TD 3/ 86

Decision rendered July 15, 1986

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT, S. C. 1976- 77, C. 33 as amended

AND IN THE MATTER OF a hearing before a Human Rights Tribunal Appointed under S. 39 of the Canadian Human Rights Act.

BETWEEN:

DAVID J. DeJAGER Complainant

and

DEPARTMENT OF NATIONAL DEFENCE Respondent

BEFORE: WENDY ROBSON, Chairman
A. WAYNE MacKAY
PAUL J. D. MULLIN, members

TRIBUNAL DECISION

APPEARANCES: RENÉ DUVAL AND ANNE TROTIER, Counsel for the Complainant and the Canadian Human Rights Commission

SEYMOUR MENDER AND GEORGE ANNAND, Counsel for the Respondent

> This Tribunal was appointed May 1, 1985 to inquire into the matter of a complaint by David J. DeJager against the Department of National Defence in which he alleged he had been discriminated against on the ground of physical handicap in a matter related to employment. The hearing took place in Halifax, Nova Scotia October 1, 1985 through October 3, 1985.

The complaint, dated July 13, 1982, reads as follows: "I have been advised that I will be released from the Canadian Armed Forces based on medical grounds (asthma) effective October 12, 1982. I believe I am being discriminated against contrary to Section 7 and 10 of the Canadian Human Rights Act."

The Canadian Human Rights Act provides as follows:

S. 7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. ...

S. 10. It is a discriminatory practice for an employer, employee organization or organization of employers,

(a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment referral, hiring, promotion, training, apprenticeship transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

COMPLAINANT'S EVIDENCE

David John DeJager is 25 years old and a resident of Halifax, Nova Scotia. He first enlisted in the Armed Forces in October, 1977 and was employed as a boatswain. He left the Forces in 1979 because of personal reasons but subsequently re- enlisted May 10, 1980. In the summer of 1981 he gave some consideration to leaving the Forces again and requested a release. His personnel request was dated September 27, 1981 but he subsequently withdrew that request as there appeared to be the possibility of a medical re- muster.

The evidence indicates some four asthmatic related incidents that culminated in the release of Mr. DeJager by the Armed Forces on October 12th, 1982. A fifth incident occurred after his release.

The first episode of breathing difficulty was experienced in December of 1980 when he was on Christmas leave. He was at his girl friend's apartment when he experienced symptoms he described as "tightness in my chest, shortness of breath and wheezing and coughing" (vol. 1. p. 29). He returned to his ship immediately where he was given Ventolin, an inhalant spray.

A second episode took place in the same month which he controlled with the Ventolin. He described these episodes as lasting a matter of minutes. (vol. 1. p. 10)

The third and most serious of the episodes took place in May 1981. He was leaving his apartment for his father- in- law's home when he experienced symptoms. He used the Ventolin and continued on to his destination where the symptoms re- occurred. He was, at that point, out of Ventolin and went to Stadacona Hospital with the intention of obtaining more of the inhalant. He was admitted to the hospital where he remained for five days. He was treated with Ventolin, oxygen and intravenous Aminophyllin.

Mr. DeJager testified he was told he had bronchitis. (Vol. 1, p. 12) Dr. Brian O'Brien later testified the diagnosis was asthma and that the admitting officer had described his condition as "between mild to moderate". (Vol. 2. pp. 249- 251)

Upon his release from hospital, he then resumed his normal duties on HMCS Protector and not until October 1981 did he have another attack. He described that as not as bad as the others, "... mainly just wheezing and tightness of chest." (Vol. 1. p. 13) He was on board ship at the time watching a movie and obtained Ventolin from the doctor. Following the October, 1981 episode, he was placed on light duties and remained on them until released in October, 1982.

Prior to his release his medical record had been reviewed and his medical category downgraded as of October 7, 1981. The change in medical category went through the various review procedures culminating in his release.

His only other asthmatic episode appears to have taken place in December 1984 when he was at home in Halifax and he received Ventolin at the Victoria General Hospital but was not admitted.

Mr. DeJager was the only witness for the Commission but extensive evidence was given on behalf of the Department of National Defence covering two principal areas, medical and employment. We will deal first with the employment aspect.

DUTIES OF THE BOATSWAIN

Mr. DeJager described his duties as boatswain as follows: "Boatswain duties mainly consist of painting, spray painting, rigging, fueling of ships, storage, ammunitions, demolitions, carrying small arms, helmsman, lookout, special sea dutyman." (vol. 1. p. 6)

Lieutenant Commander D. W. Fitzgerald gave a more elaborate description of the boatswain's duties. Lt. Commander Fitzgerald has ten years of sea time serving on destroyers and minesweepers and latterly has been involved in officer training and is presently responsible for career management of all naval tradesmen numbering some 7500 sailors.

In essence all navy trades are sea- going and "for each trade we have a trade specification which identifies in general terms what the trade is requiring, both in the jobs, the functions he will be required to perform over the course of his career-- it identifies any special requirements, certain security clearance required for the trade and any medical standards, the minimal medical standards required for a tradesman, and also it outlines the various working conditions that a bosun would be expected to work under during that time." (vol. 2. p. 162)

He then proceeded to describe the duties of a boatswain,

"They are the professional seamen of the navy, and are responsible for small boats; the handling of small boats... ; the launching and recovery of small boats. The are responsible for upper deck evolutions and the equipment that we require for our upper deck evolutions dealing with towing, anchors, cables, replenishment at sea, pulleys, blocks, large ropes, small ropes, steel wire rope, winches, that sort of thing, that require, that enable us to conduct or exchange fuel at sea, conduct transfer of materials and personnel at sea." (vol. 2. p. 163)

He went on to describe the boatswains' responsibilities for the watch rotations, upper deck watch organization including steering, lookout duties, husbandry of the ship, small arms, demolition duties. In heavy weather there is a higher risk attached to a boatswain's duties because they work on the upper deck. They also have responsibility for fire fighting, a major hazard at sea.

He was asked whether the illness or sudden incapacitation of a boatswain would affect either the boatswain's well- being or the well- being of those around him. He answered in the affirmative and described certain situations.

"... the greatest fear is the sudden incapacitation-- that's the greatest fear, particularly when we are doing one of ....seamanship evolutions where we have our bosuns... giving the orders to actually accomplish that evolution. Should any of them become suddenly incapacitated because-- when you are conducting that particular evolution the only people you've got up there are the people you need to be there. You don't have any extra people up there if somebody is going to be hurt. You have only got the people you want... So if suddenly you lose one of those members you've got a problem on your hands and, depending on what the evolution is, and the circumstances, it could certainly end up causing risk to life and limb, and also degrade the ship's actual operation capability to conduct those evolutions." (vol. 2. p. 171)

He further described fire- fighting exercises, a constant focus of training. In one instance in which he was involved they were fighting a fire in an exercise and the second hose for personnel protection was dropped by an individual suddenly incapacitated. The Lt. Commander was engulfed by flames and pulled out by instruction staff who would not have been there had it been a genuine fire as opposed to an exercise.

Other examples offered by him included the lowering of small boats in heavy weather, rescue operations, towing evolutions, fuelling and replenishment at sea.

He also gave evidence of medical facilities available at sea. It would appear that there are no qualified doctors on board destroyers or submarines although there are medical assistants and pharmacies providing both Ventolin and oxygen.

The full description of a Boatswain (also called bosun) is set out in Exhibit R- 9, the first two pages of which are included.

CFP 123(2) R- 9 TS 181 PART TWO

BOATSWAIN

1. SCOPE

a. This specification describes the Regular Force trade of Boatswain, which is the only trade in the Boatswain career field. b. The functions of this trade are as follows-

(1) Operations. This trade encompasses all aspects of the traditional professional seaman's trade such as the operation and navigation of ships' whalers, motor cutter, landing craft, crash and rang safety bows, use of navigational and meteorological equipment, anchor and cable work, rigging, ropework, and seaman ship evolutions. The Boatswain trade carries out such duties as small arms weapons drill, weapons range firings, and above water demolitions; organizes and conducts internal security and boarding operations; and operates cargo handling equipment. In addition, the trade is responsible for organizing the watch- keeping, disciplinary, and regulating functions at sea and parade and ceremonial duties ashore and afloat. (2) Maintenance. Carries out maintenance on anchors and cables, capstans, windlass, outboard motors, derricks, cranes, fork lifts, boats, life saving equipment fitted in ships, rigging, small arms, and other ship- borne equipment pertaining to seamanship. Additionally, the Boatswain trade is responsible for the

supervision and coordination of the preservation of metal surfaces above the waterline, and all wood surfaces. (3) Administration/ Clerical. Administers personnel within the trade including advising and counselling on career and personal matters. Performs administrative functions, ashore and afloat, with respect to watch- keeping, maintenance of order and discipline, and leave. Demands, receives and accounts for and musters stores, small arms, ammunition, and demolition explosives. Compiles reports and returns, and amends publications. (4) Instruction. Instructs subordinate tradesmen in the Boatswain trade. Instructs and provides expertise to all trades employed at sea in seamanship, above water demolitions and parade and ceremonial. Conducts fleet support and team training. May be required to train civilian personnel in certain aspects of trade. (5) Damage Control. Performs damage control duties as required. (6) General Military Requirement. Performs additional duties not normally associated with trade, which include guns crews, first aid teams, ship's husbandry, shore patrol, and sentry duties.

c. Trade Specialty Qualifications (TSQs) applicable to the BOSN 181 trade are listed in CFP 123(1) and the Trade Specialty Specification (TSSs) are contained in CFP 123(4). Part Two and Part Eleven.

2. PROGRESSION IN CAREER FIELD/ TRADE

a. Progression in the BOSN 181 trade is through the various levels from TQ 3 to TQ 8. b. Promotion prerequisites (exclusive of trade qualifications) governing progression are detailed in CFAO 49- 4.

3. SPECIAL REQUIREMENTS

a. Security Clearance. Secret. b. Medical Standards. Medical standards for the Canadian Forces are governed by CFP 154. The minimum medical standards for initial assignment to the BOSN 181 trade are included below for information purposes only:

V CV H G O A 3 2 3 2 2 5

Note: It is emphasized that the medical standards listed above are for the initial assignment of personnel to the trade shown. Experienced tradesmen who leave their category lowered will be considered for retention in the trade on individual merits by a Career Medical Review Board in accordance with CFAO 34- 26.

AL 17 1 >TS 181 CFP 123(2)

PART TWO

4. WORKING CONDITIONS

a. Physical. Boatswains perform their duties afloat, in exposed positions, at any time, day or night, in all kinds of weather. In rough weather, in operations such as replenishment at sea or the securing of loose or damaged equipment on deck, tradesmen may be required to work under extreme conditions where the decks are wet and slippery and following the normal safety

precautions would not permit the carrying out of the evolution. The hoisting, lowering, and operation of boats for rescue at sea in rough weather is usually extremely hazardous and is often at the risk of life and limb. Members of the cable party, when a ship is transitting confined waters, are required to remain at instant readiness for long periods of time in exposed positions and may have to endure extreme cold. Boatswains are required to perform watchkeeping duties ashore and afloat. b. Special Factors. Tradesmen must be able to work under emergency conditions. They must be capable of quick reaction to orders or situations when handling boats or steering ships, and when supervising evolutions such as demolitions and small arms firing. c. Stresses. The mental and physical stresses in this trade range front moderate to severe. Stress increases when in charge of small craft in heavy weather, when steering ships in close proximity of other vessels such as underway replenishment, in adverse weather, and during violent manoeuvering. Stress also increases when conducting evolutions which require precision in execution. especially when responding in critical situations when something has gone wrong or some development is endangering personnel or property. Emergency situations involving a great deal of stress include internal security, riot control, landing, and boarding operations. d. Consequence of Error. Errors in handling ship's boats and in seamanship evolutions may result in injury or loss of life and or damage to or loss of materiel. Errors in steering or transmission of conning orders in ships whilst replenishing at sea, berthing, in exercises, or in combat situations may result in collisions and injury or loss of life. Errors during small arms firing, demolitions training, and operations may result in injury or loss of life. Errors in dealing with disciplinary problems may adversely affect the careers of others. e. Occupational Hazards. Injury or loss of life resulting from

(1) falls from masts, booms, or stages, (2) accidents with hawsers, wires, or cables, (3) small arms accidents, (4) contact with personnel during arrest or custody, (5) accidents involving demolitions, (6) combat, (7) infection or poisoning as a result of handling paints, solvents, fuels or rope fibres, and (8) treating loss from close proximity to high noise levels over long periods of time.

5. RELATED OCCUPATIONS

Canadian Classification and Dictionary of Occupations, 1971 Civilian Code Number

Painter Shipyard 8595.118 Spray Painter, Finish, Large 8595.126 Painter Helper 8595.314 Spray Painter Helper 8595.322 Inspector/ Finisher Fibreglass Boats 8596.118 Able Seaman 9155.118 Deck Hand 9155.122 Long Shoreman 9313.110 Motor Boat Operator 9159.134 Winchman 9311.166 Boatswain 9155.144 Rigger 9311.138

2 AL 17 > - 7 MEDICAL EVIDENCE

The medical fitness evidence fell into two categories, firstly, the specific requirements of the Canadian Armed Forces and secondly, the more complaint related evidence concerning asthma generally and Mr. DeJager specifically.

Dr. David R. Gowdy is a member of the Canadian Armed Forces presently posted in the Surgeon General's Office, Ottawa. He is in the Directorate of Medical Treatment Services dealing with the application of the medical category system.

He described the medical profile system which has been in use since 1945, as amended in 1967, which is contained in Canadian Forces Publication 154. The purpose is "A combination of a physical profile and a category system... to communicate to administrative and employment authority a concise medical opinion of the employment of recruits and serving members." (vol. 1. p. 110- 111)

The minimum requirements are G2 02 (Ex. R- 7) indicating that the servicemen "are fit to go anywhere in the world and to do anything the average serviceman is meant to do in the Armed Forces." (vol. 1. p. 113)

There are a number of other basic and more sophisticated requirements but the above- noted G2 02 rating is the medical profile designation of concern in this case.

Dr. Gowdy explains the G2 rating as one which requires no climatic or environmental limitations and does not require regular medical support. The 02 rating refers to the occupational standard and

"will be assigned to the individual who is free from medical disabilities, except those minimal conditions that do not impair his ability to perform at an acceptable level of endurance in a front-line combat environment and to do heavy physical work." (vol. 1. p. 115)

Dr. Gowdy went on to say that the medical profile may be downgraded: "... if, in his judgment, a member has a medical condition or an injury that justifies amending his employment location based upon the requirement for certain medical facilities or certain living conditions ... the doctor might award him a 03, indicating to the commanding officer of the vessel that he is fit to go to sea because he only needs periodic supervision, but if another doctor felt he had a condition that might require the presence of a doctor, in other words physician services available, he is obliged to award a G4." (vol. 1. p. 116)

The downgrading of a medical profile can be temporary if it is thought that some form of treatment can alleviate the medical problem.

Lieutenant Colonel Jack Winston Stow, Chairman of the Career Medical Review Board outlined the procedures once a medical profile has been downgraded.

He said, "If a medical profile falls below the minimum then the person's file and personnel history is referred to the Board for a decision as to what will be the appropriate career action for that person." (vol. 1. p. 139) Sitting on the Board are the Chairman, three other serving officers in career management and a medical doctor.

Initially a doctor will re- assign a medical category more suitable to the man's limitation. That re- assignment is contained in a document called Canadian Forces Document 208 which is

referred to a command surgeon for verification. if verified it is returned to the man's unit and the man is advised of the downgrading. The document is then forwarded to the commanding officer for one of four main recommendations. "One will be retention in his current trade and employment; the second will be a re- muster to a different trade; the third will be release from the Canadian Forces; a fourth might be retention in current trade but with career restrictions." (vol. 1. p. 140- 141)

That form is then sent to Ottawa for review by the Surgeon- General's Office and for presentation to the Career Medical Review Board with a final review by the Director General in charge of posting of careers in the ranks.

He went on to say that the re- classification to G4 rendered Mr. DeJager "unfit to serve at sea, unfit to serve in the field; unfit to serve in United Nations duties; unfit to serve in any isolated place where there were no physician services readily available." (vol. 1. p. 144- 145)

This summary of steps was completed in Mr. DeJager's case as evidenced by Exhibit T2, "Notification of Change of Medical Category". On that exhibit the Review Board decision is dated March 15, 1982.

It would appear from Lt. Col. Stow's evidence that cases of asthmatics reviewed by the board have all resulted in release from the Forces. (Vol. 1, p. 150) It is also to be noted that in 1984, the Career Medical Review Board dealt with 300 service persons who were released and 50 who were re- mustered. (Vol. 1, p. 142)

Two doctors gave evidence directly pertaining to the complainant's medical situation. The first was Dr. Paul Landrigan, a medical doctor since 1954 and accepted as an expert in respiratory decease. He is affiliated primarily with the Halifax Infirmary and became involved in this case in November, 1982 at the request of Mr. DeJager's family physician.

Dr. Landrigan did a history and physical examination and concluded that Mr. DeJager was a mild to moderate asthmatic and in cross- examination "We have very few people that we recommend they take just the occasional Ventolin aerosol to relieve any of their symptoms at all- - that would be a very mild case.

That, I think, would sum up my feeling about this situation at the present time." (vol. 1. p. 94)

At the request of the Human Rights Commission Dr. Landrigan conducted two further examinations of Mr. DeJager in June of 1983 and July of 1984.

In his report of June 24, 1983 he indicated that he felt the probability of no further return asthmatic attacks for Mr. DeJager was in the 90 percent range. (vol. 1, p. 70) In his testimony, Dr. Landrigan made further reference to that same report:

"... that he hadn't had any previous attacks or anything that required therapy for years, and I thought there was a reasonably high chance that he would go into a period which many asthmatics do where they don't have many symptoms for some years, and don't require any

therapy, but you never can predict that it may not come back at some time. Of course at this time I wasn't aware that there was another episode in December '84". (vol. 1. p. 71)

He was asked whether there would be any increased danger or risk to Mr. DeJager if he were to be in an isolated post, away from medical attention and Dr. Landrigan agreed that there could be.

Finally, he was of the view that Mr. DeJager's asthma was caused by external factors and would be labelled extrinsic. He had no reservations as to the complainant's ability to handle physical exercise or the requirements of his job description but it was obvious that the combination of critical situations and geographic distance from medical care made him somewhat uncomfortable. Evidence was also given by Dr. Brian O'Brien, a Colonel in the Canadian Armed Forces. He is a medical doctor currently stationed at Canadian Forces Hospital, Halifax. He has a specialty in internal medicine which includes the treatment of asthmatics.

He testified in two main areas-- Mr. DeJager's medical file and more particularly, the hospitalization episode in May 1981 with which he was personally familiar.

Dr. O'Brien described Mr. DeJager as being dramatically short of oxygen at the time of his admission to Stadacona Hospital and "a very sick man" who could not have been adequately treated aboard ship.

There was a subsequent referral to Dr. McSween, an allergist and consultant to the Forces. These tests indicated no particular allergic trigger for his attacks. The report was dated March 1982, some time after the Change of Medical Category had been initiated.

There was considerable questioning and evidence about intrinsic or extrinsic asthma. The gist of it would appear to be that there are asthmatics whose episodes are triggered by external causes be they allergens or general environmental causes. Intrinsic asthma is more likely to be caused by internal situations-- a bronchial hyper- irritability. But Dr. O'Brien made it quite clear that whether intrinsic or extrinsic, Mr. DeJager's profile would still have been downgraded. The purpose in trying to establish an allergenic cause was for treatment only.

THE MILITARY FACTOR

Quite apart from the boatswain's duties outlined earlier which are analogous in most circumstances to those of the merchant navy, there was some emphasis placed on the military aspect of Mr. DeJager's employment. The military aspect can present circumstances of danger and risk requiring a high degree of quick and certain response. (vol. 2. pp. 170,183) There was however, little evidence other than that generally applicable to sudden incapacitation as dealt with earlier.

There was no evidence presented of any occupational testing conducted on Mr. DeJager with reference to his ability to perform the tasks of a boatswain and the only specific medical testing was done by Dr. McSween for allergies or organized by Dr. Landrigan after Mr. DeJager's release.

PRELIMINARY ISSUE OF TRIBUNAL COMPOSITION

This tribunal, like many others, was composed by a procedure which has now been invalidated by the Supreme Court of Canada because it created a reasonable apprehension of bias and thus contravened sections 2(e) and 11(d) of the Canadian Bill of Rights R. S. C. 1970, Appendix III. This conclusion of bias was reached in MacBain v. Canadian Human Rights Commission (1985), 62 N. R. 117 (S. C. C.). However, the conclusion in this case was narrowly drawn and applied to the facts of the particular case.

In Re Local 916 of the Energy and Chemical Workers Union (1985), 17 Admin. L. R. 1 (F. C. A.), the application of the MacBain ruling to other tribunals was considered. It concluded that the case only applied where the tribunal was challenged on the basis of bias at the earliest convenient date. The case had no application where there was an express or implied waiver of a bias challenge. If Mr. Mender, counsel for the Department of National Defence, and Mr. Duval, counsel for the Human Rights Commission, did not expressly waive the right to challenge the tribunal on the basis of bias they did so impliedly. (vol. 1. p. 4; vol. 3, p. 352) Thus the McBain decision does not impair the jurisdiction of this tribunal to proceed with the case.

DISCRIMINATION BASED ON DISABILITY

It is clear on the evidence that Mr. DeJager's dismissal was the result of his downgraded medical classification due to being diagnosed as an asthmatic. Asthma is a "disability" within the meaning of section 3 of the Canadian Human Rights Act S. C. 1976- 77, c. 33 and is thus a prohibited ground of discrimination under that statute. For the purpose of clarity it should be stated at the outset that asthma is not only a "physical disability" as defined in section 20 of the above statute but also a "physical handicap" as discussed in the Bona fide Occupational Requirement Guidelines S. I./ 82 - 2 (January 13, 1982). The reference to the older terminology of handicap rather than disability is explained by the earlier date of the Guidelines. There was no challenge to the fact that asthma is a physical disability. Since it was the basis of the dismissal, there is a prima facie case of discrimination by the refusal to continue the employment of Mr. DeJager in contravention of Section 7 of the statute and by pursuing a policy and a practice which discriminates against asthmatics contrary to Section 10.

While the policy pursued by the Department of National Defence in respect to asthmatics is directly related to the specific discrimination against Mr. DeJager, Mr. Duval emphasized the latter. Encompassed in the alleged violation of Section 7 of the Canadian Human Rights Act were three related claims. There was discrimination in the dismissal of Mr. DeJager; the refusal to consider him for a temporary medical profile and the refusal to re- muster him to another position within the navy. In respect to the dismissal the reason was asthma and Mr. Mender's attempts to argue that it was the medical downgrading do not change the situation. (vol. 3, p. 361, line 14; p. 363, line 4, 12; p. 364, line 17- 24; p. 365, line 4- 8, 17- 19; p. 366, line 2- 17; pp. 369- 372) The reclassification came as a result of the diagnosis of asthma and the extent of the downgrading was greater than if it were some other physical problem.

The result of the other two claims is less clear. It has been established that discrimination can result from not being considered for a position even if no express application is made. Villeneuve

v. Bell Canada (Tribunal: N. D. Hesler, May 31, 1985). Thus if Mr. DeJager was entitled to a temporary medical profile, he should have been considered, whether or not he applied for one. Mr. Mender's argument that being kept on for many months after he had received his medical reclassification was more favourable treatment only goes so far. He was dismissed in October, 1982, after being on lighter duties. His condition does seem to have improved after October, 1982 and rather than being dismissed, he could have had his medical profile upgraded from its lower temporary status.

Whether Mr. DeJager could have been re- mustered is not clear. His G4 03 classification rendered him unfit for most if not all naval trades. Naval jobs generally require that a person go to sea and that is what Mr. DeJager's medical classification did not allow. There were a very small number of shore jobs available but they appear to be for cases of greater disability and more seniority. Both the question of the temporary medical profile and the re- muster have more to do with accommodation of the disabled to be discussed later.

BONA FIDE OCCUPATIONAL REQUIREMENT

Having concluded that Mr. DeJager was discriminated against, at least in respect to the dismissal, we now turn to the critical question in this case. Was this discrimination on the basis of a bona fide occupational requirement (hereafter referred to as b. f. o. r.)? The relevant section under the Canadian Human Rights Act is section 14(a).

14. 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;...

Thus while there is a prima facie case of discrimination, there is no legal discrimination if it is based on a legitimate b. f. o. r.

The logic of this is underscored by Peter Cumming in his recent tribunal decision, Mahon v. C. P. (Tribunal: P. Cumming, October 25, 1985). At page 53 he states:

In employment cases, therefore, there will be no discrimination if an employer denies a handicapped person a job because he or she is unable to perform the essential duties of the job.

This is not a matter of discrimination but of practical business necessity. Parent v. D.. N. D. and A. G. Canada (1980), 1 C. H. R. R. D/ 121 is a case in point where the complainant's disability disqualified him from 75% of the job.

Earlier in Mahon v. C. P., supra, Peter Cumming stresses the importance of defining equality broadly and not confusing its definition with the need for some practical limitations. Referring to David Baker, "Equality for Disabled People: A Preliminary Analysis of the Impact of Section 15(1) of the Charter of Rights and Freedoms" (unpublished April 17, 1985) he states at page 19.

Baker suggests that to apply the equality provisions correctly, the scope of equality cannot be confused with the limits to be placed on equality. He is the first to admit that the disabled are a

"classic" example of a group that cannot demand absolute equality because a disability has certain consequences. He provides the example that a blind person cannot demand to drive a car. However, he argues that equality be given a broad scope as a starting premise and that appropriate limits be placed on equality, not that the scope of equality be unduly narrowed to begin with...

Without attempting to reproduce the broad sweep of Peter Cumming's decision in Mahon v. C. P., supra, we assert at the outset that a broad and purposive interpretation of human rights codes designed to promote genuine equality, is the appropriate approach. In Winnipeg School Division No. 1 v. Craton (1985), 15 Admin. L. R. 177 (S. C. C.) human rights codes were classified as below constitutional documents but above regular statutes. Thus, it may be appropriate to note that in relation to the protection of rights under the Canadian Charter of Rights and Freedoms the Supreme Court of Canada has consistently called for a broad purposive analysis to give effect to the guaranteed rights. L. S. U. C. v. Skapinker, [1984] 1 S. C. R. 357; Hunter v. Southam, [1984] 2 S. C. R. 145 and R. v. Big M Drug Mart, [1985] 1 S. C. R. 295. Human rights codes should be approached with this same rights consciousness. Ont. Human Rights Comm. v. Simpsons, (1985), 17 Admin. L. R. 89 (S. C. C.) and Bhinder v. C. N. R., (1985), 17 Admin. L. R. 89 (S. C. C.).

Although this case arose prior to the coming into effect of the equality guarantees in section 15 of the Charter, it is appropriate to approach this case in the general spirit of the Charter. David Lepofsky, "The Charter's Guarantee of Equality to the Handicapped: Meeting the Challenge of a New Era", A paper delivered at the October, 1984 conference of the Canadian Institute for the Administration of Justice in Ottawa, argues that many of the decisions related to the disabled are based on stereotypes and under- estimates of what disabled people can do. Both the Charter and human rights codes should be used to counteract such generalizing.

In relation to a b. f. o. r. problem there are two branches to such an approach. One is reading the scope of protections against discrimination broadly and the other is reading the exceptions narrowly. In R. v. Oakes an unreported February 28, 1986 decision (S. C. C.), Chief Justice Dickson provides another Charter analogy. He states that the section 1 "reasonable limits" clause in the Charter should be read narrowly in the context of a Charter where the primary focus is the protection of rights. In this context it means reading the b. f. o. r. exception in section 14 of the Canadian Human Rights- Act narrowly so as to give effect to the general rule of non-discrimination. There is no doubt that the rule is non- discrimination and that b. f. o. r. 's should not be allowed to destroy the rule. Ont. Human Rights Comm. v. Etobicoke, [1982] 1 S. C. R. 202 and Mahon v. C. P., supra.

The above approach is consistent with the Bona fide Occupational Requirement Guidelines promulgated pursuant to sections 14(a) and 22(2) of the Canadian Human Rights Act. These guidelines came into effect on January 13, 1982 and are applicable to this case. Mr. Mender did not object to their application, although he did indicate that the original medical re- classification did occur prior to January, 1982. (Transcript at pp. 395- 96.) However, the dismissal of Mr. DeJager did not take place until October, 1982 and as Mr. Mender himself argued, for other purposes, the dismissal date is the relevant one. If the earlier medical classification was not done in accordance with the guidelines, another one should have been done prior to the dismissal.

Since the guidelines are crucial to our conclusion in this case, we set out the relevant provisions for purposes or reference.

3. Paragraph 14(a) of the Act applies in any case where an employer establishes that a specific ability is necessary for the safe and adequate performance of a job.

5. Where an employer devises methods of testing an individual's performance on a job, he or she shall proceed as follows to establish bona fide occupational requirements:

(a) identify the essential tasks that make up the requirements of the job; (b) identify the skills and capabilities required to perform the essential tasks of the job; (c) use methods that evaluate the ability of the individual to carry out by any reasonable method the essential tasks of the job; (d) set standards that do not exceed the minimum requirements of the job.

Physical Handicap 6. For the purposes of paragraph 14(a) of the Act, where an employer

offers an employment opportunity to a handicapped person, (a) the requirement that the handicapped person pass tests that would not be required by him if he or she were not a handicapped

person is not a bona fide occupational requirement; and (b) a handicapped person shall not be presumed to be unable to perform the job unless testing shows that the person cannot actually perform one or more of the essential tasks of that job.

7. For the purposes of paragraph 14(a) of the Act, where an employer refuses an employment opportunity to a handicapped person, since the person's handicap would create a safety hazard to the employees of that employer or to the general public, the refusal is deemed to be based on a bona fide occupational requirement.

8. Where an employer finds that the performance of a job by a handicapped person would create a safety hazard to his or her employees or to the general public and before he or she refuses an employment opportunity based on a bona fide occupational requirement, the employer shall support his or her findings by establishing that the safety hazard has been evaluated on the basis of:

(a) the probability of the occurrence of accident as a result of the performance of the job by the handicapped person; (b) evidence that the safety hazard is significantly greater than if the person were not a handicapped person; and (c) the relation of the safety hazard to the specific physical handicap of the handicapped person.

9. Where an employer finds that he or she cannot make reasonable accommodation in order to offer an employment opportunity to a handicapped person and before he or she refuses such employment opportunity based on a bona fide occupation requirement, the employer shall support his or her findings based on evidence that:

(a) no method of accommodation exists that would permit a handicapped person to perform the job in a safe and satisfactory manner; (b) to make an accommodation would impose an undue hardship involving either financial cost or business inconvenience to the employer; or (c) to make an accommodation would create a predictable safety hazard for other employees or the general public.

10. Where an employer refuses an employment opportunity to a handicapped person on the basis that the person's physical handicap could, as a result of the performance of the job and whether or not reasonable accommodation is made, cause an unreasonable risk to himself or herself, and before he or she refuses such employment opportunity based on a bona fide occupational requirement, the employer shall show that the exposure of the person to the risk would likely result in the disruption of the employer's business.

11. Where an employer refuses an employment opportunity to a handicapped person and the refusal is based on a bona fide occupational requirement related to the predicted future work abilities of that person, the employer shall establish that:

(a) the abilities of the handicapped person will diminish to such an extent and at such a rate that he or she will not be able to perform the job for a reasonable period of time; and (b) the diminution referred to in paragraph (a) will result in the disruption of the employer's business.

To avoid defeating the general purposes of the Act a heavy burden is placed upon the employer to establish a b. f. o. r. defence. This burden has not been discharged in this case in respect to asthmatics generally and Mr. DeJager in particular. Indeed, both counsel before the Tribunal failed to directly address the guidelines except in response to direct questioning by the Tribunal.

There is some confusion as to what the exact b. f. o. r. is in this particular case. At pages 359, 363, 365 and 367 of the transcripts the following phrases are used.

(1) "a medical profile better than G4 03" (2) "against people with a G4 rating" (3) "unfit for sea duty" (4) "Once a person receives a G4 rating the policy is that their position is reconsidered." At pages 345 and 351 of the transcripts it appears that the b. f. o. r. is a "minimum G2 02 level of medical fitness". While it would be hard to deny that a requirement of some minimal level of medical fitness for service in the navy is reasonable, we question the application of this standard to asthmatics. There is little doubt that employment as a boatswain requires that a person be fit for sea duty in the mandated geographical areas. Thus the employer has met the requirement in section 3 of the guidelines of establishing that a specific medical ability is necessary to the job of boatswain. The problem arises in showing that Mr. DeJager lacks the necessary ability. What is offensive about this claimed b. f. o. r. is its stereotypical assumptions about the performance of asthmatics and, further, the failure to provide individual assessment. For purposes of this case the relevant b. f. o. r. is the disqualification of asthmatics as boatswains. This narrower definition of the b. f. o. r. is what we shall consider in what follows. While directly addressing these issues in the context of the guidelines, we also shall consider some of the cases of b. f. o. r. exemptions.

TEST OF B. F. O. R.

Almost as a matter of ritual, cases of this kind begin with a reference to the test for a b. f. o. r. as stated by the Supreme Court of Canada in Ont. Human Rights Comm. v. Etobicoke supra, at 208.

... 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.

We do not seriously question that the D. N. D. meets the subjective branch of the above test in that their policy was not designed to defeat the purposes of the Act or to intentionally discriminate against asthmatics. We do pause to indicate, however, that the sincerity of the employer's belief in the policy may be called into question if they have no clear recollection of the origins of a prima facie discriminatory policy, and if they have failed to conduct a serious study into the practical validity of the policy. McCreary v. Greyhound Lines (1984), 5 C. H. R. R. D/ 2512. There was no evidence tendered by the employer to establish the origin or practicality of its policy in respect to asthmatics.

The more significant problem for the employer's b. f. o. r. claim arises in respect to the objective branch of the Etobicoke test. In McCreary v. Greyhound Lines. supra, at p 2518 this branch is broken into two parts.

This involves two sub- issues in the circumstances of this case. First, does the evidence support the Respondents' rationale for this policy on a factual basis? Secondly, does the rationale, if factually supported, lead to a legal conclusion that the requirement [quoting Etobicoke] "is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public"?

On the first question the employer's rationale for requiring a minimal level of medical fitness for a boatswain is fairly clear. A boatswain has a demanding job that requires a reasonable level of medical fitness. This is supported by the evidence and the exhibits. It is much less obvious that the downgrading of asthmatics, such as Mr. DeJager (vol. 3, p. 385- 386), to G4 03 is justified by the empirical evidence of their performance. (vol. 3, p. 363, lines 15- 22; p. 368- 369)

Indeed, once the G4 geographical rating is assigned there appears to be no attempt to assess occupational performance. (vol. 2, p. 210, 214) Thus there appears to be more stereotypical assumptions about asthmatics underlying the employer's policy than hard factual data. The particular problem of individual assessment will be addressed shortly.

RISK FACTOR

Turning to the second question in McCreary (which is really an extension of the Etobicoke test) we consider the impact on the employer and safety concerns. Any hardship on the employer

would be by way of accommodation and will be considered later. The concerns about safety raise sections 7, 8 and 10 of the guidelines. The evidence in respect to these safety concerns has been reviewed as part of the facts.

Considering sections 7 and 8 in respect to risks to fellow employees and the general public, the burden on the employers has held to be lower in establishing a b. f. o. r., where risks are involved. Anderson v. Atlantic Pilotage Authority (1982), 3 C. H. R. R. D/ 966 at D/ 970 and Ward v. C. N. R. (1982), 3 C. H. R. R. D/ 689. However, Peter Cumming in Mahon v. C. P., supra, argues that an employer should not be able to deny protection for the disabled, by merely raising the risk factor. We can do no better than to quote Mr. Cumming at page 42 of Mahon.

The cases have not established how significant a risk must exist before it amounts to a b. f. o. r. Must the risk posed by handicapped people to themselves or others be substantially greater than that posed by a non- handicapped person or is only some greater degree of risk necessary? The vague standards of risk used in the cases (particularly if in combination with a lesser onus of proof on the employer to establish risk as a b. f. o. r.), may result in the protections in the Act tending to be only empty phrases. Risk to others is a valid factor in denying employment but as the Ward case pointed but, any employee can present a risk to fellow employees. Before denying a handicapped person a job on this basis, a real and significantly greater risk to other employees or the general public than that posed by the non- handicapped should have to be established by the employer. The future is difficult to predict, but we must not deny equality of opportunity on some very remote, or fanciful possibility.

In respect to other employees and the general public the employer has failed to show that Mr. DeJager would pose a significantly greater risk than a person who did not have asthma. Indeed, the kind of risks described did seem rather fanciful or remote. In addition to the section 8 guideline requirement of showing a significantly greater risk there was little hard evidence about the probability of an accident or the link between the handicap (asthma) and the alleged risk, which are the other factors itemized in the guideline. There was some debate between the medical experts about the likelihood of incapacitation but the overall conclusions were impressionistic. In summation Mr. Mender placed little emphasis on the risk to others but concentrated on the risks to Mr. DeJager himself. (vol. 3, p. 375 ff)

As the hearings unfolded the main basis for the employer's claim to a b. f. o. r. was the risk of serious injury to Mr. DeJager himself. This concern was expressed in relation to the fact that there would be no physician on many ships and in certain life boat duties no availability of drugs such as ventolin. There were also concerns about isolation. The degree of risk on this point depends upon whether one accepts the more serious assessment of the D. N. D. doctors or the more favourable medical evaluation of Dr. Landrigan. On any account Mr. DeJager did not have the most severe form of asthma. Should the risk to the disabled employee be an individual choice or subject to the views of a paternalistic employer?

In Ont. Human Rights Comm. v. Etobicoke, supra, the Supreme Court implied that the same reduced standard of proof should apply to the employer's claim to a b. f. o. r. whether the risk was to the employee with the disability or others. More expressly in Manitoba Human Rights Comm. v. Baker Manufacturing Ltd., [1984] 5 W. W. R. 704, at 709 the court held that no

employee has the right to risk personal injury. Because of section 10 of the guidelines there is a higher burden on the employer to establish a b. f. o. r. on the basis of risk to the disabled employee. The employer must show a likely disruption of the employer's business. This same standard is to be applied to predicted future work abilities according to section 11 of the guidelines. Mr. DeJager would be covered by these sections.

There are really two levels of speculation. What is the probability of an accident due to the disabled employee? The probability of a combination of factors, including a stressful situation, chest cold, extrinsic causing factors and a lack of medical services converging on Mr. DeJager, seems low. Is the risk involved one that society should be willing to accept? The basis value choice is well captured in the following passages at pages 109- 110 of Mahon v. C. P., supra.

... Everyone is entitled to recognition of his and her inherent dignity as a person, with the right to 'equality of opportunity' in being free to self- development and self- realization. Society must accept some added risks in exchange for the benefits conferred upon the disabled in enhancing their freedom to truly achieve equality of opportunity. Moreover, all of society generally benefits indirectly in the enhancement of core values in respect of such a minority group.

However, at some point, the risk through a disabled person taking an employment position is "sufficient" to be denied the position because the freedom of others is affected (for example, a blind person could not insist upon a right to a driver's licence), simply because the risk is too great.

Where there is the appropriate balancing of interests between the rights of the disabled person and the rights of society generally? Put otherwise, what is the dividing line such that on one side there is an 'insufficient' risk for the b. f. o. r. defence, and on the other side there is a sufficient risk"? If it were only an added risk to the disabled person alone that was at issue, it could be also argued that the dividing line should be shifted further along the spectrum of factual situations, to the advantage of the disabled person seeking the employment position. Our society values highly the right of individuals to make decisions which do not adversely affect others.

We are not convinced that the risk to Mr. DeJager or to others is sufficient to justify discriminating against him on the basis of asthma. The evidence describing the risk to Mr.

DeJager and his fellow employees and the limited evidence on employer disruption doe not over-ride the broader values of equal opportunity and individual free choice enshrined in the Canadian Human Rights Act. The employer has not convinced the Tribunal of the need for a b. f. o. r. exception in this case.

DEMONSTRATED ABILITY TO PERFORM TASK

There is another important reason why the employer's b. f. o. r. defence fails in this case. Section 5 of the guidelines appears to require an individual assessment of whether the disabled person can fulfill the required task. Once Mr. DeJager was diagnosed as having asthma and accordingly assigned a G4 category there was no effort to assess his individual occupational abilities. A personal and individual assessment is necessary to determine whether an employee meets the

G202 minimum medical classification. There was no clear evidence that Mr. DeJager could not do the job, and Mr. Mender admitted as much at pages 249 and 369 of the transcripts.

Mr. Duval described the process as automatic. Once a person is diagnosed as having asthma his or her medical category is downgraded to a point where dismissal from the navy is the only real alternative. This view is supported in part by the evidence of Lieutenant Colonel Stow of the Career Medical Review Board. Although this is contested by Mr. Mender in summation, there does appear to be a blanket policy with respect to asthmatics rather than an individual assessment of each case.

In Ward v. C. N., supra and Villeneuve v. Bell Canada, supra, the tribunals conclude that the Canadian Human Rights Act calls for an individual evaluation of job performance. This reasoning is further elaborated in Rodger v. C. N. R. (Tribunal: S. N. Lederman, July 24, 1985). This case concerning a train man who suffered two epileptic seizures, held that a blanket policy can only be a substitute for individual assessment where the latter is shown to be impractical. As in this case, the employer denied having a blanket policy but that was the practical result. In this case the employer does appear to have a blanket policy and has failed to establish that individual assessment is impractical.

It might at first glance appear that a requirement of individual assessment runs counter to the nature of a b. f. o. r. as defined in Bhinder v. C. N. R., supra. There is no actual conflict for two reasons. Bhinder was decided at the tribunal level before the guidelines came into effect so there was no issue of individual assessment as raised by section 5 of the guidelines. Furthermore, Bhinder dealt with the quite different situation of an individual exception (on religious grounds) to an established b. f. o. r. This point is emphasized in the following passage at page 13 of the Supreme Court case.

... To conclude then that an otherwise established bona fide occupational requirement could have no application to one employee, because of the special characteristics of that employee, is not to give s. 14(a) a narrow interpretation; it is simply to ignore its plain language. To apply a bona fide occupational requirement to each individual with varying results, depending on individual differences, is to rob it of its character as an occupational requirement and to render meaningless the clear provisions of s. 14(a). In my view, it was error in law for the Tribunal, having found that the bona fide occupational requirement existed, to exempt the appellant from its scope.

We have found that there is no established b. f. o. r. applicable to asthmatics, such as the complainant, and thus have required the Respondent to demonstrate an inability to perform the task-- a requirement which has not been met.

DUTY TO ACCOMMODATE

The above conclusion that no b. f. o. r. was established was reached without considering whether the employer had any duty to accommodate Mr. DeJager's asthmatic condition and thereby reduce risks and continue his employment. One obvious form of accommodation would have been to re- muster him to a situation where his asthmatic condition would be less of a risk. On the evidence of the employer such re- muster would be limited to a very small number of shore

jobs. Another accommodation could have the granting of a temporary medical profile to see how serious Mr. DeJager's asthma appeared to be and how it affected his job performance.

Another possible accommodation would be to let Mr. DeJager continue in his job as a boatswain but where practical post him where medical support services are available. According to section 9 of the guidelines before denying reasonable accommodation to a disabled person, the employer must show:

(a) no accommodation without creating a risk to disabled person; (b) imposition of undue hardship (financial or otherwise) on the employer; (c) risk to other employee or the general public.

As discussed previously the employer has failed to substantiate these points. Since Mr. DeJager could generally do his job, accommodation could not be dismissed as impractical as in Parent v. D. N. D. and A. G. Canada, supra.

Once a b. f. o. r. is found to exist there is no duty to accommodate according to the majority in Bhinder v. C. N. R., supra. Even on this point Chief Justice Dickson dissented arguing in Bhinder that a broad reading of section 14(a) of the Act was needed to combat adverse effect discrimination. He did not feel that the absence of express statutory language such as that in Ontario litigated in Ont. Human Rights Comm. v. Simpsons- Sears, supra, precluded an implied duty to accommodate. In any event we found no b. f. o. r. in this case and the duty to accommodate as discussed in section 9 of the guidelines is relevant to this case. It relates both to the validity of the b. f. o. r. claim and the possible remedial action we should direct.

CHANGED CIRCUMSTANCES

Before leaving this case we want to briefly comment on the relevance of Mr. DeJager's present condition which would appear to be much better than what appeared in October, 1982 when he suffered four asthma attacks in a ten month period. A b. f. o. r. which is valid at one point in time can change and later become invalid either because the job has changed or the affected person's condition has improved. Mahon v. C. P., supra, at p. 47. This same conclusion was reached in Rodger v. C. N. R., supra.

Mr. Duval raised this point in summation but Mr. Mender replied by indicating that Mr. DeJager was free to re- apply at any time and he would be tested for a new medical classification. There is no indication on the facts that he has re- applied so this discussion about the impact of changed circumstances may be moot in light of this decision in any event.

CONCLUSION

We conclude that the employer has failed to establish a b. f. o. r. defence to the prima facie case of discrimination under sections 7 and 10 of the Canadian Human Rights Act. Thus Mr. DeJager's claims of discrimination are justified. This was not because of any ill will or deep seated prejudice on the part of the employer who was in good faith concerned about the health and safety of its employees. However, the D. N. D. 's policy with respect to asthmatics and its

application to Mr. DeJager is based more on stereotypical assumptions about asthmatics than on hard medical evidence.

While some added risks are created by the continuing employment of Mr. DeJager, they are risks which we deem acceptable to society. To deny Mr. DeJager the pursuit of his chosen career would be contrary to the spirit of the Act and would smother him with well meaning but paternalistic policies which claim to protect him. He should be free to make his own choices and not to have his disability of asthma turned into an unnecessary handicap.

On October 3, 1985 the Tribunal adjourned the bearing to deal with the initial questions of whether a case for discrimination bad been made out and secondly whether there was a bona fide occupational requirement. Having found the complaint was proven and that a bona fide occupational requirement had not been made out we are prepared to hear evidence and arguments as to remedies and damages.

Dated at Peterborough this 4th day of July, 1986.

(signed) Wendy Robson

(signed) A. Wayne MacKay

(signed) Paul J. D. Mullin