

T. D. 4/ 89 Decision released February 22, 1989

THE CANADIAN HUMAN RIGHTS ACT (S. C. 1976- 77, C. 33 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JOSEPH PEDERSON Complainant - and

CANADIAN ARMED FORCES Respondent - and

CANADIAN HUMAN RIGHTS COMMISSION Commission

TRIBUNAL: Wendy Robson, Chairman

Harish C. Jain, Member

Hugh Fraser, Member

DECISION OF TRIBUNAL

APPEARANCES:

CHERYL CRANE AND PAT LINDSEY PECK Counsel for the Canadian Human Rights Commission

BRIAN SAUNDERS Counsel for the Respondent

DATES AND PLACE September 13- 14, 1988 OF HEARING: Kingston, Ontario

> 2 INTRODUCTION

The complainant, Joseph Pederson of Yarker, Ontario alleges that the Respondent, the Canadian Armed Forces, has engaged in discriminatory practice on the ground of religion in a matter related to employment pursuant to Section 7(b) and Section 10(a) of the Canadian Human Rights Act (hereinafter called the "Act").

Mr. Pederson first became a member of the Royal Canadian Air Cadets at age 13 and after four years with the Cadets joined the North Saskatchewan Regiment, an infantry reserve unit, for a further two years. In 1975 he joined the regular Canadian Armed Forces and after training was posted to Calgary, Alberta with the first Battalion PPCLI. He served as an infantry soldier until 1979 and during that period did a six month tour of duty in Cyprus.

He re-engaged in the Armed Forces in 1977 for an indefinite period but in 1980 applied to enter the electrical trade in the Armed Forces. Permission was granted and he commenced training as an electrician. By the time he left the military he had acquired a Trade Qualification Level 4. Although a person entering the electrical trade would have received lower pay at a lower rank, Mr. Pederson was permitted to retain his seniority for both rank and pay.

Mr. Pederson had no particular religious beliefs at the time he commenced his electrical training but after he was posted to CFB Kingston, he became involved with the Worldwide Church of God.

Initially his wife had attended some church meetings and at the end of October, 1983, Mr. Pederson started attending Church meetings and was finally baptized into the Church March 13, 1987.

The relevant tenets of the Worldwide Church of God include strict observance of the Sabbath which is from sundown Friday evening until sundown Saturday evening. No work is to be performed on that day'. In addition there are fourteen holy days which require abstinence from work.

In 1983, Mr. Pederson was working in the electrical shop at CFB Kingston generally performing a regular shift from 7:30 a. m. until 4 p. m., Monday to Friday. In July of 1984, he was advised that he would be posted to CFB Alert for an eight week period. He advised his superiors that there would be a conflict with his religious observances. He was subsequently advised that he was under contract to serve on a 24 hour basis whenever he was called upon to do so and he would have to proceed to Alert or face disciplinary action. He went to Alert and while others worked Monday through Saturday he worked Sunday through Friday. One holy day occurred during his time at Alert and he was required to work although he had asked to be relieved of his duties.

October 11, 1984, he returned to CFB Kingston and resumed his work in the electrical shop.

In addition to the regular schedule of work outlined above, the military electricians are also required to perform duties on a roster basis outside the regular hours and on weekends.

The Base Duty NCO was to be in the mess hall and to be at headquarters to deal with telephones and incoming personnel. For the most part Mr. Pederson was able to switch those assigned duties with other personnel in order to keep his religious observances.

The other duty required outside regular hours was the position of the Duty Engineer, a seven day term of on-call for trouble situations. Although he undertook those duties, he always arranged for someone else to take the pager on Saturday for the trouble calls.

In order to maintain observances, he also arranged leave for certain days if there was a conflict.

Until May of 1985, this arrangement seems to have worked

reasonably satisfactorily. On the Wednesday prior to May 25, Mr. Pederson was told that he would be working on Saturday, May 25 as it was Canadian Armed Forces Day. He then spoke to Warrant Officer Gallant saying he could not work on that day and wondered if someone else could do it for him. Apparently no one else was available from the military electricians and he would have to do it. He then spoke to Lieutenant McQuillan on Thursday who said he would look into it and get back to him. The Lieutenant advised him on Friday that he was required to

work on the next day but he could grieve the order later. Mr. Pederson indicated that he would not be there and the Lieutenant gave him a written order to report for duty.

Mr. Pederson disobeyed that order and spent the Saturday observing one of the holy days in his church. He was charged, appeared before an Orders Parade June 11, 1985 and was fined \$400 which was deducted from his pay.

Following the Orders Parade and at the suggestion of the Base Commander, Mr. Pederson met with the Base Chaplain, Major Saunders, Major Playford and Mr. Kurnik, a minister of the Worldwide Church of God. The upshot of that meeting was that Mr. Pederson should apply for a voluntary release from military service. Mr. Pederson thought that a good idea but wondered if he could stay in the Forces long enough to take his Trade Qualification 5 level which would assist him considerably, in civilian life but during that period of time wished to avoid work on his Sabbath or holy days. He was advised that there could be no guarantee that he would not have to so serve. At that he decided to apply immediately for release and did so also requesting an exemption from the six month notice period. The exemption request was denied and he was finally released December 24, 1985.

Major Alexander gave evidence that the six month requirement before release was to ensure that sufficient trades people were in the forces to meet usual requirements. Mr. Pederson's early release had been denied because the electrical trade was short two people. From the evidence,

> 4 there would appear to be only 131 military electricians on strength at the time of Mr. Pederson's request. The 131 included ten serving overseas in Europe, Cyprus and Damascus.

In cross-examination Mr. Pederson was asked what duties he would perform as a military electrician. He indicated that he was prepared to work only in Construction Engineering and was not prepared to do weekend duty either at CFB Kingston or in a field hospital. He also said he would refuse to go to war and he would refuse to serve in a peace-keeping operation.

Mr. Pederson complains that the Canadian Armed Forces unfairly discriminated against him in that they did not make provision for his religious observances, that they did not expedite his release and that his treatment by the Armed Forces had an adverse impact on him. He further alleges that there was no bona fide occupational requirement and therefore a duty to reasonably accommodate his religious practices existed, which duty was not met.

Counsel for the Canadian Armed Forces alleges that if there was discrimination then it is exempt because of the bona fide occupational requirement that a member of the Armed Forces be available to serve 24

hours a day, seven days a week. Colonel Tattersall of National Defence Headquarters gave evidence as to the requirements of service in the Canadian Armed Forces in both war and peace.

He was asked at p. 108 vol. 1, transcript "... what hours of work the members of the Canadian Forces are expected to be available for duty?"

He answered, "You are never off duty. There is no such thing as being off duty. Even if you're on leave you can be recalled. If you're sleeping in the middle of the night, you may be called to go in, but you're never really off duty."

THE LAW It is clear from the law that discrimination can occur intentionally or unintentionally.* once the discrimination is found, the only exception can be for a bona fide occupational requirement.

The test for a bona fide occupational requirement is set out in the Etobicoke case at page 208 when Mr. Justice McIntyre says:

> 5 "(it) ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the Adequate performance of the work involved ... and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code."

Bhinder v. C.N.R. (1985) 2 S.C.R. 561 Ontario Human Rights Commission and O'MALLEY v. SIMPSONS- SEARS LTD (1985) 2 S.C.R. 536

Ontario Human Rights Commission v. Borough of Etobicoke (1982) 1 S.C.R. 202

FINDINGS On the evidence there was a prima facie case of unintentional discrimination against the complainant, Mr. Pederson. His religious requirements were in conflict with his employment as a member of the Canadian Armed Forces.

We further find that there is a bona fide occupational requirement that all members of the Canadian Armed Forces be prepared to work seven days a week and 24 hours a day if required in times of peace or war. The military can require the ultimate sacrifice in the commission of its duties under the National Defence Act and the Queen's Orders and Regulations. To accommodate Mr. Pederson could place some other members of the Forces at additional risk. Mr. Pederson, well-grounded in military service and well aware of its requirements was candid in his unwillingness to serve in war or in peace-keeping.

Having found a bona fide occupational requirement, we do not feel it necessary to deal with a duty to accommodate.

The complaint fails. Wendy Robson H. C. Jain Hugh Fraser