CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

RONALD J. HOWELL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

REASONS FOR DECISION

MEMBER: Shirish P. Chotalia

2004 CHRT 31
2004/09/23

I. INTRODUCTION

[1] The complainant, Mr. Ronald J. Howell, became a member of the Canadian Armed Forces (CAF) on September 9, 1983. At the time, he was approximately 20 years old and had a grade 11 education. He was born on December 15, 1962 and is currently 42 years of age.

[2] After Mr. Howell completed basic training, he was posted to Canadian Forces Base (CFB) Winnipeg. He began his trade specific training in February of 1984 at CFB Borden in Ontario. There, he underwent his initial training as a driver. He was then posted to Toronto. Initially, he was at the rank of Private.

[3] In September of 1985, Mr. Howell became a regular member of the CAF. He was posted to CFB Petawawa in a support unit. He remained in Petawawa from 1985 until 1993. While in Petawawa he was promoted to the rank of Corporal. By 1987, he completed training which qualified him as a vehicle technician.

[4] He received positive job performance appraisals until his release.

[5] Unfortunately, throughout his career with the CAF, Mr. Howell experienced a series of knee surgeries.

II. DISCRIMINATION COMPLAINT - DRILL INCIDENT

[6] Mr. Howell alleges that his superiors aggravated his existing right knee problems when they forced him to participate in a platoon drill on March 23, 1995 without his brace ("drill incident"). He alleges that had the CAF accommodated his request to get his brace or to go to the medical infirmary, at the time, by excusing him from drill exercise, he would not have sustained further knee deterioration of such magnitude as to result in his release. He alleges that but for the drill incident he would still be a member of the CAF today.

III. FACTS

A. Knee Injuries Existing Prior to Drill Incident

[7] Mr. Howell has a longstanding and complex history of right knee injuries and surgeries. These are outlined in the report of Dr. Randall dated December 9, 2003[1] with attachments and his complete medical file found in Volumes 1-4[2]. It is suffice to say that Mr. Howell's right knee injuries began in about January 1982 when he was involved in a serious car accident. As early as May 1984, Mr. Howell complained of pain in his right knee particularly during activities such as running and playing sports. He also complained that his right knee buckled in the mornings. He suffered a major right knee injury in September1989 when he twisted and injured his right knee after stepping on a rock during a voluntary athletic competition, known as the "Ironman Competition". He was taken to the hospital and treated for a major knee injury (right knee anterior cruciate ligament injury). His right knee problems began with this incident.

[8] Then, in 1990, he slipped while kicking a tire and further injured his right knee. He underwent his first right knee surgery for ACL reconstruction on May 21, 1991.

[9] Following that surgery, Mr. Howell was prescribed a "Generation II" brace which he obtained in about November 1993.

[10] In about May 1992, he re-injured his right knee while marching in a military parade exercise and twisting his right knee. In August 1992, he underwent a second surgery, an arthroscopy to his right knee.

[11] By June 1, 1993, Mr. Howell was posted at CFB Shilo and promoted to the rank of Acting Master Corporal. He was required to pass a Junior Leaders Course (JLC course) in order to receive his promotion to Master Corporal. The JLC course was designed to teach non-commissioned officers leadership skills. Early in his posting, he experienced problems while performing a drill routine. On June 16, 1993, he was seen by a physician for his complaints of soreness after performing drill. He was advised to use crutches, ice, a knee brace and knee elevation to alleviate the symptoms.

[12] In January 1994, he complained of discomfort with walking, and particularly running. He was referred to a physician to determine if he was fit to participate in a JLC course which would involve considerable physical activity. The CAF then referred him to Dr. de Korompay, a civilian orthopaedic surgeon. Mr. Howell reported to him his experience of occasional locking of his right knee, discomfort and other "popping sensations" which symptoms appeared to have been aggravated by his job. Based on Dr. de Korompay's recommendation for a further arthroscopy, Mr. Howell was found to be unfit for the course.

[13] Dr. de Korompay performed a third surgery on Mr. Howell's right knee in February 1994 after a slip and fall. Dr. de Korompay noted a medial meniscus tear which he resected. The doctor also noted that although Mr. Howell had a partial tear in his ACL, he had reasonable stability. He felt that Mr. Howell could continue with his CAF duties. In fact, by March 1994, Mr. Howell's supervisors continued to recommend Mr. Howell for promotion.

[14] In September 1994, Mr. Howell participated in a JNCO (Junior Non-Commissioned Officer) course, which is similar to the JLC course. The JNCO course included the administrative aspects of the JCL course with an added component of infantry. During that course, he began to experience anterior right knee problems and pain. He realized that his knee was not sufficiently well to complete the course. He asked to be released from the course. Upon such request, he was given a medical RTU ("medical Return to Unit"), giving him permission to leave the course and return to the unit without being given a course failure. The CAF recommended that he be given another opportunity to take the course once his medical condition was resolved. At the time, he was assessed by his supervising officer as being neither physically nor mentally prepared for leadership training. Mr. Howell agreed with this assessment because the JNCO course included an infantry component not found in the initial JLC course.

[15] After his return to Shilo, Mr. Howell undertook aggressive physiotherapy for PFS (patella femoral syndrome), the most common cause of anterior knee pain. He tried to rehabilitate his knee in preparation for the JNCO course to be held at CFB Shilo in February 1995.

[16] In December 1994, he passed a fitness test, and the base physician at Shilo advised him to wear cushion soles and inserts and to wear a knee brace, as well as to avoid impact sports. Mr. Howell indicated to the physician that he would try his best in the course.

[17] By January 1995, Mr. Howell reported to the base physician that he was having good results from using cushion insoles and his knee brace. At this time, the base physician gave Mr. Howell a chit that he was fit for starting another JNCO course. A chit was a note given by a physician to CAF members who were unable to perform their CAF tasks due to medical problems. The chit outlined the limitations of the member to his supervisors. The member was responsible for giving the chit to his respective supervising officers who passed the chit up to the members' unit officers.

B. Alleged Discrimination - March 1995 - Drill Incident

[18] Mr. Howell started his JNCO course again on February 27, 1995. At the start of the course, Mr. Howell advised Sergeant Thompson that he had a knee injury and was required to wear a brace. Sergeant Thompson had no difficulty with this request.

[19] Unfortunately, on March 7, 1995, Mr. Howell slipped on ice when walking into a building. He was diagnosed with a vulgus strain of the right knee. As of March 13, 1995 his knee condition was essentially unchanged: he was taking Ibuprofen for pain, and was icing his leg and elevating it. He was given a chit to wear his knee brace.

[20] During a weekly interview with Sergeant Thompson, on about March 20, 1995, Mr. Howell asked him if he could be excused from participating in further drill testing given that he had already passed his drill portion of the course. Drill involved marching, halting, swift right and left turns, hard pounding and stomping of the feet, and standing in the attention position for long periods of time. Mr. Howell indicated that this type of drill activity was hard on his knee. Sergeant Thompson agreed to excuse Mr. Howell from participating in the drill portion of the course on March 23, 1995. He told Mr. Howell to rest his knee in preparation for phase two of the course, consisting of infantry tactics. Sergeant Thompson obtained the consent of other CAF staff to facilitate an exemption from drill for Mr. Howell.

[21] On the morning of March 23, 1995, Mr. Howell participated in the physical fitness component of the course, wearing shorts and without his brace. He played aggressive "hard charging army style" basketball. Sergeant Thompson observed Mr. Howell playing this game.

[22] Later that morning, after breakfast, Mr. Howell reported to the parade square without his knee brace believing that he was excused from drill. Lieutenant Hart asked Mr. Howell why he could participate in PT ("physical training") but not in drill. Mr. Howell replied that he had worn his brace and running shoes. Lt. Hart replied that if he could participate in basketball, he could participate in drill. Mr. Howell stated that he did not have his brace with him. His brace was in Brandon, Manitoba. Lt. Hart ordered him to participate in the 40 minute drill without his brace. When Mr. Howell resisted, Sergeant Thompson began using expletives and demanded to know why Mr. Howell was not participating in drill. Mr. Howell again indicated that he did not have his brace with him. Again using expletives, Sergeant Thompson ordered Mr. Howell onto the parade square in spite of the fact that he did not have his brace with him. Mr. Howell obeyed the orders and participated in the first half of the drill for about 20 minutes. During a break, Mr. Howell sought permission of Sergeant Houde to go to the medical inspection room ("MIR") to be excused from drill. Sergeant Houde gave him permission to do so. However, when Sergeant Thompson observed Mr. Howell putting on his jacket, he used expletives to order Mr. Howell back onto the parade square to finish the drill. Mr. Howell advised him that he wished to go to MIR and Sergeant Thompson denied this request. Sergeant Thompson told him to go to "sick parade" the next morning. Mr. Howell repeated his request to go to MIR for a chit but again this request was denied by Sergeant Thompson in less than polite language. Mr. Howell completed the second half of the drill as ordered.

[23] After completion of the drill Mr. Howell's knee felt painful and swollen. However he did not report to MIR immediately. In fact, he completed the rest of his CAF activities for the day. The next morning, Mr. Howell reported to the base physician.

C. Subsequent History to Drill Incident

[24] The following day being Friday, March 24, 1995, Mr. Howell's knee was swollen. He indicated to the base physicians that he was in pain and was having problems bearing his body weight. He was given a steroid shot and an anaesthetic in order to reduce the swelling and discomfort in the knee. Mr. Howell reported that his knee had been locking and hurting for about 4 weeks to that date. He was referred to the base hospital for further assessment.

[25] No medical restrictions were imposed on Mr. Howell and he was told to return to the course. He did so. He was given a practice test in preparation for his

upcoming "small party tasking" which he failed. However, this failure did not affect his mark as each member was given a practice chance to pass.

[26] Mr. Howell went home to Brandon for the weekend. The members had been given a leave pass for the weekend. He iced his knee and elevated it and felt confident that he could return to the course.

[27] He returned to his course on Sunday evening March 26, 1995. On Monday, March 27, Mr. Howell, participated in physical training consisting of marching with a full rucksack. After breakfast, on his way to an underground classroom, his knee locked. He fell head first down a set of stairs. He fell on top of another member and was unable to stand in the stairwell. He was taken to MIR where he complained of pain in his right knee and "true locking" incidents. The base physician suspected the existence of a meniscal tear. This was a significant injury.

[28] A base doctor recommended that Mr. Howell fall within a temporary category. He was unfit to work and not capable of completing the course. He recommended a medical RTU or medical return to unit for Mr. Howell. A medical RTU is where, due to a medical condition, a student is released from the course without any career ramifications. Once the member is well the member is then permitted to take the course again. Mr. Howell was given crutches and prescribed Tylenol 3 for pain.

D. Small Party Tasking

[29] After taking Tylenol 3 Mr. Howell felt sleepy and groggy. Nonetheless, that evening Mr. Howell was further tested in a test known as "Small Party Tasking". Through small party tasking members were evaluated on their ability to command others to carry out an assigned task. Mr. Howell voluntarily participated in the small party tasking even though he indicated to Warrant Officer Legge that he was concerned about his ability to take the test given his medicated state. Mr. Howell was permitted to take the test from his bed in the barracks. His task was to direct team members to move furniture from one room into another. He failed the test due to his medicated state of mind. The following day, he was released from the course. However, Lieutenant Hart gave him a course failure on his course report for below standard performance and poor motivation and attitude. He was demoted in rank. In March 1996, Mr. Howell grieved this report successfully and it was amended to indicate that he failed the course due to medical reasons. Lieutenant Hart's concerns that Mr. Howell exhibited disrespectful attitude towards his supervisors were maintained on the revised course report post-grievance. Mr. Howell was satisfied with the amended course report. His rank of acting Master Corporal was reinstated with retroactive pay.

E. Medical History After the Alleged Discrimination

[30] Mr. Howell was again referred to Dr. de Korompay, who saw him on June 12, 1995. Mr. Howell advised Dr. de Korompay of the drill incident but did not advise him of his March 27, 1995 fall down the stairs. Mr. Howell exhibited some anterior and retropatellar discomfort and medial joint line symptoms. Dr. de Korompay recommended that Mr. Howell undergo another right knee arthroscopy which he performed in July 1995. This was Mr. Howell's fourth surgery. During the surgery, Dr. de Korompay found a meniscal tear as well as a slight tear to his ACL graft. Dr. de Korompay removed a significant portion of Mr. Howell's anterior meniscus. The injuries that Dr. de Korompay observed in June 1995 and during the surgery of July 1995 were caused by the March 27, 1995 fall. Further, the wearing of the requested knee brace during the drill would not have prevented such or similar injuries.

[31] Post surgery Mr. Howell was advised to wear soft-soled boots. His condition improved to the point that, in August 1995, he was participating in heavier sporting activities such as European handball. He completed the forced march portion of CAF "warrior" training and had his temporary restricted medical category reinstated to full duties ("G2O2") as of October 1995. His job duties were not modified and his knee surgeries did not prevent him from working as many overtime hours as he was accustomed to working prior to the surgery. Mr. Howell and Dr. de Korompay saw his July 1995 surgery as having successfully resolved his knee problems.

[32] However, Mr. Howell had further incidents involving his right knee following the July 1995 surgery. These included a first degree strain of his right knee in about April 1996 when he was lifting a generator at work. His knee went into spasms but the symptoms resolved quickly. Unfortunately, his knee pain persisted and, in August 1996, he was given a temporary restriction in medical category due to bilateral knee pain, with the right knee being worse than the left knee.

[33] He consulted Dr. de Korompay again in September 1996, complaining that he could not run and was experiencing pain while running. Mr. Howell testified that his physical and mental condition had deteriorated. Dr. de Korompay suggested that he perform another scope to his knee to determine if there were mechanical problems leading to his symptoms. He felt that unless he could remedy the problems, Mr. Howell would have to consider retiring from the CAF given his need to run. Dr. de Korompay performed a fifth arthroscopy on Mr. Howell in January 1997 and found that degenerative changes in his knee would prevent Mr. Howell from performing his CAF duties, including running. Dr. de Korompay felt that Mr. Howell "should have permanent restrictions from prolonged running, particularly with weights such as having to carry backpack".[3]

After the surgery, Dr. de Korompay had a serious discussion with Mr. Howell about his inability to continue his career with the CAF. Mr. Howell agreed that he needed to retire from the CAF to protect his knee. He was also having mental anxieties.

F. Release from CAF - March 1998

[34] Thus, on February 20, 1997, Mr. Howell voluntarily assessed himself as being incapable of performing a number of tasks due to his knee injuries, specifically the General Duties of his vehicle technician job. He indicated that he could not walk cross-country over uneven terrain for long distances, could not stand for periods of up to 10 hours each, and could not dig a personal trench. Mr. Howell completed the form knowing that his responses to the questions would result in a medical release.

[35] On that day, he was given a permanent category of "G4" and found to be unfit for UN duties / field duties. He was awarded "O3" as being unable to perform his occupational duties such as running, rucksack, drill, marching or other high impact activities. This ultimately resulted in a CAF career medical review board reviewing Mr. Howell's career prospects. The board found that Mr. Howell's employment limitations drastically restricted his capacity to perform the full spectrum of his CAF duties. He was found not to meet the universality of service principle. As a consequence, he was discharged from the Canadian Forces effective March 31, 1998.

G. Post Release

[36] Following his discharge from the CAF, through a military insurance plan, Mr. Howell commenced retraining. He completed his grade 12 and then began a college radiology course. Because the radiology course required him to stand frequently, he was unable to take on the vocation of a radiology technician. After aborting his retraining in May 1999, he decided to start his own small engine repair shop which he ran from approximately June 1999 to about June 2003. He did not make a profit. Rather, the business operated at a loss.

H. Application for PTSD Pension

[37] During the intervening years from the date Mr. Howell left the CAF to the date of the hearing, he was awarded four disability pensions from the Department of Veterans Affairs ("DVA"). The effective date and percentage amounts of the pension are found at page 8 of Respondent's tab 13 of its additional disclosures[4]. In brief, Mr. Howell is currently receiving a pension assessed as a 20% disability for his right knee. That pension was effective April 2, 1998.

[38] In February 2004, Mr. Howell made an application for a federal disability pension alleging that the drill incident contributed to or caused him to suffer from Post Traumatic Stress Disorder ("PTSD") and that the drill incident led to his course failure and his ultimate release from the CAF. Dr. McIntrye, a psychiatrist, supported Mr. Howell's application by providing an opinion to DVA that Mr. Howell had PTSD and that the drill incident seemed to have precipitated Mr. Howell's anxious and depressive syndrome. The pension was granted after appeal. Mr. Howell had not served in combat. Thus, Mr. Howell eventually began to receive a second pension retroactive to September 24, 2002 for a 40% disability.

[39] The total amount of the pension that Mr. Howell receives is $2,162.63 per month. That figure is 72% of the total amount which the Complainant would be entitled to if he was completely disabled and takes into account the fact that the Complainant is married and has three children.

IV. BASES OF MY FACTUAL FINDINGS

[40] The bases for my factual findings are outlined below.

A. Lay Witnesses

[41] As the events occurred many years ago, and because there is a conflict between the written notes of the events and the oral testimony of the witnesses, I place more weight on the written notes. As well, where there is a discrepancy between the testimony of Mr. Howell and that of Sergeant Thompson and Captain Hart, I prefer the testimony of the latter two CAF witnesses.

[42] I find Sergeant Thompson to be a candid witness. I find him to have acted reasonably in his dealings with Mr. Howell prior to the drill incident. He had accommodated Mr. Howell's request for special consideration twice prior to the drill incident. He initially advised Mr. Howell that he had no difficulty with him wearing his brace during the course. Then he specifically exempted Mr. Howell from performing drill upon Mr. Howell's request. In fact, he obtained the consent of others to secure this exemption. I also prefer the evidence of Captain Hart over that of Mr. Howell. I find Captain Hart to be the most candid, direct and credible witness. I find both of these CAF witnesses to be more independent than the complainant. Both testified that they did not have extensive dealings with the complaint.

[43] On the other hand, I do not find the oral testimony of Mr. Howell reliable given a number of factors. First, he had a more partisan interest in the complaint. Mr. Howell had lived and relived the drill incident in his mind many times since it occurred, each time revising his memory in a different context. For example, he testified that he had been advised by Dr. McIntyre that the drill incident was akin to him "being raped"[5].

[44] Second, he readily admitted that his memory of certain events was limited. There were discrepancies in his evidence in salient details. For example, he testified that during the drill incident he had asked permission to go to the barracks to get his brace and that this request was denied. Yet, his notes and other documentation regarding the drill incident indicate that he had not asked for permission to retrieve his brace from his barracks. Rather, he had asked permission to go to MIR to get a chit to be excused from drill. As well, he testified that he had initially refused an order to do the drill. Again, his notes, redress of grievance and complaint do not support such an event.

[45] Third, Mr. Howell suffers from PTSD and filed a complaint for a pension for PTSD based on this same drill incident. Thus his mental abilities of recall and accuracy are compromised. His independence with respect to his account of the drill incident is also compromised.

[46] I do not find the evidence of Corporal Finokio to be helpful. His memory of the drill incident and the surrounding time period was limited and he was about 30 feet away from Mr. Howell and Captain Hart when it occurred.[6]

B. Mr. Howell's Notes

[47] The written notes of Mr. Howell made the same day of the drill incident, confirm that Mr. Howell twice repeated to Sergeant Thompson and Lieutenant Hart "...I don't have my brace...". Had the brace been "five minutes away in his barracks" at Shilo, as he testified during this hearing, he would have spontaneously stated to the Sergeant "I don't have my brace but it is only 5 minutes away. Please let me get it," or words to that effect. He did not do so.

[48] As well, Mr. Howell asked for permission to go to MIR to get a chit excusing him from drill. Had the brace been five minutes away in his barracks, he would have asked permission to go to his barracks to obtain the brace rather than to go to MIR to be excused from drill.

[49] While it is true that on March 13, 1995, Mr. Howell asked for and received a chit from the base physician allowing him to wear a knee brace, I accept Sergeant Thompson's evidence that he did not receive such a chit from Mr. Howell. This is

consistent with Mr. Howell's notes of the drill incident wherein he asked for permission to go to MIR for a chit excusing him from drill. He did not state to Sergeant Thompson, "Sergeant, I gave you a chit telling you that I need to wear a knee brace for drill" or "Sergeant, you have the chit", or words to that effect. He would have spoken such words had Mr. Howell twice given Sergeant Thompson a chit. In fact, the chit itself has not been produced in this hearing as part of his CAF file. Further, Mr. Howell testified that he wanted to obtain an updated chit because he was not sure if the staff had passed the other chits to Sergeant Thompson. Thus, in his testimony, he admitted that he did not give the chits to the Sergeant personally.

[50] Mr. Swayze urges that I accept that Mr. Howell would have acted in his best interests and worn the brace the morning of the drill incident during basketball. However, with respect to the time period of September 1994 to March 1995, Mr. Swayze questioned Mr. Howell as to Dr. de Korompay's advice to him regarding knee care. Mr. Howell testified that Dr. de Korompay had specifically told him to wear his knee brace during drill and to try to avoid contact sports. Yet, Mr. Howell, contrary to his doctor's advice, participated in an aggressive game of basketball. He did not seek an exemption from participation in basketball as he did with respect to participation in drill.

[51] Sergeant Thompson specifically observed Mr. Howell's knee and whether he was wearing a brace that morning. This is consistent with the fact that Mr. Howell had requested special consideration for exemption from drill based upon the state of his knee. Sergeant Thompson would have carefully observed Mr. Howell and his knee that morning.

C. Expert Witnesses

[52] I find that Dr. de Korompay testified in a candid, professional and helpful manner. Yet, I prefer the opinion of Dr. Randall to that of Dr. de Korompay with respect to the likelihood that the drill incident led to the injuries recorded by Dr. de Korompay in June 1995 and for which he performed surgical procedures in July 1995. Some of my reasons are outlined below.

[53] In assessing Mr. Howell in June 1995 and in formulating his opinions, Dr. de Korompay was not given the benefit of assessing Mr. Howell's injuries in light of the March 13, 1995 slip on ice. He testified that Mr. Howell had not advised him of the fall. Nor was he otherwise advised of Mr. Howell's March 27, 1995 head first fall down the stairs or the May 10, 1995 incident of Mr. Howell's knee giving way and recurring locking. In his report of September 12, 2003, Dr. de Korompay confirmed that he was not aware of other episodes of injury in the interim. Based on the limited information that Mr. Howell and his counsel gave to Dr. de Korompay about Mr. Howell's medical situation at the relevant times, he opined

that the findings presented on the scope of July 1995 could be attributed to the injury of March 1995.

[54] Dr. de Korompay freely acknowledged that in assessing the extent of the contribution of the drill incident to Mr. Howell's final state, he relied upon what the patient told him and what he saw in his knee after examination. Mr. Howell informed him that the drill incident caused him significant trauma with subsequent pain and swelling.

[55] Dr. Randall, on the other hand, obtained and reviewed Mr. Howell's complete medical file, contained in four volumes. Dr. de Korompay was not given the benefit of doing so. While it is true that Dr. Randall had not examined Mr. Howell in formulating his opinion, neither had Dr. de Korompay after Mr. Howell's significant knee injuries during his CAF career, and particularly those that occurred from March 1995 through to June 1995.

[56] For the same reasons, I also reject Dr. de Korompay's opinion that had Mr. Howell worn his knee brace during the drill incident, the brace would likely have prevented the injury he observed in June 1995 and July 1995. Given that I do not accept that the June 1995 and July 1995 injuries were caused by the drill incident, the effect of not wearing a brace during the drill incident does not assist me with assessing its relationship to those subsequent injuries. As well, I accept Dr. Randall's opinion that a derotational knee brace would have played a minimal role in his knee stability that day for all of the reasons he outlined in his expert report. Even Dr. de Korompay acknowledged that the question of whether a brace provides any stability support after an adequate rehabilitation program is controversial.

[57] Finally, with respect to possible psychological benefits of the knee brace to Mr. Howell, while some evidence was produced in the hearing by the respondent to the effect that Mr. Howell

suffered from PTSD[7], the complainant and the Commission failed to call Dr. McIntryre to testify in an expert capacity. I note that he remained a potential witness throughout the hearing as per the Tribunal's potential witness list. Thus, I am unable to find that the failure to wear a brace during the drill incident precipitated or contributed to Mr. Howell's deteriorated psychological state. Respondent counsel asked me to draw an adverse inference against Mr. Howell for failing to call Dr. McIntyre. I do not need to do so to dispose of this case.

V. ISSUES

[58] Based upon my findings of fact I now address the legal issues that arise.

[59] The jurisdiction of this tribunal arises from Mr. Howell's complaint dated July 20, 1998. Mr. Howell's counsel, Mr. Swayze, confirmed in his opening statement that the crux of Mr. Howell's complaint centres around the drill incident of March 23, 1995[8]. Mr. Swayze argued that the CAF denied Mr. Howell the use of a knee brace, a piece of equipment which he required in order to properly function, and that this act constituted a discriminatory act. He argued that as a result of that incident, Mr. Howell required further knee surgery and further deterioration of his knee occurred. But for this incident, his knee would not have deteriorated as quickly as it did, and he probably would have spent more time in the CAF. Mr. Swayze argued:

> "We will show, Madam Chair, that this was a case where a split second decision, had he been given an extra five minutes to walk across to the barracks and pick up his knee brace, had he been given that time, we wouldn't be here today, Madam Chair."[9]

[60] Thus, in accordance with the complaint, the submissions of counsel and Mr. Howell's own testimony, the only issues that arise in this case are those relating to the drill incident. The issues are:

1. Did the drill incident constitute a discriminatory practice contrary to section 7(a) of the *Canadian Human Rights Act*?[10]

2. Did the drill incident constitute a discriminatory practice contrary to s. 7(b) of the *Act*?

3. If the answer to either of these questions is in the affirmative, has the CAF established a *BFOR* defence further to s. 15(a) of the *Act*?

4. If not, what remedies should be awarded to Mr. Howell?

VI. LAW

A. Human Rights Law

[61] Mr. Howell filed a complaint dated July 20, 1998, pursuant to s. 7 of the *Act* as it stood on that date, complaining about events that occurred in March 1995.

Section 7 of the current *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 employment. One of the prohibited grounds is disability.

[62] Section 15(1)(a) outlines the bona fide occupational requirement (the "*BFOR*") defence:

> It is not a discriminatory practice if 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.

Section 15(2) states:

> For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Section 15(8) confirms that section 15 applies to both direct and adverse effect discrimination.

Section 15(9) states:

> Subsection (2) is subject to the principle of universality of service under which members of the Canadian Forces must at all times and under any circumstances perform any functions that they may be required to perform.

[63] The *Act* as it stood in March 1995 did not contain provisions equivalent to the current section 15(2), 15(8) and 15(9). These amendments came into force and effect as of June 30, 1998.[11]

[64] In 1999, the Supreme Court of Canada released its decisions in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Services Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 [*Meiorin*] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights*, [1999] 3 S.C.R. 868 [*Grismer*]. In these two cases, the Supreme Court of Canada replaced the former jurisprudential distinction between direct and indirect discrimination with a unified approach. Under the unified approach, the onus remains upon the complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one that covers the allegations made, and which, if believed, is sufficient and complete to justify a verdict in the complainant's favour in the absence of an answer from the respondent. Once a *prima facie* case of discrimination has been established by the complainant, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy is a *BFOR*. In order to establish a *BFOR*, the respondent must prove that:

A) it adopted the standard for a purpose or goal that is rationally connected to the function being performed. At this stage, the focus is not on the validity of the particular standard, but on the more general purpose, such as the need to work safely and efficiently to perform the job. Where the general purpose is to ensure the safe and efficient performance of the job, it will not be necessary to spend much time at this stage;

B) it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, with no intention of discriminating against the claimant. Here, the analysis shifts from the general purpose of the standard, to the standard itself; and;

C) the impugned standard is reasonably necessary for the employer to accomplish its purpose; i.e. the safe and efficient job performance. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. The employer must ensure that the procedure, if any, to assess the issue of accommodation, addresses the possibility that it might discriminate unnecessarily on a prohibited ground. As well the substantive content of a more accommodating standard offered by the employer must be individually sensitive. Alternatively, the employer must justify his reason for not offering such an alternative standard.

[65] The Supreme Court's rulings in *Meiorin* and *Grismer* are also instructive in assessing whether or not an undue hardship defence has been established. In *Meiorin*, the Supreme Court observed that the use of the word `undue' implies that some hardship is acceptable; it is only `undue' hardship that will satisfy the test.[12] An uncompromisingly stringent standard may be ideal from the employer's perspective. Yet, if it is to be justified under human rights legislation, the standard must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship. The Supreme Court has further observed that in order to prove that a standard is reasonably necessary, a respondent always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship. It is incumbent on the respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. In some cases, excessive cost may justify a refusal to accommodate those with disabilities. However, one must be wary of putting too low a value on accommodation. It is all too easy to cite increased cost as a reason for refusing to accord equal treatment. The adoption of the respondent's standard has to be supported by convincing evidence.[13] Impressionistic evidence of increased cost will not generally suffice. Innovative and practical non-monetary avenues of accommodation ought to be considered. Finally, factors such as the financial cost of methods of accommodation should be applied with common sense and flexibility in the context of the factual situation under consideration.[14] As observed by Cory J. in *Chambly v. Bergevin* [1994] 2 SCR 525, what may be entirely reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession. I note that the term `undue hardship' is not currently defined in the *Act*.

[66] In the case at the bar, first and foremost, the issue that must be squarely addressed, is whether or not the complainant has established a *prima facie* case of discrimination? This tribunal, further to ss. 49 and 50, is to conduct an inquiry into the complaint. This inquiry is to be independent, impartial and have due regard to the evidence presented and the relevant law. This tribunal is bound by the Federal Court of Appeal's ruling in *Hutchinson v. Canada (Minister of the Environment) (C.A.)* (2003), 4 F.C. 580. The court confirmed that both *Meiorin* and *Grismer* considered the effects of discrete, explicit standards or policies which served as screening tools; i.e., an aerobic capacity standard that adversely discriminated against women, and a visual acuity standard for the issuance of driver's licenses, constituting direct discrimination. The Federal Court of Appeal distinguished those cases from a transaction between the parties that was not driven by a pre-existing policy. Instead, there was a course of dealings in which the parties operated from an understanding of their respective rights and obligations. In *Hutchinson*, it was difficult to isolate and identify a particular policy or standard. In *Meiorin*, the Court's analysis began from a finding that the policy in question distinguished between people adversely on a prohibited ground.

The Federal Court ruled that where one is dealing with a course of conduct, the more appropriate question is, does the transaction between the parties, taken as a whole, result in adverse treatment on a prohibited ground? If the transaction taken as a whole does not disclose adverse treatment, then the inquiry is at an end. If adverse treatment on a prohibited ground is shown, one proceeds to the three questions envisioned by the Supreme Court's analysis in *Meiorin*. In *Hutchinson*, the Court ruled that it was reasonably open to the Commission to find that the transaction between the appellant and the respondent, taken as a whole, did not disclose adverse treatment.

[67] Further, in *Hutchinson* the Court affirmed that a complainant does not have the right to hold out for his or her preferred alternative. In that case, the respondent did attempt to accommodate the complainant's disability by moving her to alternate work sites, employing her on a seasonal basis, promoting a scent free environment and offering telework. The Federal Court adopted the ruling in *Ontario (Ministry of Community and Social Services) v. OPSEU* (2000), 50 O.R. (3d) 560, where the Ontario Court of Appeal found that the employer's "Religious Observance Policy" was sufficient to accommodate the individual needs of adherents of minority religions. An employee claimed the right to paid time off to observe eleven religious holidays. The employer's policy provided for two paid days off for religious observance and allowed for additional days off to be taken via scheduling changes and earned days off accumulated through the employer's compressed work week option. The employee took the position that his earned days off from the compressed work week were his to use as he saw fit and that the employer could give him 11 paid days off for religious observance without undue hardship. The Court held that since the employer's policy was sufficiently inclusive to accommodate the claimant, the issue of accommodation to the point of undue hardship did not arise. The Federal Court ruled that one of the corollaries of this position is that claimants cannot refuse a reasonable solution on the ground that the alternative which they favour will not cause the employer undue hardship.

B. Human Rights Law and Tort Law

[68] The principles developed in tort law to restore victims to the position they would have enjoyed but for the wrongful act apply to human rights cases. Consequences of the act that were too indirect or too remote must be excluded from the damages recoverable.[15] Subsequent to rulings by the Federal Court of Appeal such as in *Morgan*, the Supreme Court of Canada outlined a principled approach to assessment of causation in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Causation is established where the defendant caused or contributed to the injury. The general, but not conclusive, test is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. Where the "but for" test is unworkable, the courts have recognized that causation is established where the defendant's negligence "materially

contributed" to the occurrence of the injury. A contributing factor is material if it falls outside the *de minimus* range. Causation need not be determined with scientific precision. It is essentially a practical question of fact which can best be answered by ordinary common sense. At the same time, plaintiffs need not be placed in a better position than they would have been prior to the tort. Thus it is important not only to assess the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these two positions: the "original position" and the "injured position" which constitutes the plaintiff's loss. If an intervening event was unrelated to the tort and affected the plaintiff's "original position", the net loss is not as great as it might have otherwise seemed. Thus, damages are reduced to reflect this.

VII. ANALYSIS

A. Prima Facie Case Not Established

[69] In this case, I find that the transaction as a whole that occurred between Mr. Howell and the CAF surrounding the drill incident and the subsequent JNCO course failure did not constitute adverse treatment by the CAF against Mr. Howell.

[70] With respect to s. 7(a) of the *Act*, Mr. Howell had a pre-existing history of knee problems prior to the drill incident. Thus, he had a disability within the meaning of the *Act*. However, the CAF did not refuse to employ him due to the events that transpired during the drill incident. Rather, Mr. Howell voluntarily chose to retire from the CAF due to events that transpired subsequent to the drill incident, not causally connected to the drill incident. Mr. Howell had largely recovered from his March 1995 injuries by October 1995 when his medical category was reinstated allowing him to perform full duties. At this time, his job duties were not modified and his knee surgeries did not prevent him from working as many overtime hours as he was accustomed to working prior to the surgery. Both Mr. Howell and Dr. de Korompay saw his July 1995 surgery as having successfully resolved his knee problems. In February 1997, well past his October 1995 surgical recovery, Mr. Howell evaluated himself as being unable to perform certain general military duties due to ongoing knee injuries. At the time of completing these forms, Mr. Howell was aware that this would lead to his termination as he would be found to breach universality of service principles of the CAF. Mr. Howell sought this result as he had accepted the recommendation of his physician that he should retire from the CAF. Consistent with Mr. Howell's expectations and desires, the CAF eventually discharged Mr. Howell in March 1998 on the basis that he did not comply with universality of service. The issue of the applicability, content and context of the duty of universality of service in March 1995 does not arise in this case. The complainant failed to establish a

prima facie case of discrimination. Further, even if such a case had been established, the Tribunal is bound by the ruling of *Irvine v. CAF* 2003 FCT 660 (T.D.) wherein the court ruled that while *Meorin* does apply retroactively to events that occurred prior to the 1999 ruling, it must be applied with a contextual appreciation of the universality of service policy as it existed in March 1995. Thus, had the analysis proceeded to assessment of the respondent's defence, in the facts of this case, I find that the respondent would have successfully advanced its universality of service defence.

[71] Secondly, I do not find that the CAF contravened s. 7(b) of the *Act*. It did not differentiate adversely against Mr. Howell by refusing to accommodate his request for a knee brace during drill or an exemption from drill. Mr. Howell sought a knee brace which was not medically required for him to perform drill safely. While the CAF officers denied Mr. Howell the opportunity to obtain a chit excusing him from drill due to the fact that he did not have his knee brace with him, there is insufficient evidence before me to demonstrate that more probably than not Mr. Howell required the knee brace to safely perform drill. The morning of the drill, just a few hours prior to the drill parade, Mr. Howell played an aggressive game of basketball without his brace. If he was able to perform this type of physical activity without a brace, then he was equally capable of performing drill without a brace. Mr. Howell's conduct of playing aggressive basketball without a brace is consistent with the expert opinion of both orthopaedic surgeons, Dr. Randall and Dr. de Korompay. They agreed that the brace was not physically necessary for patients one year post-surgery. They agreed that one year post-surgery, the knee brace functions to provide psychological support to the wearer, rather than mechanical support.

[72] In short, Mr. Howell was not entitled to demand accommodation of a medical condition by a brace without an objective basis for such accommodation. In the facts of this case, he did not have the right to hold out for his preferred means of accommodation.

[73] I do not find that the CAF adversely differentiated against Mr. Howell by assessing him negatively on the JNCO course report. Mr. Howell successfully challenged that course report through grievance proceedings. The report was amended to his satisfaction. Mr. Howell testified that he was satisfied with the revised course assessment that continued to maintain instructor concerns about Mr. Howell's performance and attitude. Indeed, Mr. Howell did not grieve the course failure even though he grieved the course evaluation. As well, I find that had the drill incident not occurred Mr. Howell would have been unable to successfully complete the JNCO course for a number of other reasons. Although Mr. Howell was given a chit that he was fit for the JNCO course, Mr. Howell himself was less confident about his ability to participate in the course. He indicated that he would "try his best". Secondly, the JNCO course had an added infantry component not found in the JLC course that would have required greater

physical fitness than the earlier course, and he had received an RTU from the September 1994 JNCO course. Thirdly, Mr. Howell's ability to pass the physical components of the course were compromised by his March 7, 1995 fall on ice and, more importantly, by his March 27, 1995 head first fall down the stairs.

[74] Thus, the complainant and the Commission have failed to establish a *prima facie* case of discrimination within the meaning of either section 7(a) or section 7(b) of the *Act*.

B. Causation - July 1995 Injuries

[75] Lastly, even if the analysis had proceeded to the assessment of quantum, I do not find that Mr. Howell could have successfully advanced the quantum claim he asserts. I find that Mr. Howell did not suffer significant immediate harm immediately following his drill participation. Immediately after the drill incident, Mr. Howell's knee felt painful and swollen. However he did not report to MIR until the next morning. In fact, he completed the rest of his CAF activities for the day without his brace. This conduct can be contrasted to the March 27, 1995 head first fall down the stairs. This was a severe injury. Immediately after this fall, Mr. Howell saw a physician and was advised that he was incapable of continuing with the course and that his category was changed. Had Mr. Howell suffered a debilitating injury due to the 40 minute drill, he would have reported to MIR immediately thereafter. I find that the drill incident did not materially contribute to Mr. Howell's pre-existing right knee problems: Using a common sense review of his complex medical history I find that the effect of the drill incident upon his right knee fell within the *de minimus* range. Had the drill incident not occurred, in light of his ongoing knee injuries, I find that Mr. Howell would have found himself in virtually the same medical situation as he experienced after the drill incident.

[76] Dr. Randall confirms that individuals, such as Mr. Howell, who undergo ACL reconstruction will at some point develop degenerative changes both from the initial injury and subsequent wear due to high impact activities they resume following ACL reconstruction. Thus, irrespective of the drill incident, given his 1991 ACL reconstruction and the nature of his CAF duties, Mr. Howell would have suffered from degenerative change during his subsequent career with the CAF. I have already found that the injury observed by Dr. de Korompay in June / July 1995 was caused by the March 27, 1995 head first fall down a flight of stairs. Indeed, Dr. de Korompay freely acknowledged that a fall could have resulted in the damage that he observed in June and July 1995. I accept Dr. Randall's opinion that it was unlikely that Mr. Howell could have suffered a significant tear to his meniscus without an acute event such as the March 27, 1995 fall.

VIII. CONCLUSION

[77] The 1995 drill incident, and the subsequent JNCO course failure, did not constitute discriminatory practices contrary to section 7(a) of the *Act*. Nor did they lead to Mr. Howell's termination from the CAF in 1998 in light of pre-existing and intervening incidents. Rather, the fall of March 26, 1995, more probably than not, led to Mr. Howell's need for the July 1995 surgery. Mr. Howell recovered from this operation by October 1995. Thereafter, the April 1996 generator incident led to Mr. Howell's subsequent more serious knee injuries that led to his voluntary actions to secure release from the CAF.

[78] The 1995 drill incident and the JNCO course failure did not constitute discriminatory practices contrary to s. 7(b) of the *Act*. Mr. Howell was not medically required to wear a knee brace during the drill incident, and any denial by the CAF of the opportunity to secure such a brace did not constitute discrimination. Mr. Howell was satisfied with the amended course evaluation post-grievance. I do not find that the CAF failed to accommodate Mr. Howell with respect to his disability. To the contrary, Sergeant Thompson made at least two attempts to accommodate Mr. Howell's requests prior to the drill incident. Further, throughout his career, and during the years of 1995 and 1996, the CAF accommodated Mr. Howell's needs for physical care for his knee condition.

[79] Thus, I dismiss Mr. Howell's complaint in its entirety.

[80] At the request of counsel I am not addressing the issue of costs herein. The parties may deal with them amongst themselves. If they are unable to agree, I retain jurisdiction to address this issue.

Shirish P. Chotalia

OTTAWA, Ontario

September 23, 2004

PARTIES OF RECORD

TRIBUNAL FILE:	T817/6703
STYLE OF CAUSE:	Ronald J. Howell v. Canadian Armed

	Forces
DATE AND PLACE OF HEARING:	February 9 - 11, 2004 April 27 - 29, 2004 May 3 and 7, 2004 Mat 18 - 20, 2004 Brandon, Manitoba June 30, 2004 Winnipeg, Manitoba
DECISION OF THE TRIBUNAL DATED:	September 23, 2004

APPEARANCES:

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K.E. Ceilidh Snider	For the Canadian Human Rights Commission
Sid Restall / Kevin Staska	For the Respondent

[1]Exhibit R-13.

[2]Exhibits R-1, R-2, R-3 and R-4.

[3]Exhibit C-51, Tab 116.

[4]Exhibit R-10, Tab 13, p. 8.

[5]Transcript Vol 5, p. 507, lines 5 - 15.

[6]Transcript Vol 6, p. 612, lines 21-25 and p. 613, lines 1-4.

[7]See diagnosis made by Dr. Ian McIntyre in his letter dated April 22, 2003 being Exhibit R-12.

[8]Transcript Vol 4, pp 96-98.

[9]Transcript Vol 4, p. 98, lines 6-10.

[10]R.S.C. 1985, c. H-6 [*Act*]

[11]CIF, 1998, c. 9, ss. 9 to 34 in force 30.06.98 see SI/98-79.

[12]*Meiorin* adopts the decision in *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 984.

[13] *Grismer* at paras. 41 and 42.

[14] *Meiorin*, at para. 63. See also *Chambly v. Bergevin*, [1994] 2.S.C.R. 525 at 546.

[15] *Canada (Attorney General) v. Morgan* (1992), 2 F.C. 401 (F.C.A.).