

T. D. 12/ 89

Decision rendered on August 17, 1989

THE CANADIAN HUMAN RIGHTS ACT S. C. 1976- 77, CHAPTER 33, AS AMENDED  
HUMAN RIGHTS TRIBUNAL

BETWEEN:

BUDDY LEE Complainant

AND:

BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION Respondent

TRIBUNAL: ROBIN ADAMS

DECISION OF TRIBUNAL

APPEARANCES:

Peter Carver Counsel for the Complainant

Rene Duval Counsel for the Canadian Human Rights Commission

Joan McEwen Counsel for the Respondent

DATES AND LOCATION OF HEARING: April 5- 6, 1988, June 7- 8, 1988 and June 29- 30,  
1988 Vancouver, British Columbia

The Nature of the Complaint

This case relates to a complaint brought by Buddy Lee that he was discriminated against by the British Columbia Maritime Employers Association (hereafter referred to as "BCMEA"), on the basis of physical handicap, contrary to Section 7( a) of the Canadian Human Rights Act. The complaint form (Exhibit A- 25) dated May 23, 1984, sets out the complaint as follows:

"I commenced work as a casual longshoreman in March, 1978. I worked steadily from that point until 14 March, 1983, at which time I was deregistered by the B. C. Maritime Employers Association. I was advised that my deregistration was the result of a letter of complaint from Columbia Containers Limited, dated 1 March, 1983, which stated that I appeared to be a slow learner and was very uncoordinated, and that I constituted a safety hazard to myself and other employees. Although I do have a minor speech impediment and a slight unco- ordination of my left extremities, I believe that I am capable of performing my duties safely and effectively, and that I have demonstrated that during my five years as a longshoreman. My physician has also confirmed my ability to perform the work. I believe that in refusing to continue to employ me, the B. C. Maritime Employers Association has engaged in a discriminatory practice, contrary to Section 7( a) of the Canadian Human Rights Act, on the basis of physical handicap."

The Sections of the Canadian Human Rights Act which are relevant to this case are Sections 7 and 14. Section 7(a) of the Act states that:

"It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination." Section 3 provides that "disability" is a prohibited ground of discrimination and the definition of disability contained in Section 20 of the Act is as follows:

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

The definition of physical handicap contained in Section 20 of the Canadian Human Rights Act, S. C. 1976-77, c-33, as amended, is as follows:

"physical handicap" means a Physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, 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." (my emphasis)

It is clear that Mr. Lee's particular physical problems, that is, a slight speech impediment, a somewhat awkward gait and a lack of co-ordination in his left extremities, fits within the definition of "physical handicap" under Section 20 of the Act.

If the complainant has made out a prima facie case of discrimination on the basis of disability, the Tribunal must then decide whether the Employer did not discriminate because of a "bona fide occupational requirement" within the meaning of section 14 of the Act, which states, in part, as follows:

"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 ...

The Facts The Complainant Buddy Lee, the Complainant, is a thirty-five year old bachelor, who was disabled as a result of brain injuries sustained as a child at the age of ten, which left him with a speech impediment, a somewhat awkward gait and a lack of co-ordination in his left extremities. He was employed as a casual longshore worker with the BCMEA from March 31, 1978, until his deregistration on March 14, 1983.

The Respondent The BCMEA is an association comprised of ship owners, stevedoring companies, dock operators and bulk terminal operators. It was established for the purpose of negotiating and administering collective agreements on behalf of 63 member companies with the International Longshoremen and Warehousemen's Union (hereafter referred to as the "Union"), Canadian Division.

Forty of the member companies are direct employers of labour on the waterfront.

The Employment Policies and Practices of the BCMEA It is important that the employment context in which the complaint arose be clarified as a prelude to examining the complaint in detail.

Work on the waterfront is performed by union members and casual labourers. In 1978, a casual worker had to start on E Board and work his way up through levels D, C, and B to A Board before he could become a union member. The system presently in place has only A, B, C and T Boards, as D and E have been removed. Once at A Board, an employee gets access to all of the benefits provided for in the collective agreement, pension and welfare benefits. "A" Board casuals are known as welfare casuals.

Movement from one Board to another is based upon an individual completing an average number of work hours at the lower level. A work record containing breaches of discipline may prevent upward movement. In addition, in order to pass from E Board to D Board the employee must pass a medical examination for longshoring work.

Mr. Cahan, collective agreement administrator for the BCMEA, described in his evidence the nature and relevance of these classifications, as well as the general character of conditions of employment on the waterfront. He explained that the BCMEA is responsible for the dispatch of qualified workmen to the various member companies. A regular work force, comprising approximately one-third ( $1/3$ ) of the total union membership, is employed by particular companies. A roster of union and non-union members is maintained to supplement that regular work force.

The BCMEA conducts dispatches of this work force which commence at 7:00 a. m. for daily dispatch employees, at 3:30 p. m. for the 5:00 p. m. shift and at 4:00 p. m. for the 1:00 a. m. shift. Union and casual longshoremen show up at the dispatch hall and work assignments are given out in accordance with seniority and ability. Some longshoremen have ratings which indicate that they have special skills and they receive work assignments utilizing those skills, otherwise the work is assigned in accordance with seniority.

Union members are given priority, and, by in large, have a choice where they want to work; provided that, whenever possible, an equal number of union members are spread among the member companies.

There is also evidence that the dispatch system is conducted in a sequence which first provides workers to those terminals located farthest from the hiring hall.

Casual employees are allotted the work that is left over after assignment to union members.

If any longshoreman, union or casual, turns down a job he or she is subject to a twenty-four (24) hour suspension.

Once the longshoremen, both union and casual, are assembled at the work site they are dispatched by the Employer to the various assignments in accordance with a dispatch list which is provided by the dispatch hall and is simply a list of names in seniority sequence. In most cases, the longshoremen work in crews of various sizes depending on the nature of the work to be performed.

In the event an employee presents a discipline problem or if his job performance is not up to standard, the Employer company has a number of recourses which include:

(a) the foreman on duty reprimanding or warning the employee; (b) calling in the union business agent to assess and deal with the situation; (c) firing the employee; (d) providing the BCMEA with a written request that the employee not be dispatched to that job site in the future.

When a longshoreman is fired on the waterfront he is fired for that shift. That doesn't prevent him, except in some unusual cases, from showing up for work the next day at the hiring hall and getting dispatched either to the same job site or to another one.

The BCMEA, in its capacity as administrator of the collective agreement between the waterfront member companies and the union, determines whether an individual should be deregistered. Firings and letters of complaint precipitate the deregistration process.

The work that Buddy Lee was expected to do as a longshoreman included, among other jobs, the following:

(a) destuffing containers; (b) loading and unloading sacks of grain and flour; (c) stacking cartons containing liquor in a specific pattern; (d) setting blocks; (e) shovelling coal; (f) working on wheat machines in the hold of ships; (g) loading wheat into trucks; (h) working on logships as a holdman loading and cutting bundles of logs.

#### Chronology of Events

1. March 31, 1978, Buddy Lee became employed as a longshoreman and was registered on the E Board.

2. May 11, 1979, Buddy Lee passed the medical examination required by the Welfare Plan Trustees for eligibility for consideration for "casual" status. (Exhibit A- 3).

3. December 1, 1980, Empire Stevedoring Company Ltd. fired Buddy Lee from his job at Vanterm where he was assigned as shedman destuffing containers.

4. March 2, 1981, the BCMEA deregistered Buddy Lee. > - 9 5. March 11, 1981, Vancouver Port Labour Relations Committee met to deal with the Union's grievance with respect to Buddy Lee's deregistration and Buddy Lee was subsequently reinstated.

6. March 24, 1981, Buddy Lee moved from D Board to C Board. 7. July 28, 1982, Empire Stevedoring Company Ltd., forwarded a letter of complaint to the BCMEA concerning Buddy Lee's non- appearance at the workplace (Exhibit A- 6).
8. August 11, 1982, Buddy Lee was dispatched to Berry Point to work as a holdman for Canadian Stevedoring Company Limited.
9. August 13, 1982, a letter was sent to and subsequently received on August 18, 1982, by Mr. Kaufman, president of the union, Local 500, from Alex Smith, Superintendent, Canadian Stevedoring Company Limited, requesting a log exemption for employee Buddy Lee. (Exhibit A- 16).
10. November 23, 1982, Port Labour Relations Committee met and considered Canadian Stevedoring's complaint in respect to Buddy Lee.
11. February 28, 1983, Buddy Lee was dispatched to Columbia Containers Ltd. to load wheat containers.
12. March 4, 1983, a letter of complaint was received by the BCMEA from Columbia Containers Ltd, concerning Buddy Lee (Exhibit A- 20).
13. March 14, 1983, the BCMEA deregistered Buddy Lee. 14. June 23, 1983, the union grieved Buddy Lee's case at a meeting of the Vancouver Port Labour Relations Committee.
15. August 25, 1983, the union advised Buddy Lee that it had decided not to proceed to arbitration on his behalf.
16. February 20, 1984, Canada Labour Relations Board hearing held in respect to a complaint filed by Buddy Lee alleging violation of Section 136.1 of the Canada Labour Relations Code.
17. May 23, 1984, Buddy Lee filed a complaint with the Canadian Human Rights Commission (Exhibit A- 25).
18. June 18, 1984, Canada Labour Relations Board decision was rendered and Buddy Lee's complaint was dismissed against the union and the BCMEA.

### The Complainant's Argument

The Complainant argues that he was perceived as being handicapped, that his Employer acted on that perception in its dealings with him and this ultimately led to his deregistration. It is his submission that the BCMEA made its decision regarding his employment on the basis of stereotype or upon a misconception about his handicap and not upon a fair and accurate assessment of his abilities. It is his further submission, that his work during the five years he was employed as a longshoreman was competent and did not of itself give rise to the concerns on which the Respondent acted.

The Respondent's Argument The Employer's position in respect to Buddy Lee's charge of discrimination is two submissions in the alternative. Firstly, it argues that there is no discrimination on the basis of physical disability and that Buddy Lee was dismissed for unsatisfactory work performance. Alternatively, should it be found that the deregistration was attributable in whole or in part to Buddy Lee's physical disability, namely, his co-ordination problem, the Employer says that the state of being coordinated is a bona fide occupational requirement of longshoring work and that, in addition to his disability preventing him from doing a fair days work, Buddy Lee's particular physical handicap renders him a safety hazard on the water front, both to himself and to his fellow workers.

The Employer submits that it made an individualized assessment of Buddy Lee's abilities that he was not prejudiced, and he was found not to have performed his job in a satisfactory manner, ergo, it did not discriminate.

In order to determine whether or not there was discrimination it is necessary to review the incidents which the Employer says led to its decision to deregister Buddy Lee.

#### 1. Empire Stevedoring Company Ltd.

On December 1, 1980, Buddy Lee was dispatched to Empire Stevedoring Company (hereafter referred to as "Empire") to work in its warehouse stacking cartons containing liquor. The foreman in charge that day was Bill Varhanik.

Mr. Varhanik gave evidence that Buddy Lee was paired with an individual by the name of Kuprowski and he instructed them to stack 40 lb cartons onto 42 x 48 inch pallet boards in a certain pallet pattern and at a certain height. They were working in a crew of four which included a lift truck driver and a checker.

Mr. Varhanik says he fired Buddy Lee during the shift because Buddy Lee was not paying attention to his job; in particular, he kept changing the pallet pattern and he was spending too much time standing around instead of working. Mr. Varhanik further testified that he warned both Buddy Lee and Kuprowski that he would fire them if they didn't pay more attention to the job.

The complainant gave evidence he received no warning from Bill Varhanik and that he and his co-worker were doing a satisfactory job despite the fact the cartons were vaguely marked which he says interfered with their ability to produce a proper pattern.

During the following exchange under cross-examination, Buddy Lee admitted to being warned:

Page 86, line 12 of the transcript:

Q. Okay, you say he had no discussions with you that day before he fired you?

A. Yes.

Q. None?

A. None.

Q. Okay, and I'm also advised by Mr. Varhanik that he warned you and Mr. Kuprowski that if you didn't get it right you'd be fired. Do you agree with that?

A. He gave me a warning.

Bill Varhanik has been a foreman for the past nine (9) years of his thirty- one (31) year career on the waterfront. He was described by Bruce Closter, operations manager of Vanterm, as a good foreman, and by William Kemp, First vice- President of the Canadian area of the union, as follows:

Page 340, Line 11 of the transcript: "Well, Billy likes to get things done, and that's what I guess Empire hires them for, he's the foreman and he supervises the help, gives them directions, starts them off on the job, and thats it. Its up to the individual, I guess, to hold his end up."

The Tribunal found Mr. Varhanik to be a credible witness and finds that he fired Buddy Lee for lack of productivity and for no other underlying reason. On the day in question he reported the complainant's lack of productivity to Mr. Closter and the firing was subsequently documented in a letter dated December 2, 1980 sent by Mr. Closter to the BCMEA (Exhibit A- 6) and worded as follows:

"Re: S. Kuprowski #25004 B. Lee #26701

The above named longshoremen were employed at Vanterm as shedmen destuffing containers on December 1, 1980. It was observed by their foreman as the job progressed that Mr. Kuprowski and Mr. Lee were not working in an efficient manner. After several warnings by their foreman, they were fired for non- productivity.

We recommend appropriate disciplinary action be taken based on the above case and these employees' previous history, if any."

This letter precipitated discussions between representatives of the union and the BCMEA which resulted in an agreement to have the two employees undergo a medical examination. A letter dated January 16, 1981, (Exhibit A- 7) from Mr. Hall, Assistant Agreement Administrator for the BCMEA to Mr. Kaufman, President of the Union - Local 500, purports to confirm this arrangement as follows:

"As a result, it has been decided that these two employees should be re- examined by the Industry medical examiner to ensure they can meet the medical criteria for suitability as long- shoremen ..."

The union's response to Mr. Hall's correspondence is documented in a letter addressed to him and dated February 2, 1981 (Exhibit A- 8) and it denies the

association's request for re-examination by the industry medical examiner. The BCMEA then deregistered Buddy Lee. The reasons for this action are set out in a letter to Mr. Kaufman dated March 2, 1981 (Exhibit A- 9):

"The above- named longshoreman employed at Vanterm on December 2, 1980, was reported to the association for the reason that he was unable to perform the work required of him in a satisfactory manner.

For this reason, Mr. Lee is hereby deregistered effective immediately pursuant to Article 2, Section 2.03 of the Collective Agreement for the reason of unsatisfactory conduct and performance and therefore is no longer eligible for employment with Employers covered by the said Collective Agreement."

The union grieved the deregistration and the matter was reviewed at a meeting of the Vancouver Port Labour Relations Committee on March 11, 1981.

The minutes of this meeting (Exhibit A- 11) include the following excerpt regarding the decision to re- instate Buddy Lee:

"8. B. Lee C26701 VA - deregistration The Union stated that they were grieving the deregistration of B. Lee on the basis of the reasons cited for his deregistration. It was pointed out that this employee has now been employed in this Industry for almost three years and that this was his first and only letter of complaint during this time. It was also indicated that Lee has a slight speech impediment which could tend to detract from his communication ability. It was also noted that in an attempt to improve his work opportunity on the waterfront, B. Lee was recently successful in obtaining an air brake endorsement on his drivers licence. The Union claimed that it would be unfair to deregister this man on the basis of only one relatively minor complaint.

The Association stated that although they had only received this one written complaint they had had other reports that Lee was having difficulty in keeping up and performing a fair days work. Furthermore, when his case had been discussed at the discipline subcommittee meeting it had been agreed by the joint representatives that he should be medically re- examined by the Industry medical examiner to reaffirm his suitability as a longshoreman. This jointly recommended action had been blocked when Lee had refused to take this examination ostensibly under instruction from the Local's President. Accordingly, without any other method of re- evaluating his suitability, the Association felt compelled to take the action which it did.

Based on the Union's assurance that they would give further consideration to the need for indicated special medical examinations, apart from the established Industry entrance examination, it was agreed to reinstate B. Lee at this time on a conditional basis that his future performance is to be closely monitored."

2. Canadian Stevedoring Company Ltd.



On August 13, 1982, Buddy Lee was dispatched to Berry Point to work on a logship as a holdman. This job entails unhooking a wire and steel babbitt attached to a sling filled with logs, dropping the sling over the load and getting out of the way while the operator pulls the sling away. Each load weighs approximately twenty- five (25) tons and consists of one (1) to fifty (50) logs. Once the bundles of logs are released the holdman then cuts the bands tying the logs together.

The longshoremen work in crews of eight (8) to a hatch with two (2) working in the hold, four (4) on the log boom, a hatch tender and a winch driver. Each hatch is controlled by a hatch foreman and this foreman, in turn, is supervised by a head foreman. On August 13, 1982, Buddy Lee's hatch foreman was Jamie Zanette and the head foreman was Lloyd Oates, both of whom appeared as witnesses for the Respondent. The Respondent also called Alex Smith, manager of the log department for Canadian Stevedoring, as a witness in respect to this incident.

The hazards of working on a log ship were described by Mr. Zanette and Mr. Smith respectively as follows:

Page 297, Line 8 of the transcript: "Ms. McEwen: Is there any dangerous situation when the sling is released from the logs?"

Mr. Zanette: The danger after it releases is when the top side is pulling the slings out. They would be 60 feet away. They're (the holdmen) taking a signal from another man to pull the sling out. When that sling pops out, there's two slings. Sometimes one sling pops out before the other, and when that happens that sling will spin around in a 40 foot arc, because the slings are 40 feet long. So you have to be careful there."

and further under cross- examination: Page 306, Line 1 of the transcript:

"Mr. Zanette: He could injure himself, yes, because if you've ever been on a log jam

Mr. Duval: I've never been. Mr. Zanette: Okay, you try to put the logs together so they fit and there's no holes to drop down. But in some instances you don't get the right size of logs, so now you've got a hole in here. And that could go down 30 feet, and if a person falls down there . . . well.

Mr. Duval: So it's a very risky work environment?

Mr. Zanette: Yes. Mr. Duval: I see. Mr. Zanette: You have to be conscious of what you're doing at all times there."

Page 489, Line 25 of the transcript:

"Ms. McEwen: Describe the degree of hazardousness of that job (logmen)".

Page 490, Line 1 of the transcript: "Mr. Smith: I think it's a fairly hazardous job. There's a lot of equipment moving around all the time. Slings that are constantly siwash across the deck. On the

boom, the logs, of course, roll. It's a dynamic situation; its not a static platform they're on. They can fall off the boom, whatever. It's fairly quite hazardous."

Buddy Lee's job on the day in question was to unhook logs on the deck of the ship as the hold was already full and the hatches had been closed. Sometime during the afternoon Buddy Lee went out onto the log boom and was subsequently pulled off the logs by Mr. Oates.

Buddy Lee gave evidence that he had been cajoled onto the boom by the boommen and was encouraged to do so by the hatch foreman, Mr. Zanette, despite Mr. Oates' clear instructions not to go onto the boom.

Mr. Zanette denies giving Buddy Lee permission to go onto the log boom. It is admitted by both the complainant and witnesses for the Respondent it is hazardous to work on the boom and log walking would exacerbate Buddy Lee's co- ordination problem.

If Mr. Zanette deliberately put Buddy Lee at risk by encouraging him to disobey Mr. Oates and to try walking the boom this would be a clear case of Buddy Lee being singled out by management and made the butt of a joke because of his disability.

Throughout Mr. Zanette's testimony it became evident that he kept close watch on Buddy Lee and was concerned about his safety; for example, when asked what he observed about Buddy Lee he replied:

Page 300, line 12 of the transcript: "Well, it was . . . he wasn't lazy, he would do anything I asked him to do. But when he would walk on the logs he would have trouble walking, maintaining his balance and then whenever we were pulling the slings I would have to say, Buddy get out of the way, Buddy do this, Buddy do that and I basically had to make sure I was directing him every time a load was coming in and the slings were being pulled. I let him once go up and try to cut the bands on a load of logs. There's a wire band about one inch in diameter by a sixteenth of an inch thickness, and you take an axe and you cut it so that the logs flatten out and it makes a better stow, and he went up there and he tried, and he couldn't cut it, and he almost cut his foot a couple of times. So, I says, okay Buddy, you just unhook the loads from now on, and I'll do that."

And when asked on cross- examination by Mr. Duval, why he kept Buddy Lee on the job despite the apparent safety risk Mr. Zanette provided the following plausible reply:

Page 305, Line 6 of the transcript: "Because he is only a person out looking, trying to make a dollar, he's a worker, and I figured I could look after him for the day, give him a chance and see if he would improve."

Authorizing Buddy Lee to go out onto- the- boom is inconsistent with the conduct exhibited by Jamie Zanette throughout the rest of the day. It is also doubtful he would deliberately countermand a direct order from the head foreman thereby placing himself in line for reprimand.

While there is no doubt Buddy Lee was teased onto the boom by his fellow workers, whether this was due to his disability or not is uncertain, the Tribunal finds that Mr. Zanette and Mr. Oates were not responsible for this action and, in this instance, the Employer cannot be found to have singled Buddy Lee out for discriminatory treatment.

When Mr. Oates spotted Buddy Lee on the boom he contacted Alex Smith, superintendent for Canadian Stevedoring, and Mr. Smith came to the job site and watched Buddy Lee out on the boom. As a result of his observations, Mr. Smith told the head foreman to get Buddy Lee off the boom, to fire him and get a replacement.

Buddy Lee was not rated to work on the boom but Mr. Smith was under the misconception that he had been dispatched to the site to work logs in the water. He made his initial assessment by observing Buddy Lee on the boom but when asked if he thought Buddy Lee could do the job in the hold he replied as follows:

Page 493, Line 3 of the transcript: "No, I didn't think he could do that either. We weren't in the hold, we were up on deck, and you know, the deck of a log ship, as you're coming up and you've got alternate loads at various sides of the deck, is quite uneven, and probably, you know, its walkable but it requires care.

And, in fact, I thought that there is no way that he should be on a log ship. That was my opinion."

Mr. Smith gave evidence he contacted Mr. Kaufman, president of the union, and told him he didn't want Buddy Lee back on one of their log ships and he requested a log exemption to ensure this result.

Mr. Smith confirmed his telephone conversation with Mr. Kaufman in writing as follows (Exhibit A- 16):

"With reference to our telephone conversation of today, we hereby request a log exemption for employee Buddy Lee #26701. Mr. Lee was employed as a boom man on the motor vessel "Onward" at Berry Point, on the 11 day of August. Observing Mr. Lee over the course of the day, it was the opinion of the head foreman, Lloyd Oates, that this employee lacks a good sense of balance, and should therefore not be employed as a boom man in the interest of his own safety. We would be obliged if you would follow up this request." On August 16, 1982 the Chief Dispatcher received a memo from the union representative indicating Buddy Lee was "prohibited from working logs" (Exhibit A- 17).

Mr. Smith's letter was discussed at a meeting of the Vancouver Port Labour Relations Committee on November 23, 1982 and the minutes record as follows (Exhibit A- 18):

"B. Lee - C26701 VA - Physical Condition Letter from Canadian Stevedoring - August 13, 1982 The Association pointed out that it was apparent that Lee was not capable of working on booms as he then became a safety liability due to his physical condition. Lee was deregistered in March, 1981 as a result of his inability to perform a fair day's work. He was subsequently reinstated and

warned that any future complaints could again result in his deregistration. The Association suggested that Lee's physical condition simply prevented him from performing a fair day's work and consideration should be given to deregistration."

Buddy Lee's non-existent boom rating was later "removed". The incident at Berry Point is significant for three reasons:

(1) it is evident that Buddy Lee was protected on the waterfront by his foreman and some of his duties were carried out by other workers, specifically by Mr. Zanette;

(2) it is evident that the BCMEA was aware of Buddy Lee's physical disability and they were continuing to monitor his performance closely; (3) although the Employer's complaint focused on Buddy Lee's inability to work as a boom man there was ample evidence he had difficulty working as a holdman and presented a safety hazard to himself in the environs of a log ship.

### 3. Casco Terminals

On a date uncertain, Buddy Lee was dispatched to a job at Casco Terminals unloading sacks of flour from rail cars. The sacks were piled four (4) high and weighed approximately one hundred and five (105) pounds each.

Wally Lee, the foreman on duty that day, gave evidence that Buddy Lee was very uncoordinated and was right down on his hands and knees trying to pick up sacks and that he advised the union business agent, Bill Kemp, there was a man on the job who was finding it impossible to handle his job.

Bill Kemp gave evidence that he immediately went down to the site and observed the following:

Page 350, Line 10 of the transcript: "Buddy was struggling. He was standing on both feet struggling with a sack to lift it off the car, off the tier, the car, then put it on a board. I guess I was approximately five, six, seven minutes, something like that, and I said to Buddy, come on, Buddy, get your gear, we're going home."

He then gave Buddy a lift to the dispatch hall. Buddy Lee gave evidence that Bill Kemp did not come down to the site on that particular occasion.

Mr. Kemp was very plain spoken throughout his testimony and the Tribunal finds that he went down to the site and "took Buddy Lee off the job on 'his' own violation when 'he' seen he was struggling" (Page 354, line 13 of the transcript).

The incident was not reported to management and there is no written record available.

### 4. Columbia Containers Ltd. (hereafter referred to as "Columbia")

On February 28, 1983, Buddy Lee was dispatched to the wheat loading facility at Columbia. His job was to open and close container lids and to sweep off any grain that would accidentally be

spilled on the lids or he worked as a specialty man using a button to call ahead for grain and to shut it off.

The following day, Jack Moore, superintendent of operations for Columbia, sent a letter to the BCMEA requesting Buddy Lee not be dispatched to their plant again (Exhibit A- 20).

It was worded as follows: "We request that Buddy Lee #26701 not be dispatched to our plant again. We have had him at our plant occasionally in the past and have been unhappy with him, however, in the interest of his gaining experience we have accepted his shortcomings and our reduced efficiency and production. However yesterday (Feb. 28) I could see no improvement whatsoever in his performance.

Lee appears to be a slow learner and is very uncoordinated. We constantly have to have our people instructing him. In my opinion he also constitutes a safety hazard to himself and other employees while he is at our plant ...".

As a result of the foregoing letter, the BCMEA deregistered Buddy Lee and he has not worked as a longshoreman since March 14, 1983.

In respect to this incident, Buddy Lee submitted that the firing was motivated for reasons other than those set out in Mr. Moore's letter. He presented three (3) theories for the firing, all of which are rooted in his belief he was singled out for special treatment by the Employer.

First, he argued that the grainworkers had a problem with him because he was a longshoreman and there exists a deep- rooted bitterness between the two (2) unions due to pay discrepancies and a rivalry over work.

Second, he testified he had been subjected to a rough ride in the back of a grainworker's pick up truck during the lunch hour. This resulted in the driver of the vehicle being ticketed and Buddy Lee believes that the grainworkers blame him for the charge.

Third, if he didn't know how to do the job it was because the Employer had failed to properly instruct him.

The Tribunal finds no evidence to justify the first complaint. While it is clear the complainant was subjected to a harrowing ride in the back of a grainworker's pick up, the evidence supports a conclusion that management was unaware that the incident had occurred, or at the very least, that Buddy Lee had been involved, and the Tribunal finds that the incident did not factor into the decision to ban Buddy Lee from working at the wheat loading facility.

This conclusion is reached upon examining the testimony of Buddy Lee, Mr. McKenzie, track shed charge hand at Columbia on February 28, 1983, and Edna Monk, vice- president of Columbia. Mr. McKenzie testified he had had problems with Buddy Lee throughout the day - that Buddy Lee had difficulty shutting container lids, was responsible for a number of wheat spills including a major spill in the afternoon and was slow to sweep up the spillage. Furthermore, in Mr. McKenzie's opinion, Buddy Lee was a safety risk because his lack of co-

ordination affected his ability to balance on the moving trucks, climb ladders and move out of the way of trucks maneuvering into position at the wheat loading machine.

Mr. McKenzie said he reported Buddy Lee to his superiors because he considered the longshoreman to be responsible for production slowdowns. There is nothing in his evidence to indicate he told management about Buddy Lee's ride in the back of the pick up.

Edna Monk testified she and Jack Moore, the site superintendent, had a conversation with respect to Buddy Lee and as a result of that discussion the letter of complaint was drafted and sent to the BCMEA. It is apparent from her testimony that the incident with the police did not enter into that conversation and what was of concern to the Employer was Buddy Lee's lack of productivity coupled with a concern for his safety.

Buddy Lee's testimony in respect to this incident is also revealing. He says he confronted Jack Moore about his deregistration but his testimony concerning the conversation with Moore makes no reference to the ride in the back of the pick up truck. It is apparent that Buddy Lee himself did not equate the deregistration with the pick up incident or surely he would have complained to Mr. Moore about the grainworker's behaviour.

The Tribunal could find nothing in the evidence to support the proposition that the grainworkers or their foreman deliberately complained to management about Buddy Lee as a means of seeking retribution for the police ticketing. The reports of non- productivity attributable to Buddy Lee came as a result of direct investigation on the part of Jack Moore.

Buddy Lee also asserts that the Employer's failure to properly instruct him to do his job was discriminatory. The Tribunal finds that Buddy Lee was properly instructed and finds the testimony of Mr. McKenzie credible when he says:

Page 225, line 18 of the transcript: "Well, we teach each longshoreman, if they're new on the job, how to do the job, and then if they have problems, then we go back and show them again, and we'd do this a few times with Buddy Lee, and he just wouldn't seem to catch on".

## Findings

The Tribunal found at the close of the complainant's case that he has satisfied the onus placed on him to prove discrimination. This finding of a prima facie case was based primarily upon the documentary record; specifically, those records which show that Buddy Lee was treated differently from other employees about whom a written complaint is received by the BCMEA in that he was asked to submit to a second medical examination as a condition of reinstatement.

The only logical reason for the BCMEA making this request was to enable them to reevaluate Buddy Lee's fitness to do longshoring work by causing him to take a medical test which was different from those given to other employees - he had already passed the standard medical examination.

Although Buddy Lee was never compelled to take the second medical, his reinstatement was conditional and made with the proviso that "his future performance was to be closely monitored". The Employer's vigilance in this regard was confirmed during the investigation into the Canadian Stevedoring complaint when the BCMEA again recommended deregistration because of Buddy Lee's physical condition.

The BCMEA's conduct in this regard gives rise to an inference of unlawful discrimination.

The question then arises, was the Respondent's action in attempting to establish new medical guidelines justified because the state of being coordinated is a bona fide occupational requirement of the job of longshoring.

The test of whether any refusal or exclusion in relation to any employment is a bona fide occupational requirement is set out by the Supreme Court of Canada in the case of Ontario Human Rights Commission v. Borough of Etobicoke (1982) (132 DLR (3d) 14, 3 CHRRD/ 781:

"To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, 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 with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

As is pointed out in the decision of the Tribunal in the case of Nowell v. Canadian National Railway Ltd. (1987), 8 C. H. R. R. D/ 3727 (C. H. R. Tribunal), the Supreme Court of Canada in the Etobicoke case also made it clear that a human rights tribunal "must consider whether the evidence adduced indicates there is a sufficient risk of employee failure in the category of employees being discriminated against to justify the discriminatory practice as a bona fide occupational requirement. The sufficiency of risk is therefore an issue."

The occupational requirement of the case at bar is the condition of being coordinated. It is not directed at establishing a working condition for the job which applies to all individuals as did the hard hat rule in the case of K. S. Bhinder and the Canadian Human Rights Commission v. CNR (1985) 2 S. C. R. 536, but rather, it applies to an identifiable group of individuals, those who are disabled by a lack of co-ordination. Within that class of individuals there will be varying degrees of disability.

This case, like that of Nowell, supra, deals with a class of disabled persons who may be excluded on the basis of bona fide occupational requirement depending on individual assessment. The test set out in Nowell, supra, p. 29523 is as follows:

"There is, however, a duty to establish the bona fides of the occupational requirement by assessing the degree of risk of each individual. This is necessary because there is such a wide

variation of the risks and abilities between the individuals within the class or the group excluded".

In determining whether a bona fide occupational requirement meets the second test set out in the Etobicoke case; that is, that it is reasonably necessary to assume the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public, Mr. Justice McIntyre suggested that something more than impressionistic evidence was required. Scientific evidence is not necessary but statistical and medical evidence would be more persuasive than the testimony of persons experienced in the field.

The Respondent must therefore satisfy the Tribunal as to the following:

1. that it imposed the bona fide occupational requirement honestly, in good faith and not for ulterior or extraneous reasons aimed at objectives which could defeat the purposes of the Act;
2. that there is a sufficient degree of risk to the individual to justify the discriminatory practice as a bona fide occupational requirement;
3. that the evidence required to support the bona fide occupational requirement must be more than impressionistic.

In the case at bar, the evidence supports the proposition that the BCMEA's standards in respect to physical fitness, specifically, the state of being coordinated, constitutes a bona fide occupational requirement.

It was Buddy Lee's lack of productivity which first alerted the Employer to his physical disability, as was apparent in the sequence of events which led to his deregistration on March 2, 1981. But it was upon a lengthy individual assessment of his capabilities within, what both parties admit to be a hazardous work environs that Buddy Lee was eventually deregistered.

Counsel for the complainant argued that the BCMEA failed to meet a fundamental objective in human rights law, the requirement of an employer:

"to make a decision respecting employment of a handicapped person based upon a fair and accurate assessment of her ability and not based upon a stereotype or misconception about her handicap."

Cindy Cameron v. Nel- Gor Castle Nursing Home and Merlene Nelson (1984) 5 C. H. R. R. D/ 371 (C. H. R. Tribunal).

It is the Tribunal's finding that the BCMEA carefully and honestly assessed the complainant's abilities from March, 1981 to the date of deregistration. The Employer did not base its decision upon a misconception of Buddy Lee's handicap, but rather, upon his continuing lack of performance in the work place and a concern that his lack of co- ordination constituted a safety risk to himself and his fellow employees.



At the time of Buddy Lee's hiring, the Employer recognized that the state of being coordinated was a requisite of longshoring work but it did not have criteria in place to determine the degree of co-ordination which was required to ensure the safety of the individual. At best, it relied upon an imperfect and cursory medical examination taken by casuals in order to advance from E to D Board.

When the BCMEA became aware of Buddy Lee's physical disability they sought to require a second medical examination and this was reasonable in light of the bona fide occupational requirement to be sufficiently co-ordinated to do the work of a longshoreman. In the absence of a scientific method of assessing Buddy Lee's lack of co-ordination, the Employer decided to give him a fair chance to show what he was able to do, taking into account his disability.

No scientific data was presented to the Tribunal in respect to the degree of co-ordination which would be required to minimize the risk to a person doing longshoring work; therefore, the Tribunal has had to rely on evidence presented by persons experienced in the field, particularly the testimony of various foremen, to whom the responsibility of day to day safety on the waterfront appears to fall.

This evidence supports the Employer's analysis that there was little work on the waterfront which Buddy Lee could perform safely or productively. The incident at Casco demonstrated he could not load and unload sacks, which was one of the most common assignments on the waterfront. He failed at stacking liquor cartons as indicated by the incident at Empire. He was unable to perform any of the duties at the wheat loading facility and, without assistance, he could not perform the work expected of a holdman on a log ship.

More importantly, witness after witness testified that they feared for Buddy Lee's safety. These opinions were not impressionistic views but were based upon eye witness reports concerning Buddy Lee's inability to walk on logs, his stumbling on the top of container trucks, his slipping on a ladder, his crawling on hands and knees to wrestle with grain sacks and his lack of awareness when working around siwashing cables or moving forklifts.

Counsel for the complainant argued that Buddy Lee worked as a longshoreman for five years without major injury and with few complaints about his work performance therefore the Employer must have been content with his productivity and any alleged concern about his safety must be pretextual. This would normally be persuasive except for the unique nature by which employees are dispatched to work on the waterfront. As earlier described, seniority determines work assignments and although Buddy- Lee was employed as a longshoreman for five (5) years he actually only worked about four hundred eighteen (418) days. Short term job assignments among forty (40) member companies would preclude any one foreman or member of management from properly familiarizing himself with Buddy Lee's capabilities unless, as in the instance at Canadian Stevedoring, his lack of co-ordination presented a glaring safety hazard. Additionally, because the complainant was only expected to work a short time at any one job site, some of the foreman, as in the case of Jamie Zanette, were inclined to cover for him until the next crew was dispatched.

It may seem that the BCMEA took an inordinately long time to assess the risk presented by Buddy Lee's lack of co-ordination but, in light of the difficulties presented by the Association's unique hiring practises, and, without medical guidelines, the delay is plausible.

The complainant's argument that the Respondent's concern about Buddy Lee's safety is pretextual is belied by the written record. Letters sent to the BCMEA some seven (7) months apart by Columbia and Canadian Stevedoring, two (2) disparate member companies, both refer to Buddy Lee's lack of co-ordination as constituting a safety risk. It is unlikely the author of either of these letters was aware of the conditions placed by the BCMEA upon Buddy Lee's continuing employment after his deregistration in March, 1981.

### Conclusion

The evidence adduced justifies the conclusion that there is sufficient risk of employee failure to warrant Buddy Lee's exclusion from longshoring work. It was reasonable for the BCMEA to require an employee to have a certain degree of co-ordination to work in the hazardous conditions of longshoring and the employer acted responsibly and fairly in conducting a lengthy assessment of the complainant to determine if he could perform the job safely and productively.

The complaint of Buddy Lee is dismissed.

DATED at White Rock, British Columbia, this 30th day of June, 1989.

Robin Adams Chairman