T.D. 17/95
Decision rendered on December 18, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

GORDON NELSON

Complainant

- and -

DEPARTMENT OF NATIONAL DEFENCE

Respondent

TRIBUNAL DECISION

TRIBUNAL: J. GORDON PETRIE, Q.C., Chairman

APPEARANCES: Gordon Nelson, Per se,

Margaret Rose Jamieson, Counsel for the Canadian Human Rights Commission

Michael F. Donovan and Major Randall Smith, Counsel for the Respondent

DATES AND LOCATION
OF HEARING:
May 31 to June 4, 1993
January 10 to 12, 1994 and
November 28, 1994
Fredericton, New Brunswick

Gordon Nelson became a member of the Canadian Forces on February 5, 1980.

In June 1983, Private Nelson was struck by a motorcycle while crossing a highway at CFB Chatham.

Initially, Private Nelson's right leg was amputated below the knee as a result of the accident.

However, it was later determined that an above-the-knee amputation was required and the surgery was ultimately concluded in August, 1985.

As a result of the accident and related surgery, Private Nelson was assigned medical categories within those created and utilized by the Forces.

Private Nelson was fitted with an artificial leg and, although he continued to experience a great deal of pain, he continued to carry out assigned functions within the Forces.

On September 7, 1983, after examination at Base Chatham, Private Nelson was temporarily assigned a medical category of G404, meaning "no field duty, no postings or T.D. no sea duty, unfit compulsory P.T." (See Exhibit R-8, Tab 32).

On March 7, 1984, Private Nelson was medically examined once again and assigned a permanent medical category of G304 carrying the following restrictions: "unfit heavy physical labour, lifting, light duties only, requires CMRB decision" (See Exhibit R-8, Tab 43).

On November 6, 1984, the Complainant's category was further revised to G304 with the following restrictions: "Unfit Sea Duty; Unfit Isolated Postings, Fit to drive automatic transmissions only, Requires CMRB decision"(See Exhibit R-8, Tab 51).

The Surgeon General finally in March 1985 revised the category as follows "G4 - unfit field, sea, UNEF, medically isolated postings. Requires physician services readily available. 03 - fit to drive automatic transmissions only. Unfit running. PT at own pace" (See Exhibit R-8, Tabs 57 and 58).

The medical categorization of Private Nelson was reviewed by the Director Personnel Careers Other Ranks (DPCOR) group, which concluded that the complainant was physically capable of performing 25% of positions of his current rank (MSE Op) and 27% of the positions of his next higher rank and trade. (See Exhibit R-3, Exhibit 9, Tab 61).

Finally, the Career Medical Review Board (CMRB) issued a decision on Private Nelson in May, 1985 in the following terms:

"The Board agreed that there was no option but to release Pte Nelson under the provisions of QR and O Article 15.01 Item 3(b). On medical grounds, being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable under existing service policy. He is to commence terminal leave 19 Aug. 1985 or earlier if he so desires." (See R-9, Tab 62)

Private Nelson remained in the Forces and as noted above, had further surgery in August, 1985.

During that month, he also filed a grievance within the Forces internal grievance procedure (HR-16). In the grievance, the Complainant acknowledged that he was not fully employable in the M.S.E. Op trade but sought the Forces intervention to remuster him to another trade.

The Complainant further alleged that his release was discriminatory and mentioned another member of the Forces with a similar disability, who remained within the Forces.

Furthermore, the grievance specifically mentioned that Private Nelson was capable of operating vehicles with automatic transmissions, up to a 40 passenger bus.

After receipt of the initial response on his grievance, Private Nelson made a further submission on December 13, 1985 (HR-17). He raised in that submission, an issue which has remained a genuine concern to him throughout this lengthy matter, i.e., those who place a medical category on him being people with a personal familiarity with his abilities.

I must say in passing, that the Complainant's position is one which is attractive to me. As it is common knowledge that people can handle similar disabilities in a different manner, assignment of medical categories ought to be based, in part, upon knowledge of the individual's ability to cope with the problem.

In this submission, Private Nelson also raised the prospect that with a new leg yet to be fitted, it would be premature to remove him from the Forces, until he was provided the opportunity to be tested with this new apparatus.

Eventually, his grievance was dealt with by General P. D. Manson for the Chief of the Defence Staff (Exhibit HR-18) on March 20, 1987.

I will quote directly from that response, paragraphs 2 to 6 inclusive:

"2. In your original application, you stated your belief that you were not as restricted in your employment as your medical category indicated. In addition, you asserted that the decision to effect your release was discriminatory in

that you knew of a WO at CFB Greenwood who had lost a leg above the knee as a Cpl but nevertheless had been allowed to remain in the CF and even recently been promoted to WO rank. You asked why you could not be given the same chance as he has been given. After you had received the response to your grievance from the Comd, AIRCOM, you stated that you were willing to remuster to another trade, and you pointed out that your physical ability with your new leg not yet been determined.

3. As was pointed out to you by the Comd, AIRCOM, the decision with respect to the WO you mentioned in your application was made over twenty years ago and, since then, significant changes have occurred with respect to both Service requirements and the criteria upon which medical conditions are judged in relation to the decisions taken to retain, remuster, or release a member. Situations indeed change and, over the past few years, it has become increasingly evident that support trades have been overloaded with medically-limited personnel. The retention of members who are not fully employable results in an inequitable proportion of postings to fully employable members to isolated and field units while those members with limitations must be assigned to static units and bases. Under these circumstances, commanders of static units and bases have found themselves hampered in their ability to assign troops to physically-demanding and essential tasks associated with base defence, crowd control, aid to the civil power, and other real and simulated emergencies. Therefore, the existing Service policy, which reflects the needs of the Canadian Forces, is that the retention of a medically-limited member in his or her MOC or, the remuster of such member to some other MOC, can only be considered if the limitations and restrictions resulting from the medical condition are of such a nature as to not significantly affect the member's ability to perform the basic military

tasks which any member, most particularly a junior member, may be assigned.

4. Following a reassessment of your improved medical condition in early 1986, it is true that your medical category was upgraded, and that at that time you were given a less restrictive medical profile of G2M 03, with limitations as follows:

G2M - unfit sea
03 - fit to drive automatic transmissions only
- unfit running
- PT at own pace.

5. The Surgeon General has reviewed your case from a medical standpoint and has assured me that your medical category and resulting limitations as detailed above are appropriate to your medical condition. I can see no reason to disagree. However, despite the upgrading of your medical category, the facts are that you remain less than 60% employable in the MSE Op MOC because of your limitations. While the geographical (G) medical factor provides only that you are unfit sea duty, because of the occupational (O) medical factor limitations, your employment with a service battalion or with any other field unit would be very restrictive, and you would experience great difficulty in completing either the MSE Op TQ5 course or the Junior Leader's course.

6. In my view, to provide you with limited and favoured employment to accommodate the limitations resulting from your medical condition is not fair to the fully employable members of the CF and impacts negatively on the operational effectiveness of the Forces. Further, I believe that the G and O factors and limitations awarded you are appropriate to your medical condition. Therefore, I consider that the decision to effect your release from the Canadian Forces does not constitute personal oppression, injustice or any other form of ill-treatment. Accordingly, but regrettably, I must deny the redress that you seek."

It is interesting to note as well, that the CMRB reassessed Private Nelson's abilities on June 11, 1986 and concluded that he was fit for 47% positions for current rank and trade and 64% positions for next higher rank and trade. (See Exhibit R-9, Tab 109).

On June 11, 1986 a second CMRB conclusion was released, based upon further evaluations and assessments of Private Nelson. The conclusion in Exhibit R-9, Tab 110 was as follows:

"Pte Nelson's case has been re-examined in light of Ref. A, however, his occupational limitations have not improved sufficiently to permit his retention in the CF.

He is considered unfit for the MSE Op trade and because his limitations prevent him from performing many of the general military duties, (GSORS), required of all junior personnel regardless of trade, he unfortunately cannot be remustered to another CF trade."

The terminal leave date had been extended during the period of 1985 and 1986. Ultimately, the date for departure was set at July 7, 1986 or earlier, if selected by the individual.

The Complainant chose a release date of June 25, 1986 and, as Counsel for the Respondent points out, he thereupon became eligible for payment of a portion of his salary for two years.

I might add that I do not believe that anything turns on this fact which, simply stated, only shows that Private Nelson was aware of benefits arising within the Forces when faced with termination due to a disability.

The Respondent led a great deal of detailed evidence including videos descriptive of the functions and physical requirements of members of the Forces generally and the MSE Op trade in particular.

In addition, there was much medical evidence led before the Tribunal describing the limitations implicit in an above the knee amputation and the types of physical activities which are not achievable by a person suffering from that type of disability.

One matter was abundantly clear from all of the evidence: Gordon Nelson was a member of the Canadian Forces who took his duties seriously and had a complete devotion to and love of the life in the Forces.

Quite frankly, it is my sense of the evidence that the forced removal from the Forces was an issue which deeply hurt Private Nelson because of his devotion to the institution.

A fair, in my opinion, description of the Complainant is contained in HR-22, a letter of recommendation to potential future employers written by Major Stinson which stated as follows:

"TO WHOM IT MAY CONCERN

Gordon Warner Nelson enrolled in the Canadian Forces (Regular Force) in February 1980, took recruit training at Cornwallis NS, military driver training at Borden Ont, was posted to this Section in August 1980 and served here until his honourable release from the Forces in June 1986.

In June 1983 Gord was badly injured in a traffic accident and his right leg was amputated above the knee as a result. In the past three years he has recovered from that injury as far as hard and painful work and the latest in prosthetic technology will permit. In spite of several rounds of surgery and considerable frustration with the slow process of recovery and gaining competence in the use of his artificial leg, he has never given up, has kept up his spirit and has been a contributing member of the staff of this Section. He has
been coach of the section hockey team, pitcher on the softball team and a valued and active member of the section social committee.

Throughout the past three years, Gord has kept his provincial drivers permit. He was also allowed to return to driving military vehicles in the light and medium cargo classes and passenger vehicles from sedans to a 40 passenger bus. All of these vehicles have automatic transmission. He has not yet developed sufficient dexterity with his right leg to allow him to operate trucks with standard transmission. As a military driver licensing authority here, I have ensured that Gord was tested particularly carefully.

He did not experience difficulty and passed the tests well. When not driving, he was employed on administrative tasks and also did them well.

Put bluntly, Gord loves the Service and did not want to leave. His level of disability is such, however, that he cannot perform the entire range of duties demanded of CF members of his rank, regardless of trade and he therefore has been released.

I have known this man for five years. I have watched him struggle, persevere and succeed in minimizing, to the extent possible for him, the limitations imposed by his artificial leg. In the process, he has also matured considerably. I admire his courage and respect his efforts. I recommend him to any employee who seeks a man who can learn, who will work as hard as he is able and who will not quit."

Role of the Canadian Human Rights Commission

Prior to addressing the disposition of this complaint, I am compelled to address the above-noted subject.

Common to most of the complaints which reach the Tribunal stage for hearing, the Commission, through Ms. Jamieson, had carriage of this proceeding, she examined the witnesses on direct, marshalled the documentary evidence and cross-examined the Respondent's witnesses.

Private Nelson, not being schooled in the law, played on a subsidiary role and obviously relied upon the Commission's Counsel.

With but one witness remaining to be called in the hearing, Ms. Jamieson informed the Tribunal that she had been instructed to withdraw as Counsel for the Canadian Human Rights Commission and discontinue any further participation in the hearing.

The instruction was apparently based upon a decision in a similar

case, where the Commission had played a role as a participant.

However, the removal of Counsel in this matter in the circumstances, not only delayed the completion of the hearing, but more so placed Private

Nelson in an untenable position. He would have to retain Counsel with all attendant costs or complete the matter with his limited personal abilities in a foreign field.

Considering that a Tribunal must be created for a hearing when requested by the Commission, it was my opinion, and remains so, that the untimely removal of Counsel from this proceeding was unfair, unwise and most damaging to the Complainant.

While my authority is obviously limited to redress the matter, I would strongly recommend to the Commission that a removal of Counsel in similar circumstances only be carried out when adequate financial arrangements can be made with a Complainant to permit the completion of a proceeding which has commenced.

Frankly, I have not received a reasonable explanation for the removal of Counsel in this proceeding with but one witness remaining. The actions of the Commission were, in the circumstances, absurd.

The Decision

The Complainant has claimed that the Respondent's actions in terminating his employment from the Forces constituted a breach of sections 7 and 10 of the Canadian Human Rights Act.

There was insufficient evidence to support the alleged breach of section 10.

The legal issues to be determined therefore revolve around sections 7 and 15 of the Human Rights Act which follow:

"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. 1976-77,c.33,s.7.

15. It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to

any employment is established by an employer to be based on a bona fide occupational requirement;"

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It is common ground between the parties that disability is a prohibited ground of discrimination. The Respondent admits that unless it has established a bona fide occupational requirement under section 15, the complaint is valid.

The Respondent's actions, it submits, are in accordance with Article 15.01 of Chapter 15 authorized by the National Defence Act. The specific authority is contained in item 3(b) which provides for release on medical grounds where the individual is assessed as being disabled and unfit to perform his duties at his present trade or employment, and not otherwise advantageously employable under existing service policy. (See Exhibit R-2).

In short, the Respondent submits that the termination of Private Nelson due to an above the knee amputation is a bona fide occupational qualification for a member of the Canadian Forces.

Mr. Donovan, in his submission, points out that prior decisions of a similar nature have concluded that medical release from the Forces due to a physical disability constitutes direct discrimination. See Bouchard v. Canada (Armed Forces) 15 CHRR D/362 and Michaud v. Canadian Armed Forces Sept. 1993.

The definition of direct discrimination is contained in Alberta Human Rights Commission v. Central Alberta Dairy Pool (1990) 72 D.L.R. (4th) 417 at page 428 wherein Justice McIntyre stated:

"A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here". There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited

ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force...An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom

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it may apply."

If the issue is one of direct discrimination and not otherwise justifiable as a B.F.O.R., it will be struck down.

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In the Central Alberta Dairy decision, supra, the Supreme Court of Canada differentiated between direct and adverse effect discrimination in respect to the duty to accommodate.

In the latter situation, the employer must meet a judicial standard of accommodation. Failure to do so will result in a finding of breach of the applicable legislation.

On the other hand, if the work rule is deemed a direct discrimination and a B.F.O.R. is established, there arises no duty to accommodate.

In the instant matter, it is readily apparent that the category to be assigned to the Respondent's decision to terminate Private Nelson due to his disability becomes determinative of the issues, if the Respondent has established the B.F.O.R. defence.

While I have some hesitancy in characterizing the termination of Private Nelson as direct discrimination, I am persuaded that precedents in the field lead to that conclusion.

My hesitancy arises from the fact that there is no clear policy position that all members suffering from a disability will be removed from the Forces. Indeed there was reference in the evidence to some exceptions, although they appear to be quite limited.

I am however, satisfied from the evidence and representations that the Respondent has established a B.F.O.R.

The ability of members of the Canadian Forces to carry out all duties of regular members requires, in my opinion, a physical capability that Private Nelson was, despite his best efforts and sincere desire, unable to achieve.

The Respondent has further directed my attention to Canada v. Robinson (1994) 170 N.R. 283 (FCA) and Attorney General of Canada v. St. Thomas et al (1993) 109 D.L.R. (4th) 671 (FCA); and Canadian Human Rights Commission v. Canadian Armed Forces (Husband) (1994) 114 D.L.R. (4th) 721 (FCA).

These authorities in my opinion, support the position adopted by the Respondent both in respect to individual testing and the role of a soldier.

In conclusion therefore, I find that Private Nelson was subjected to direct discrimination in respect to his termination as a member of the Canadian Forces. However, the Respondent has established that such termination was based upon a Bona Fide Occupational Requirement.

The result is that the complaint is dismissed.

Dated this 8th day of November 1995

J. GORDON PETRIE, Q.C., Chairman