement, but not acknowledged as such until August 17, 1979."

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After completing the conciliation stage without satisfactory resolution of the complaint, I was appointed as a Tribunal under the Canadian Human Rights Act in October 1980. The hearing took place on February 19 and 20, and March 5 and 6, 1981.

FACTS:

There are two quite different characterizations of the facts, by

solicitors for the Complainant and the Respondent respectively, but certain facts are not in dispute.

On August 9, 1978, George Richards, the Complainant, suffered from a heart attack, more specifically diagnosed as acute myocardial ischaemia. He was seen by Dr. Banks, who was acting in place of his regular family doctor, Dr. Fraser.

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Mr. Richards was admitted to hospital on August 9 and stayed there for approximately one week. At the time of his heart attack, Mr. Richards occupied the position of Port Financial Officer with the National Harbours Board, situated in Halifax. He had joined the National Harbours Board in 1970, and had occupied the position of Port Financial Officer since 1973. Mr. Richards was seen by Dr. Fraser in early September 1978, and on a regular basis after this. In his testimony, Dr. Fraser stated that he had been treating Mr. Richards for heart problems for some time. He had also been treating him for eye problems, and referred him to specialists. In January of 1979, Mr. Richards underwent cardiac catheterization at the Victoria General Hospital in Halifax. This procedure consists of injecting a dye through the veins, and is used as a diagnostic tool. He was admitted to the hospital on January 16, 1979.

On January 19, 1979, after the cardiac catheterization was completed, Dr. Fraser filled out a form entitled "Attending Physician's Statement of Disability". Under the heading 'diagnosis', the entry states that the results are not known yet, that the patient has just undergone cardiac catheterization and is under treatment for an eye condition. Further, under the heading diagnosis, are listed: 1/ coronary artery disease with ischaemia and angina, and 2/ macular degeneration. The form states that the patient's progress had retrogressed.

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In the section dealing with the extent of disability, Dr. Fraser has indicated that the patient is now totally disabled for any occupation, as well as being totally disabled for his regular occupation. In answer to the question "when do you think the patient will be able to resume any work", he replies probably never, and that he is not a suitable candidate for a rehabilitation program. He states that the patient has Class 3 functional capacity, which indicates a marked limitation.

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On January 24, 1979, Mr. Richards wrote to the National Harbours Board, through Mr. Ray Beck, General Manager of the Port of Halifax, indicating that he had been advised by his family doctor to "discontinue work" because of his health. He stated that he had just been released from the hospital and was still undergoing treatment, and that he "had no alternative but to accept the advice of Dr. F. Murray Fraser and ... with reluctance advise that I am applying for Disability Benefits". He enclosed the form making

application for disability benefits, Dr. Fraser's medical statement, and certain other forms. He refers in his letter to sick leave credits and severance pay, making the following comments with regard to severance pay: "insofar as Severance Pay is concerned, I contemplate placing an amount to an RRSP fund. I will be advising the company name within a week." He also advises Mr. Beck that he will continue to contribute to the Blue Cross Plan, and will submit post-dated cheques to the Pay Office to cover the contribution. With the letter, he

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encloses keys to the main office building, and to his own office. At the end of the letter, Mr. Richards thanks Mr. Beck for his "patience, understanding and most important (your) cooperation while I occupied the Port Financial Officer's position. Without these my job would have been most difficult."

The response of the Board to this letter is significant. Its communications to the Complainant until August 17, 1979 were consistent with the fact that the Complainant had not resigned. Internally the Board appeared to process the letter as a resignation by action as early as January 29, 1979, although its actions were not entirely consistent. The nature of the Board's responses are now detailed.

Mr. Beck wrote to Mr. Richards on January 26, 1979. The first paragraph of that letter states as follows:

"Thank you for your letter of January 24. Needless to say, I can fully appreciate what a trying decision that was yours to make. I am sorry to hear that your condition has not improved to a stage where you could resume your duties as Port Financial Officer. It is hoped that with the medical expertise available that in a time your health will be restored."

The letter then deals with questions raised by Mr. Richards in his letter, i.e. sick leave over-payment, life insurance benefits, severance pay, and Blue Cross. In the closing paragraph, Mr. Beck acknowledges Mr. Richards' contribution to the Port over the years, and offers any assistance he can in the future.

It should be noted that between the time in August 1978 when Mr. Richards suffered the heart attack and this exchange of letters

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in January 1979, Mr. David Bellefontaine had been appointed Acting Port Financial Officer, with a corresponding salary increase. The 'acting' designation was made on October 2, 1978, and was effective August 1, 1978.

On January 29, 1979, Mr. Beck submitted a memo for approval by Mr. Gerald E. Simmons, Chief Executive Officer and Chairman of the Port Authority with the National Harbours Board in Halifax, dealing with the appointment of a permanent replacement for Mr. Richards. This memo recommended approval of the appointment of David Bellefontaine for the position, which written approval was given by Mr. Simmons and another member of the Executive Committee on January 30, 1979. A memo was then circulated within the office indicating that David Bellefontaine was the new (permanent) Port Financial Officer.

According to the submission of the Respondent, Mr. Richards' letter of January 24 was a letter of resignation and was interpreted by Mr. Beck at the National Harbours Board as such. Steps were immediately taken to fill the position permanently, and this was done by January 30, 1979. Mr. Richards claims that he did not intend to resign and did not in fact do so, and that the National Harbours Board had no right to give his job, on a permanent basis, to someone else when he had clearly not resigned. According to Mr. Richards, he was not informed that he had no job until he received a letter from Mr. Beck dated August 17, 1979.

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To complicate the situation, Mr. Beck, on January 29 and February 5, wrote to the Department of Supply and Services, Superannuation Branch in Ottawa. The January 29 letter enclosed several forms relating to Mr. Richards' "application for long term disability benefits due to his retirement due to ill health effective February 7, 1979". However, the Administrative Officer, signing for Mr. Beck, states in the February 5 letter, that Mr. Richards was on leave without pay, as follows:

"One of our employees, who is in the Management Group, has been on approved Sick Leave due to a heart condition and other related health problems since August 10, 1978. His Sick Leave Credits will expire effective February 6, 1979, so, effective February 7, 1979, we would consider this employee on Leave Without Pay."

This letter states further that:

"he has not requested documents in connection with making application for his Superannuation Pension, and when he was approached on this matter, he would not advise as to his intentions with respect to retiring. According to his Physician's Report on his application for Long Term Disability, this is a permanent disability and that he would never be able to resume any work".

The letter then goes on to ask specific questions concerning pensions and other things. There was some indication in the evidence that this letter had been drafted by Mr. D.M. White, Personnel Assistant.

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At least two other documents internal to the National Harbours Boards, which did not go to Mr. Richards, indicated that Mr. Richards had not retired to resigned. On a form signed by D.M. White, Personnel Assistant, dated January 30, 1979, the remarks

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indicate that:

"All leave credits due Mr. Richards will be exhausted effective as of the close of business on Tuesday, February 6, 1979, so, for the pay period from January 28 to February 10, 197(8), he will only be entitled to seven (7) days pay. Effective February 7, 1979, Mr. Richards will be considered on Leave Without Pay, until further notice."

The purpose of this kind of document is to indicate any changes in an employee's job status.

Another form signed by Mr. White, dated February 5, 1979, which is apparently a document submitted to the Unemployment Insurance Commission, indicates that the reason for Mr. Richards' cessation of work was "illness or injury". (Other boxes that could have been ticked included "retired", "quit", or "other".) It indicates that the expected date of return to work is "unknown". The box saying "not returning" was not checked. However, there was testimony that it is not unusual to indicate illness as the reason for cessation, rather than quitting or retiring, in order to give the employee the full benefit of unemployment insurance benefits, as indicated by Mr. Rejean Gagnon at page 500-501 of the transcript.

The evidence is clear that Mr. White has no jurisdiction to make decisions on hiring and firing, or for granting leave without pay. Mr. Beck is able to make such decisions up to the level of 'Department Head'. At the "Department Head" level and above, decisions are ultimately made by the Executive Committee, of which Mr. Simmons is the Chairman. It should be noted that Mr.

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Richards, as Port Financial Officer, was designated as a 'Department Head'. However, if Mr. Richards were merely returning to work after sick leave, leave without pay, or long term disability leave, it would appear that Mr. Beck could deal with this himself, although no evidence was presented on the matter.

In early May, Mr. Richards was advised that his application for long term disability had been denied. He called Mr. Beck and set up an appointment with him on May 16 or 17. The evidence given by both Mr. Richards and Mr. Beck indicates that Mr. Richards told Mr. Beck that his long term disability had been turned down, and that he wanted to come back to work. They agreed that Mr. Richards would return to work on Tuesday, May 22. When Mr. Richards asked who would tell Mr. Bellefontaine, Mr. Beck replied that Mr. Richards could do this. Mr. Richards then went to see David

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Bellefontaine and told him that he would be returning. David Bellefontaine was apparently shocked at this news. Mr. Richards informed him that something would be worked out so that he would not lose his salary increase, and mentioned the possibility of creating the position of Deputy Port Financial Officer.

It was also not disputed that on or about May 18, 1979, Mr. Richards received a telephone call from Mr. Beck, who asked him if he could delay his return for a few weeks, as it would take a while to arrange things.

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On May 22, Mr. Beck wrote to Mr. Richards requesting another medical form to be completed, to state that he was able to resume his duties with the National Harbours Board. This form was given to Dr. Fraser, and then forwarded to Mr. Beck. The form as signed by Dr. Fraser, (Exhibit R-5) indicated that Mr. Richards was able to return to work on June 4, 1979, but did not include any other information under the "physician's remarks" section of the report.

On receipt of Dr. Fraser's report, Mr. Beck called Mr. Richards and said that the medical form submitted by Dr. Fraser lacked certain information. It merely stated that he would be fit to return to work on June 4, but made no comment as to his previous or present disability. On or about June 4, Messrs. Richards and Beck agreed that Mr. Richards should see the doctor at the Department of Health and Welfare in Halifax. According to Mr. Richards (at page 79): "The arrangement was that if I was determined by the National Health and Welfare doctor to be incapable of work then I agreed to apply for retirement, on the other hand if I was able to perform my duties then I would return immediately".

Mr. Richards saw Dr. Glynn at Health and Welfare in Halifax on June 21, but due to summer vacations, his report (signed by Dr. Sinclair) was not completed until August 1, and was received by Mr. Beck shortly thereafter. This form indicated that Mr. Richards was fit for work. Having heard nothing from National Harbours

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Board since June, Mr. Richards wrote to Mr. Beck by letter dated August 10, 1979 (Exhibit C-4) outlining the chronology of events, and asking for clarification of his position.

Mr. Beck responded by a letter dated August 17 to Mr. Richards. That letter states, in part, as follows:

"It is realized that this matter has taken some time, however we did not have any other choice than to request information on your present physical condition. Our concern was based partially on the information supplied on Form no. 424, completed by your doctor, F. Murray Fraser, on January 24,

1979, which indicated total disability for your regular occupation...

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When your own physician declined to change his previous assessment of your condition, we were placed in a situation where we had no choice but to ask for the review by Health and Welfare.

All of this proved to be very time consuming. We only received the "General Physical Examination Report" on August 3, 1979 and a copy is attached for your information.

I am sure you can understand why your letter of January 24, 1979 was accepted by us as giving your notice of final discontinuance of work due to your physical condition. The importance of the position of Port Financial Officer to the continued efficiency and well being of the Port required that the essential financial duties be carried forward without any serious disruptions, so we immediately filled the position, on a permanent basis, thereby leaving no vacancy in the Finance Department.

... we regret to advise that we do not have a suitable position available for you at this time, however should one become available, you will be given every opportunity to full same...

Mr. Richards testified that this was his first and only indication that his letter of January 24 had been interpreted as his resignation, and that he in fact had no job. At that point, he

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obtained legal advice, and approached the Canadian Human Rights Commission, alleging that he had been discriminated against on the basis of physical handicap, i.e. his illness.

It must be noted that, in his testimony, Mr. Beck candidly admitted that he had made an error when he told Mr. Richards at the May meeting that he could return to work on Tuesday (at page 252). Only Mr. Simmons, the Chief Executive Officer of the Port, and Chairman of the Executive Committee, had authority to hire and fire at the 'Department Head' level. Immediately after his meeting with Mr. Richards, Mr. Beck phoned Mr. Simmons, telling him what had happened. Mr. Simmons told Mr. Beck that the job had been filled on a permanent basis, and advised Mr. Beck to tell Mr. Richards that the date of his return would have to be put off until June, to look at the situation. Mr. Beck admitted in cross-examination (at page 322) that "for that period we were groping quite a bit". Mr. Simmons testified that following his conversation with Mr. Beck, he phoned the Head of Personnel and Industrial Relations for the National Harbours Board in Ottawa, Mr. Rejean Gagnon, asking what could be done about the situation. Mr. Gagnon, after seeing Mr. Richards' January 24 letter, informed Mr. Simmons that Mr. Richards

had resigned, and there was no problem (at page 521). This conversation took place some time around June 24, 1979.

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Motions

Before getting to the substantive issues, one must deal with the two motions which were made during the course of the hearing before the Tribunal. At the outset of the hearing on February 19, 1981, counsel for the Respondent made a motion dealing with the question of jurisdiction, alleging that the complaint form signed by Mr. Richards did not adequately set out the basis of the complaint. Mr. Richards, on the complaint form, stated that the following was the basis of the complaint:

"I was discharged from employment without my knowledge at the termination of my sick leave. My letter stating that I was applying for disability benefits was taken as notice of retirement, but not acknowledged as such until August 17, 1979."

Counsel for the Respondent felt that the complaint form did not disclose the particulars of the offence alleged to have been committed under the Act. He felt that it was at least incumbent on counsel for the Complainant to point out, at the outset of the hearing, the basis of the complaint. In response, counsel for the Complainant noted that the complaint had been extant for two years, that there had been much communication between counsel for the Respondent, the Complainant, and the Commission, and that counsel could not now allege that they did not know the nature of the complaint. He clarified that the complaint is framed under section 7(a) of the Act, in that the Respondent refused to continue to employ Mr. Richards as a result of his physical handicap. (at page 9)

Counsel for the Respondent accepted this clarification, and

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indicated that his motion as to jurisdiction had been adequately dealt with. I consider the matter to have been decided at this stage of the hearing.

Counsel for the Respondent made a further motion for summary dismissal of the complaint, after completion of the testimony of witnesses for the Complainant. He alleged that the case for the Complainant did not indicate that discrimination on the basis of physical handicap existed, and that the complaint should be dismissed. According to Mr. Campbell, the evidence led by the Complainant was clear in that this letter was a resignation. If accepted by the Tribunal to be such, the matter was concluded, since there could be no "refusal to continue to employ". Mr. Murtha, counsel for the Complainant, argued against the motion, on the basis that the letter was not intended as a resignation letter,



but merely a notification to his employer that he would be applying for long term disability. He felt also that, as a matter of natural justice, the matter should be heard in its entirety, once and for all, since it had been before the Commission for such a lengthy period of time.

The Tribunal refused to grant the motion for dismissal at the

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hearing, on the basis that there was some evidence to indicate that the letter was not a resignation. The testimony of the witnesses for the Complainant - Dr. Fraser and Mr. Richards - did raise some questions, but it could not be said that no evidence had been led by counsel for the Complainant to justify

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the complaint. In the interests of natural justice and providing a fair hearing, the motion for dismissal was not upheld.

#### Authorities

The relevant provisions of the Canadian Human Rights Act are as follows:

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.

Section 3 of the Act sets out the prohibited grounds of discrimination:

s. 3 For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination.

"Physical handicap" is defined in section 20:

s. 20 ....

"physical handicap" means a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defects or illness and, without limiting the generality of the foregoing, includes epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness, or speech impediment, and physical reliance on a seeing eye dog or on a wheelchair or other remedial appliance or device.

Counsel have not disputed the fact that Mr. Richards' illness would fall under the definition of "physical handicap" in section 20.

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The other section relevant to this complaint is section 14, dealing with a defense to a charge of discrimination in employment:

s. 14 It is not a discriminatory practice if:  
(a) any refusal, exclusion, expulsion, suspension, specification or preference in relation to any

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employment is established by an employer to be based on a bona fide occupational requirement.....

There are several methods of statutory interpretation which at various times have been given pre-eminence, including the mischief rule, the literal approach, and the so-called 'golden rule'. However, the most widely accepted method now in use in Canadian courts is that as stated by Mr. Elmer Driedger, in *The Construction of Statutes* (Butterworths, 1974, at p. 67):

"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

The object of the Canadian Human Rights Act is expressly set out in section 2, as being that

"every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so... by discriminatory employment practices based on physical handicap."

The Act does stipulate that there are certain situations where discriminatory treatment of individuals is acceptable,

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such as where there is a bona fide occupational requirement. I agree with the expression in the Human Rights Tribunal decision relating to *Foreman et al. v. VIA Rail Canada Inc.* (1980), 1 C.H.R.R. D/97 of the difference between discriminatory practices as prohibited under the Act, and acceptable differentiation among individuals. The Tribunal states that

"... in reading the Act as a whole ... the object of the Act is not to create a presumption that differential treatment per se constitutes discrimination ... The Act is not oriented towards compelling employers to treat all applicants or employees identically. (It) is directed towards ensuring fundamental equality in employment consistent with other goals

such as eliminating incompetence, lack of safety, inefficiency and job frustration... (The) Act contemplates the special nature of the employment market place and is structured to take this into account". (at paras 999-1000)

With regards to onus of proof, it is clear that the onus is on the Complainant to show that, on the balance of probabilities, a contravention of the Act has occurred. However, it is not a discriminatory practice if the employer can establish the existence of a bona fide occupational qualification. The latter is a statutory onus, set up by section 14.

The meaning of bona fide occupational qualification has been stated in Re Ontario Human Rights Commission and City of North Bay (1977)

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17 O.R. (2d) 712, at page 715, and I accept that statement of principles:

"Bona fide is the key word. Reputable dictionaries... regularly define the expression in one or several of the following terms, viz., honestly, in good faith, sincere, without fraud or deceit, unfeigned,

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without simulation or pretense, genuine. Those terms connote motive and a subjective standard. Thus, a person may honestly believe that something is proper or right even though objectively, his belief may be quite unfounded and unreasonable... However, that cannot be the end of the matter or the sole meaning to be attributed to "Bona fide", for otherwise, standards would be too ephemeral and would vary with each employer's own opinion (including prejudices), so long as it is honestly held, of the requirements of a job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be over 25 years of age. However, if it requires such a limitation as a condition of employment or continuing employment I would have no doubt that such limitation would not qualify as a bona fide occupational qualification or requirement... Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact. In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason, based on the practical reality of the work a day world and of life..."

The Respondent has mentioned the existence of a bona fide occupational requirement in this case, that being the requirement of good health, and alleges that Mr. Richards did not receive a clean bill of health until August of 1979, as indicated by Dr. Sinclair's report. However, they are not basing their case on this defence, as they allege a complete absence of discrimination in that there was no "refusal to continue to employ". (at page 597)

The existence of a bona fide occupational requirement was raised only as an alternative argument, and will be dealt with only if discrimination is found to have existed.

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It seems clear from recent human rights cases that it is no longer necessary to prove an intention to discriminate. Discrimination now seems to be measured by its effect rather than the intent or motivation of the alleged violator. Professor William Black in a short comment entitled "From Intent to Effect: New Standards in Human Rights" (1980) 1 C.H.R.R. C/1 outlines the gradual change in emphasis from the intent of the violator to the effect of the conduct on the person who is bringing the complaint. It appears that even if the National Harbours Board did not intend the consequences of its actions, or perhaps did not anticipate that their conduct would result in the discriminatory effect, if it were

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found that an individual or group suffered a disadvantage on the basis of a prohibited ground of discrimination, they would be guilty of a violation of the Canadian Human Rights Act.

Nor is it necessary to prove that the prohibited ground be the sole determining factor in the decision which is complained against, so long as it is one of the factors. (Goyetche v. French Pastry Shop Ltd, (1980), 1 C.H.R.R. D/124) I.A. Hunter, in his article "Human Rights legislation in Canada: Its Origins, Development and Interpretation" (1976), 15 U.W.O. Law Rev. 21, at page 32, states as follows:

"Canadian Boards of Inquiry have consistently held that it is sufficient if the prohibited ground of discrimination was present in the mind of the respondent, however minor a part it may have played in the eventual decision."

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However, it cannot possibly be held that mere knowledge of a handicap or characteristics such as the heart attack in this case, or colour or sex in other cases, constitutes discrimination. One must prove that the Complainant suffered an adverse consequence as a result of the handicap or characteristic, one which he or she would not have suffered if the handicap or characteristic had not been present. This was expressed in Payne v. Calgary Sheraton Hotel (Alberta Board of Inquiry, 1975) as follows:

"In determining whether or not a person has discriminated against another person the action must be looked at from the point of view of whether intentionally or unintentionally the person doing the act has in some way, offended the dignity of the person with whom he is dealing."

Evidence

In deciding whether the National Harbours Board practiced

discrimination against Mr. Richards in this case, I will first turn to the question of whether or not there has been a "refusal to continue to employ", and whether or not Mr. Richards intended to resign by his letter of January 24, 1979, addressed to Mr. Ray Beck, General Manager of the Port of Halifax. The solicitor for the Respondent has urged upon the Tribunal the existence of many facts which, he contends, support the contention that this letter was intended as a resignation. (see Mr. Campbell's summation, at pages 604-616) Many of these factors are conclusions which he has drawn from the evidence, which are necessarily subject to findings as to the credibility of the various

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witnesses.

He alleges the fact that Mr. Richards was concerned that Mr. Noddin, his next-door neighbour and co-worker at the Board, might

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have told Mr. Beck about his imminent "resignation", before the letter was received by Mr. Beck, indicated that he intended the letter as a resignation. I don't think that this conclusion necessarily follows. Mr. Richards testified that he was concerned that the matter go through the proper channels, and felt that Mr. Beck should hear the news directly from himself. I do not find this an illogical explanation, and I find Mr. Richards credible on this matter. Nor do I accept the contention that Mr. Richards, by referring to the January 24 letter as "my retirement letter" (in Exhibit R-7) some ten months after the letter was written, is conclusive. Throughout the evidence presented at the hearing the words "retirement", "leave of absence", and "resignation" have been used with very little precision, and I feel it would be unfair to conclude that Mr. Richards' use of the word "retirement" in a letter not directed to the employer, and written many months after the event, should be seen as evidence of his intention to have resigned.

Another factor urged by the solicitor for the Respondent is evidence from Mrs. Bellefontaine, wife of David Bellefontaine, that she overheard Mr. Richards indicate to her husband at a dinner party in early January, 1979, that he would be leaving the Board. She testified in direct examination as follows (at

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page 200):

Q: And what if anything can you tell me as to what he might have said with respect to his employment with the National Harbours Board?

A: Well, Mr. Richards and David were down in the rumpus room and they were over by the bar and Mrs. Richards and I were talking and David and Mr. Richards were talking and I recall him telling David not to worry, that the job was his.

Q: Yes, and what job did you assume he was referring to?

A: Mr. Richards' job.

On cross-examination, Mrs. Bellefontaine admitted that she was approximately twelve feet from her husband and Mr. Richards when she allegedly overheard the conversation, and that music was playing. (Mr. Bellefontaine thought it was closer to twenty feet from the sofa where his wife and Mrs. Richards were sitting, and the bar where the conversation was supposed to have taken place. - at page 431) It was also apparent at the hearing that Mr. Bellefontaine is a very soft-spoken man. While I do not wish to disbelieve Mrs Bellefontaine's testimony, I find that all of these factors, as well as the fact that the conversation took place two years ago, lead me to conclude that little weight should be given to this evidence.

Mr. Campbell argues that the fact that Mr. Richards admitted that he usually makes drafts of his letters and that the January 24 letter was a second and final draft, that it was carefully written

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and that it was a difficult letter to write, weighs in favour of the letter being intended as a letter of resignation.

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Otherwise, says Mr. Campbell, "if all he were doing was applying for disability benefits and nothing more... (he) wouldn't be too concerned about it". I do not agree that this is the only conclusion which can reasonably be drawn. Mr. Richards would probably do two drafts of even a letter advising that he would be applying for disability benefits; he testified that it was a practice of his to do this (at page 105). The fact that he found the letter difficult to write is not inconsistent with his applying for long-term disability, as this would mean a lengthy absence from his employment, something that he would apply for only when there are few, if any, other options.

Another fact to which Mr. Campbell points is that Mr. Richards knew of Dr. Fraser's diagnosis when he wrote the letter, that is, that he knew he was disabled and unfit for work. I do not see that this has any bearing at all on whether the letter was intended as a resignation, since Mr. Richards states explicitly in the letter that he is following his doctor's advice in leaving his job and applying for long-term disability.

Also, the fact that Mr. Richards' sick leave credits had expired, and that he had to do something about his status vis-a-vis the Board, indicates to Mr. Campbell that, realizing that there were no other options, he decided to resign. His interpretation of the situation was that Mr. Richards had never stated that he applied for leave without pay, and Mr. Beck

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would have been the person to grant it; he did not do so, hence the

resignation letter. With respect, I find that there was another option, and that is, to apply for long-term disability, as Mr. Richards' letter on its face indicates.

Mr. Campbell alleges that David Bellefontaine's evidence to the effect that Mr. Richards had made encouraging remarks to him at the dinner party regarding his job, and on another occasion in the context of Mr. Bellefontaine taking a job in Ottawa, goes to the intent of the letter. However, I find that these comments are not inconsistent with an intention to apply for long-term disability benefits. If this were the intent, Mr. Richards would be aware that he would be absent from his job for some time, perhaps even a year or more; he also knew that David Bellefontaine had been appointed as Acting Port Financial Officer, effective August 1, 1978. There would be no reason for him not to encourage David Bellefontaine to stay with the Board in Halifax, as his position as Acting Port Financial Officer would be assured due to the fact that Mr. Richards was going on disability.

Evidence was heard from Mrs. Jessie Noddin, wife of John Noddin, a co-worker and neighbour of the Richards'. Mr. Noddin died in

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October of 1980. Her testimony states in part, as follows (at page 354):

Q: In fact, did you know that Mr. Richards was about to write a letter of January of '79 to his employer?

A: No, I didn't know that until after.

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Q: When did you come to learn it?

A: My husband told me.

Q: What was your impression from speaking with your husband, as to the intent or import of that letter?

A: Well, to my knowledge, I thought he was retired. And further, at page 359,

Q: What, if anything, did Mr. Richards tell you about David's Ottawa job application?

A: He told me or he told it to both of us, that David was offered this job in Ottawa. He would, you know, he was resigning or leaving, whatever. I couldn't see why he wouldn't take his job because he had to uproot his family and he would be just as well off taking his job over as going to Ottawa.

Q: What if any impression did you get as to whether Mr. Richards was advising David to take the Halifax job, rather than the Ottawa one?

A: Yes, he was.

Mrs. Noddin gave evidence that relations between the two families - the Richards' and the Noddins' - were not good, although it is not exactly clear when or why the relationship began to cool. Both pieces of evidence cited refer to an assumption or feeling that Mr. Richards had resigned, rather than having heard directly from Mr. Richards that this is what he was doing. Assumptions reached by a neighbour who has admitted to bad feelings with Mr. and Mrs. Richards should not be given too much credence.

There is a conflict in evidence over whether or not Mr. Richards requested Mr. Bellefontaine to clear his (Richards') personal belongings from his office and return them to his home. Mr.

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Bellefontaine alleges that the request was made at the January dinner party (at page 401); he further states that Mr. Richards asked him to do it "quietly" (at page 433). His evidence is corroborated by his wife. Mrs. Noddin also testified that she

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visited the Richards' home one evening, and Mr. Richards told her that the pictures she admired had come from his office, and that Mr. Bellefontaine had brought them home for him. Mr. Richards denies having asked Mr. Bellefontaine to remove his personal effects from his office, and stated further that "I was very surprised when they were brought home to me" (at page 125). Regardless of whose evidence is believed on this matter, it is doubtful whether the conclusion would be indicative of an intention to have resigned. As I have stated previously, if he were applying for long-term disability, he would be anticipating a lengthy absence from his job. He knew that David Bellefontaine was filling his position in a "acting" capacity. A desire to clear his effects from his office is not inconsistent with his intention to apply for disability benefits, rather than retirement.

The last piece of evidence urged by Mr. Campbell as weighing in favour of an intention to resign is the letter of January 24 itself. It states that he has been advised by his family doctor "to discontinue work because of the condition of (my) health". Use of the phrase "discontinue work" is, I think, significant. Mr. Richards admitted to making drafts of his letters and of taking particular care with this one. He did

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not use the word "retire" or "quit", nor did he request a leave of absence. I suggest that this was done because he did not want the letter to be interpreted as a letter of resignation, but as a letter informing his employer of an application for long-term disability.

He says" "I have no alternative but to accept the advice of Dr. F. Murray Fraser and must therefore with reluctance, advise that I am



applying for disability benefits under the terms of the Public Service Management Plan". This sentence is clear in its intent, and is only capable of another interpretation than that of applying for long-term disability, with some distortion.

He encloses certain documents for processing, all relating to his claim, and refers to the fact that his sick leave credits have been used up, and that he may be eligible for some severance pay. He stated that he wished the severance funds to be placed in an RRSP, and that he would inform them of the company administering the plan. He never did inform the Board of the name of the company. It was not disputed that severance pay is usually only tendered when the employee has ceased employment. However, Mr. Richards gave evidence that there had been an occasion at the Port of Halifax when some longshoremen who were laid off were permitted by the Public Service Alliance to opt for their severance pay, even though they had not terminated their employment. Mr. Beck did not deny this, but noted that Mr.

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Richards was not a member of the Public Service Alliance. However, in cross-examination, Mr. Beck stated as follows (at page 286):

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Q: Do you think it's possible that Mr. Richards might have thought that he would be able to collect severance pay?

A: To be fair to him, yes.

While it is admittedly an unusual situation, it would not be illogical for Mr. Richards to think that he might be permitted to opt to take his severance pay at the time of going on long-term disability. He stated that he felt it was an option, and I accept his evidence on this matter. In the letter, he mentioned the life insurance with the Board, as well as Blue Cross. He wanted to continue his participation with Blue Cross, because of his inevitable need for prescriptive medicine in the future, and said that he would "remit annually to the pay office twelve post-dated cheques for the full cost amount of the plan at no cost to the Board". I do not find this necessarily inconsistent with notification of a pending application for long-term disability.

He enclosed two keys, one for the main National Harbours Board building, the other for the Port Financial Officer's office. In his evidence, Mr. Richards stated that at the time of writing the letter, he had been off work for several months on sick leave (from August 1978), and was anticipating a further lengthy absence. He would have no need for them when he was on disability. This was not contradicted in cross-examination.

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In the last paragraph of the letter, Mr. Richards thanks Mr. Beck for his patience and understanding in the past while he "occupied" the position of Port Financial Officer, saying that "without these

my job would have been most difficult". The solicitor for the Respondent suggests that the use of the past tense implies that Mr. Richards would not be returning to his job, and that he would be resigning. Mr. Richards explained the use of the past tense, at page 60:

Q: ... Why would you use the past tense if you were thinking that you were applying for Disability Insurance?

A: The past tense was used in this context because I hadn't been occupying if you will, physically occupying the Port Financial Officer position for several months from August until January and it was customary for me to, well, it's not customary, but I was referring to my position prior to my illness. I had nothing else to relate that to."

I accept Mr. Richards' testimony on this matter, and do not find the use of the past tense to be indicative of an intention to have resigned.

Therefore, I conclude that the letter written by Mr. Richards to Mr. Beck on January 24, 1979, was not intended as a letter of resignation. I am not sure that it is necessary for this Tribunal to direct itself to the question of whether the employer had reasonable grounds for treating this letter, regardless of its intent, as a voluntary resignation. Mr. Campbell urged on the

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Tribunal the fact that the employer would

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be at a most unfair disadvantage if it could not interpret this as a resignation, in light of the wording of the letter and the surrounding circumstances. He quotes the case *Re Government of British Columbia and British Columbia Government Employees' Union* (1977), 17 L.A.C. (2d) 42 in which the arbitrator referred to the significance of an expression of an intention to resign, and concluded as follows:

"I suggest that it would put an employer at a completely unfair disadvantage if an employee could issue and withdraw resignations at will. The potential for harassment of management would be enormous."

The question of the reasonableness of the Board's reading of the letter as a voluntary resignation does not have to be dealt with by this Tribunal, so long as it can be found that it was not done on a discriminatory basis. This is a matter for either the civil courts, or for a tribunal dealing more generally with employment. The jurisdiction of this Tribunal only extends to matters of discrimination.

Regardless of the intent of this letter, I feel compelled to conclude that it was interpreted as a letter of resignation, rightly or wrongly, by the officials at the National Harbours

Board. There are several factors which lead me to this conclusion. Even though Mr. Beck's acceptance letter of January 26 does not specifically refer to "retirement", "quitting", "leave of absence", or "long-term disability", and is fairly ambiguous in its phrasing, certain actions resulted from receipt of Richards' letter and the reply letter of Mr. Beck.

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Perhaps the most important result is that Mr. Beck immediately spoke with David Bellefontaine - if appears to have been on the same day that Mr. Beck wrote to Mr. Richards - about the possibility of him taking over the job of Port Financial Officer on a permanent basis. Mr. Bellefontaine accepted the job offer, and the permanent replacement for Mr. Richards was approved by Mr. Simmons, Chairman of the Executive Committee, on January 30, 1979. Further, a memo was sent to all Department Heads, from the General Manager, dated February 2, 1979, stating:

"This is to advise that Mr. David Bellefontaine has been promoted to the position of Port Financial Officer effective February 1, 1979. Your usual cooperation with the Finance Department is anticipated and appreciated."

Further indication that Mr. Richards was no longer considered an employee of the Board after the January exchange of correspondence are the facts that mail directed to the Port Financial Officer was no longer directed to Mr. Richards at home, and phone calls

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relating to requests for information or advice from the Board to Mr. Richards ceased around this time. This was confirmed in the testimony of Messrs. Richards, Beck and Bellefontaine.

Another factor is a form introduced into the evidence as Exhibit R-12 under the heading "Employee General Changes". Mr. Bellefontaine testified that the purpose of the form is to activate the master file to deal with changes in an employee's status for payroll purposes. This form indicates that, for the internal purposes of the Board, Mr. Richards had ceased to be

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an employee.

Finding:

I have no hesitation in concluding that Mr. Richards' letter, even though intended by him as notification of an application for long term disability, was interpreted by the Harbours Board as a resignation. This was stated in evidence by Messrs. Beck, Simmons and Bellefontaine, and corroborated by their actions. Since it was not intended as a letter of resignation but was interpreted as such, it follows that Mr. Richards was refused continuation of his employment. It certainly does not seem unreasonable for Mr. Richards to have assumed, in the period between January and August

1979, that he was still an employee since he had not been notified to the contrary by the Board until August 17.

However, the onus is on the Complainant to prove, on the balance of probabilities, that the Harbours Board discriminated against him on the basis of physical handicap, and not merely to prove that he was denied continuation of his employment. In making the finding as to whether discrimination existed, it is not necessary to find a discriminatory intent. It should be noted that there was no evidence of such a discriminatory intent by the Board at any time; in fact, feelings between the employer and Mr. Richards until August 1979 seemed quite cordial, and Mr. Beck had stated in evidence that Mr. Richards was a valuable employee of the Board.

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The Complainant's onus in this case is not to prove that Mr. Richards was unjustly dismissed, or unfairly treated by the Board, or that as a result of a misunderstanding, his status as an employee was adversely affected. He must prove that there was discrimination on the basis of physical handicap.

I am unable to conclude, on the basis of the evidence, that the Complainant's onus has been satisfied, and that a violation of the Canadian Human Rights Act has occurred. Even though a misunderstanding occurred between Mr. Richards and the National Harbours Board as to his status, there is no evidence either that the physical handicap played any role in bringing about the misunderstanding, or that the conduct of the Board produced

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discriminatory results. There was no conclusive evidence that the fact of Mr. Richards' heart attack, per se, led to unjust treatment at the hands of his employer, or that the Board refused to continue to employ him because of his heart attack, the internal administrative problems notwithstanding. (One could speculate that such a misunderstanding might have been precipitated by events other than illness, for example, if an employee intended to apply for leave without pay, and this was interpreted by the employer as a resignation.) It is my conclusion that the fact that Mr. Richards was refused continuation of his employment with the Board was the result of factors unrelated to discrimination on the basis of physical handicap. There is no question that adverse consequences were suffered, but I am unable to find that they were suffered because of a "human rights" reason, to

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bring them within coverage of the Canadian Human Rights Act. Having concluded that there was no discrimination, it is not necessary to deal with the existence of a bona fide occupational qualification under section 14.

On the basis of the evidence and for the reasons cited herein, I find that the National Harbours Board did not discriminate against

Mr. George Richards on the basis of physical handicap. Therefore, the complaint is dismissed.

I would like to make some comment on the handling of personnel matters within the National Harbours Board in Halifax. At the time of the complaint, there was no position such as "Personnel Manager" in the Halifax office. There was a person called a "Personnel Assistant", the position being filled by Mr. D. M. White. Several memos, signed by Mr. White, were tendered as exhibits, indicating that Mr. Richards was on a leave of absence. They include: Exhibit C-7, dated January 30, 1979, which appears to be a payroll form signed by Mr. White, stating that "... Effective February 7, 1979, Mr. Richards will be considered on Leave Without Pay until further notice"; and Exhibit C-8, dated February 5, 1979, which is a letter for Mr. Beck's signature but signed by Mr. Merrigan, the Administrative Officer, and apparently drafted by Mr. White, telling the Department of Supply & Services that "... effective February 7, 1979, we would consider this employee on Leave Without Pay". It should be noted that Mr. White had no authority to hire or fire or to grant leave without

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pay, nor was it ever suggested that he had such authority. While these two forms were used for internal purposes only, they do indicate either that Mr. White was incompetent or that he had not been informed of the decision that had been reached with respect to Mr. Richards.

Mr. Beck admitted that he acted in error when he advised Mr. Richards at their May meeting that he could return to work "on Tuesday". He is to be commended for his candour with the Tribunal,

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but it must be noted that a person in his position, capable of exercising considerable decision-making power with respect to the employees under his jurisdiction, should not have led Mr. Richards to believe that his position was still available with the Board, even though it had been offered on a permanent basis to someone else at least four months previously.

Mr. Campbell's interpretation of the events surrounding the May meeting are found in his closing argument (at page 648), and should be noted:

"... Mr. Beck being the humanitarian that he is, and being the kind of guy who wants to help out, and especially since Mr. Richards said, "Look, all I need is a couple of years because as soon as I get to be age fifty, I can get a Superannuation disability pension or regular Superannuation pension." In light of all that, Mr. Beck says to him, "Well, I'll see what I can do." He says, "Well, I'm ready to report for work." Mr. Beck said, "Well, let's look at Tuesday." That's a time frame that Mr. Beck just - as being a nice guy like he is, can't look the man in the eye and just say, "Well,

you'll just have to go on Welfare." He can't look him in the eye and say that. He makes an error. He's saying in his own mind, "We'll create a job for him. This is a big

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organization. We'll create a deputy position or something." So he runs off to the chief executive officer attempting to sell that idea of creating a position out of the goodness of his heart, and he is turned down by Mr. Simmons saying, "No, we don't have the budget for it. We can't do that, you'd better tell the man that we can't do that." But Mr. Beck just doesn't have the heart to go back to him and say he is definitely out in the cold... So the next several weeks are spent trying to turn the medical records around. Dr. Fraser gets in the way, Dr. Glynn gets in the way, Dr. Sinclair gets in the way. Finally, on August 1 there is an indication that he is fit for work. At that point in time, Mr. Beck finally has to look him in the eye and say, "Look, I really want to help you but there's no job for you. I'm secretly hoping that something will come up or something that could be created, or the budget maybe can be pulled..."

While this statement of the surrounding facts is slightly overstated in parts, it does indicate a possible explanation for Mr. Beck's conduct at this time. It is absolutely clear to me that, at this May meeting, Mr. Beck knew that there was no job for George Richards. Not only was Mr. Richards not told this, he was told that he could come back to work within a few days. Even after Mr. Beck had discussed the matter with Mr. Simmons (who had in turn discussed it with Mr. Gagnon in Ottawa), Mr. Beck did not tell Mr. Richards that there was no job. Instead, he led Mr. Richards to believe that the only thing holding up his return to work was clarification of the medical report. To this end, Mr. Richards was sent to the doctor at Health & Welfare in Halifax. This whole procedure looks like a stalling tactic on the part of Mr. Beck, who appeared to be trying to put off the day when he would eventually

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have to tell Mr. Richards

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that there was no job for him. This was finally done by the August 17 letter. This delay was unreasonable and extremely unfair to Mr. Richards; one would expect more business-like conduct from a person in Mr. Beck's position.

While it is my opinion that the handling of personnel matters within the National Harbours Board offices in Halifax at the time of these events leaves much to be desired, the matter is outside the scope of this Tribunal.

I would like to acknowledge with thanks the work of Mr. Michael Glynn, Tribunal Officer, and also to commend the lawyers involved in this hearing for their most able and persuasive arguments.

Dated at Halifax, Nova Scotia, this 30th day of April, 1981.

Susan Mackasey Ashley  
Tribunal

Appendix attached