T.D. 3/95
Decision rendered on February 9, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

BUDDY LEE

Appellant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION

Respondent

DECISION OF THE REVIEW TRIBUNAL

TRIBUNAL: Keith C. Norton, Q.C., B.A., LL.B, Chairperson
Barry M. Gelling, Member
Lyman R. Robinson, Q.C., Member

APPEARANCES: Eddie Taylor, Counsel for the Canadian Human Rights Commission.

Dugald E. Christie, Counsel for the Appellant

Patrick Gilligan-Hackett, Counsel for the Respondent

DATES AND LOCATION
OF HEARING: July 22, 1994
November 28 to 30, 1994
Vancouver, British Columbia

1. INTRODUCTION

This is an appeal from the decision of a single member Tribunal chaired by Robin Adams dated June 30, 1989.

(a) Factual Background to the Complaint

The Respondent, the British Columbia Maritime Employers Association [BCMEA], is the employer's agent for stevedoring firms and terminals which operate on the docks along the Vancouver waterfront and which employ longshoremen. The Appellant was a longshoreman from 1978 until March 14, 1983. Pursuant to an agreement between the Respondent and the International Longshoremen and Warehousemen's Union, longshoremen are dispatched from the hiring hall each day to work for the various stevedoring firms and terminals on the docks where the services of longshoremen are required. If there is more work on the docks than members of the union can handle, casual workers, who are not yet members of the union, may be dispatched. The names of these casual workers, who are available to work as longshoremen in these circumstances, are registered on boards at the union hiring hall. The Appellant was in this category. When work is available, names are called, on the basis of seniority, from those registered on these boards. A longshoreman may advance from one board to another and eventually become eligible to obtain all of the benefits of the collective agreement. In 1978, the Appellant's name was registered on the lowest ranked board. As he gained seniority, he was dispatched more frequently. The Appellant was deregistered before he became eligible to join the union.

When longshoremen arrive at a work site, they are supervised by foremen who are employed by the stevedoring firm or terminal. A foreman has the authority to "fire" a longshoreman for the day. This does not mean that the "fired" longshoreman is deregistered from the board of longshoremen who are available to be dispatched. A longshoreman who has been "fired for the day" may be dispatched to another stevedoring firm or the same stevedoring firm on the next day. Nevertheless, on the evidence adduced before the original Tribunal it is apparent that when a longshoreman is "fired for the day", the firing may be accompanied by a request that the longshoreman who has been "fired for the day" not be sent back to that firm. If a stevedoring firm is very dissatisfied with a longshoreman's performance or has had more than one unsatisfactory experience with a longshoreman, the firm may request that the longshoreman be "deregistered". If a longshoreman is deregistered, the person's name is removed from the board and that person is no longer eligible to be dispatched to work on the docks as a longshoreman.

The Appellant was deregistered on March 14, 1983, after the Respondent had received a number of complaints about the Appellant from employers whom the Respondent represents. These complaints referred to safety concerns and lack of co-ordination.

(b) The Complaint

The complaint filed with the Canadian Human Rights Commission [Commission] by the Appellant alleged that the refusal of the Respondent to continue to employ the Appellant after March 14, 1983, constituted a discriminatory practice contrary to section 7(a) of the Canadian Human Rights Act. The prohibited ground of discrimination alleged in the complaint was the physical disability of the Appellant. A head injury suffered by the Appellant as a child has left him with a minor speech impediment and some degree of unco-ordination on his left side.

c) The Decision of the Original Tribunal

The original Tribunal found that the Appellant had made out a prima facie case of discrimination but that the Respondent had established a bona fide occupational requirement that persons employed as longshoremen be coordinated and that the evidence justified the conclusion that there was a sufficient risk of the Appellant's failure to be coordinated to warrant the Appellant's exclusion from longshoring work. The original Tribunal dismissed the complaint.

(d) Notice of Appeal

A Notice of Appeal dated the 11th day of September, 1989, was filed on behalf of the Appellant. By a letter dated October 19, 1994, counsel for the Appellant applied to amend the Notice of Appeal. After receiving written submissions from the Respondent and the Commission, the Review Tribunal permitted the Appellant to amend the Notice of Appeal in some respects but not in others. An amended Notice of Appeal, incorporating the amendments permitted by the Review Tribunal, was tendered at the opening of the hearing.

2. PRELIMINARY MATTERS

(a) New Evidence

Prior to the hearing before the Review Tribunal, counsel for the Appellant applied for permission to adduce new evidence on the merits of the complaint before the Review Tribunal. At the commencement of the hearing of the Review Tribunal on November 28, 1994, counsel for the Appellant withdrew this application to introduce new evidence.

(b) Laches

Prior to hearing submissions with respect to the merits of the appeal, the Review Tribunal heard submissions and received documentary evidence with respect to the application of the equitable doctrine of laches. The Review Tribunal delivered an oral decision to the parties and advised the

parties that written reasons would be incorporated in the written decision of the Review Tribunal.

The Respondent submitted that the delay of over five years between the date of the decision of the original Tribunal and the hearing of the appeal invoked the equitable doctrine of laches and that the appeal should be dismissed for this reason.

Several authorities on the doctrine of laches were submitted by the parties. Most of these authorities were reviewed in Vermette v. Canadian Broadcasting Corporation (1994) 94 C.L.L.C. 16372 (Canadian Human Rights Tribunal). After reviewing the authorities, the Tribunal in Vermette concluded at page 16381:

"Applying the standards pertaining to the equitable doctrine of laches as described in Martin v. Donaldson Securities Ltd. et al., the task for the Tribunal is to balance the degree of diligence that might reasonably be expected from the Complainant against the extent of the prejudice experienced by the Respondent in relation to the Respondent's ability to mount a full answer and defence to the complaint."

In the context of this appeal, it is necessary to first consider whether the Appellant has pursued his appeal with the degree of diligence that might be reasonably expected. The evidence adduced with respect to the issue of laches reveals that the decision of the original Tribunal was

conveyed to the Appellant on August 17, 1989, and that a Notice of Appeal was filed on September 11, 1989. Therefore, the Notice of Appeal was filed within the thirty (30) day limitation provided by section 55 of the Canadian Human Rights Act.

The Commission advised the Appellant that it would not join in any appeal by the Appellant but would "support" any appeal that the Appellant pursued. It was made clear by counsel for the Commission before the Review Tribunal that the position of the Commission meant that the Commission would not oppose an appeal by the Appellant but the Commission would not assume responsibility for the carriage of the Appellant's appeal.

On October 19, 1989, Mr. Carver, who had represented the Appellant before the original Tribunal, informed the Appellant that he would not be able to represent the Appellant with respect to his appeal.

In November 1989, the Appellant began his quest to find legal counsel to represent him on his appeal. An inference may be drawn from the Appellant's circumstances that he did not have the financial resources to permit him to retain and pay for private counsel. Therefore, his efforts to seek legal counsel were primarily directed toward seeking the assistance of legal aid or some form of pro bono legal assistance. Documentary evidence which was tendered before the Review Tribunal amply demonstrates

that the Appellant actively pursued his quest to obtain legal counsel throughout the years 1990, 1991, 1992 and the early part of 1993 and that he regularly kept the Canadian Human Rights Tribunal registry advised of his efforts.

The agencies that the Appellant contacted in his quest for legal assistance included the Legal Aid Society of British Columbia, the Chinese Benevolent Association of Vancouver, the British Columbia Civil Liberties Association, the University of British Columbia Law Clinic, the British Columbia Human Rights Coalition, the British Columbia Public Interest Advocacy Centre, the Canadian Bar Association and the Salvation Army.

The Appellant's quest ended in the early part of 1994, when Mr. Dugald Christie, Barrister and Solicitor, of Vancouver, British Columbia, agreed to represent the Appellant with respect to his appeal and a Review Tribunal hearing was scheduled.

The Respondent did not argue that the Appellant should have attempted to pursue the appeal without the assistance of legal counsel. The Review

Panel has concluded that a person with the Appellant's education and training could not be expected to argue an appeal on matters as complex as those raised in this appeal without the assistance of legal counsel. Therefore, with the possible exception of the latter part of 1993, the Review Panel finds that the Appellant pursued his appeal with the diligence that might reasonably be expected from a person in his circumstances.

Second, it is necessary to consider the extent to which the Respondent's ability to mount a full answer and defence to the appeal could be prejudiced by permitting the appeal to proceed after a delay of over five years from the date of the original Tribunal's decision. The Respondent submitted that the failure to have its obligations to the Appellant, if any, determined with finality in a timely manner constituted legal prejudice as distinct from factual prejudice. Counsel for the Respondent observed that the Respondent's potential obligations to the Appellant had existed since the Appellant was deregistered as a longshoreman in 1983.

If counsel for the Appellant had pursued his application to introduce new evidence and the application had been successful, the issue of whether the Respondent was prejudiced in relation to its ability to respond to such new evidence would have taken on an entirely new dimension. However, the Appellant withdrew its application to tender new evidence and therefore the appeal was argued solely on the basis of the written record including the exhibits admitted before the original Tribunal and the transcripts of the testimony taken before the original Tribunal.

Counsel for the Commission cited Cluff v. Canada (Department of Agriculture and Sage (No. 1), unreported, Canadian Human Rights Tribunal (June 16, 1992) where the Tribunal, when discussing the subject of delay at pages 11-12, referred to "significant and actual prejudice to the

respondents". Counsel for the Appellant drew the Review Tribunal's attention to the fact that the Respondent did not object to the Appellant's application for an adjournment of the review hearing when the Appellant made such an application in February, 1991. The Review Tribunal concluded that in the circumstances of the review of the Tribunal decision in this case, where the Notice of Appeal was filed within the time allowed by the Act and the appeal is based solely on the record, there would be little prejudice to the Respondent's ability to mount a full answer and defence to the appeal.

Consequently, the Review Panel, after balancing the diligence of the Appellant in pursuing his appeal and the prejudice to the Respondent, has concluded that the equitable doctrine of laches does not apply in the circumstances of this case.

3. MERITS OF THE APPEAL

The Appellant's Notice of Appeal, as amended, raises questions of fact, questions of law and questions of mixed fact and law. Before considering these questions, it is necessary to review the proper scope and standard of a review by a Review Tribunal.

(a) The Scope and Standard of Review

In the Supreme Court of Canada decision in Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, (Kathy K), in reviewing a decision of the Federal Court of Appeal which set aside the judgment at the trial level and which apparently ignored various findings of fact made by the trial judge and substituted its own appreciation of the "balance of probability", Ritchie J. states at page 806,

> "I think that under such circumstances the accepted approach of a court of appeal is to test the finding made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability."

Further, in Brennan v. the Queen, [1984] 2 F.C. 799 (C.A.), (Brennan), at page 819, Thurlow C.J. states in the majority decision,

> "It is no doubt true that in a situation of this kind where no new evidence in addition to that before the Human Rights Tribunal was before the Review Tribunal the latter should, in accordance with the well-known principles adopted and applied in Stein et al. v. The Ship "Kathy K" ([1976] 2 S.C.R. 802; 62 D.L.R. (3d)1) accord due respect for the view of the facts taken by the Human Rights Tribunal and, in particular, for the advantage in assessing credibility which he had in having seen and heard the witnesses. But, that said,

it was still the duty of the Review Tribunal to examine the evidence and substitute its view of the facts if persuaded that there was palpable or manifest error in the view taken by the Human Rights Tribunal."

And finally, in the Federal Court decision in Cashin v. Canadian Broadcasting Corporation, [1988] 3 F.C. 494, (Cashin), Mahoney J. states, at p. 501:

"The first respondent argued that, whether the Review Tribunal heard additional evidence or not, its power to render the decision "that, in its opinion, the Tribunal appealed from should have rendered" [subsection 42.1(6)] enabled it effectively to conduct a hearing de novo. However, in addition to the authority of the Robichaud case, such an interpretation should not, it seems to me, be given to section 42.1 unless it is the clear intention of Parliament since the bias of the law runs strongly in favour of fact-finding by the tribunal which heard the witnesses. Parliament's intention, as I read it, appears in fact to be that the hearing should be treated as de novo only if the Review Tribunal receives additional evidence or testimony. Otherwise, it should be bound by the Kathy K principle.

The findings of the adjudicator must therefore stand unless she committed some palpable and overriding error."

Therefore, since this Review Tribunal received no additional evidence, we find, based upon the above case law that, unless we find that the Tribunal in the first instance committed "some palpable and overriding error", her findings of fact must stand and the review will be restricted to questions of law.

When an appellate tribunal is considering questions of law, the proper standard of the review is whether the original Tribunal applied the correct legal principles. This standard was articulated by Lamer C.J.C. in University of British Columbia v. Berg (1993), 152 N.R. 99 (S.C.C.) which involved an appeal from a decision of the British Columbia Council of Human Rights. At page 115, paragraph 22, he said:

"Turning to the issue before the court, it is clear that the question of what constitutes a service customarily available to the public is a question of law with wide social implications, in which the Council has no particular expertise. There being no reason why

deference should be given to the Council of this question, the appropriate standard of review is one of correctness."

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(b) Position of the Parties

The Appellant's position is essentially that the original Tribunal erred in its determination that being coordinated was a bona fide occupational requirement for the position of longshoreman and its finding that there was a sufficient risk of the Complainant's failure to be coordinated to warrant the Complainant's exclusion from longshoring work. Several of the individual grounds of appeal will be referred to later in this Decision.

The Respondent's position was that the decision of the original Tribunal, dismissing the Appellant's complaint, should be upheld.

(c) Analysis

Paragraph 8 of the Appellant's Notice of Appeal, as amended, was the focus of much of the argument before the Review Tribunal, namely, that the original Tribunal erred in determining that being coordinated was a bona fide occupational requirement for being a longshoreman.

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At the time of the Tribunal decision, section 14(a) of the Act [now section 15(a)] provided:

"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;"

The accepted definition of a bona fide occupational requirement was articulated by McIntyre J. in Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14 (S.C.C.) [Etobicoke] where he stated at p. 19-20:

"To be a bona fide occupational qualification and requirement a limitation ... 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."

After reproducing the preceding quotation from the judgment of McIntyre J. in Etobicoke, the Tribunal Chair concluded at page 33 of the Tribunal Decision:

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

The Review Tribunal has concluded that the Tribunal Chair applied the correct legal definition of a bona fide occupational requirement.

The Tribunal Chair then proceeded to find that the state of being coordinated is a bona fide occupational requirement. Paragraph one of the Appellant's Notice of Appeal, as amended, alleges that the Tribunal erred in finding that the bona fide occupational requirement had been established on the basis of impressionistic evidence without any or sufficient evidence of a scientific or medical nature. In Etobicoke, at the Tribunal level, Professor Dunlop, had remarked that the evidence in relation to the age at which firefighters should retire was "largely impressionistic" and that something more was required to discharge the burden on an employer than

general assertions and expressions of witnesses to the effect that firefighting was a "young man's game". Professor Dunlop further remarked on the absence of any scientific evidence in that case. In the Supreme Court of Canada, McIntyre C. stated at page 23:

"I am by no means entirely certain what may be characterized as 'scientific evidence'. I am far from saying that in all cases some 'scientific evidence' will be necessary. It seems to me, however, that in cases such as this statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in fire-fighting, to the effect that fire-fighting is 'a young man's game'.

The issue before the Tribunal in this case is different than was the case in Etobicoke. In Etobicoke the complainant had been retired solely because he had reached a specified age. There had not been any individualized assessment of the complainant or others who had reached the specified age to determine whether they could still perform the functions and duties of firefighters and no scientific or medical evidence had been tendered to establish that all or substantially all persons who reached the specified age would be incapable of performing the functions and duties of a firefighter. In those types of cases, McIntyre J. stated that statistical and medical evidence would be more persuasive than testimony of persons with experience in the field but even with respect to that type of issue, McIntyre J. drew back from stating that scientific and medical evidence was absolutely necessary. In this case, the Tribunal Chair was cognizant of the need for more than impressionistic evidence. At page 36 of the Tribunal Decision, the Tribunal Chair stated:

"These opinions were not impressionistic views but were based upon eye witness reports ..."

The Tribunal Chair's finding specifically refers to the testimony of various persons who had many years of experience working on the Vancouver docks, particularly various foremen to whom the responsibility of day to day safety on the docks appears to fall. This testimony did not consist of general or impressionistic statements with respect to the need for co-ordination. The testimony consisted of specific observations of the witnesses with respect to need for co-ordination among longshoremen in order to maintain their balance on containers that may move unexpectedly or on irregular and slippery surfaces such as raw logs and to avoid injury from moving equipment that is used on the docks. The Review Tribunal does not find any palpable and overriding error with respect to this finding of the original Tribunal.

After determining that the state of being coordinated was a bona fide

occupational requirement, the Tribunal concluded at page 38 of the Tribunal decision that there was a "sufficient" risk of employee failure to warrant the Appellant's deregistration as a longshoreman and the consequent exclusion from longshoring work. In Nowell v. Canadian National Railway Ltd. (1987), 8 C.H.R.R. D/595 (Canadian Human Rights Tribunal), the Tribunal stated atpage D/3730, paragraph 29517:

"However, where the occupational requirement excludes a whole class of individuals with varying degrees of disability within the class (according to the medical evidence) there should be, in the interests of fairness and justice, individual assessment within the group that is excluded to determine if there is sufficiency of risk to justify the exclusion of that particular employee from the job."

Paragraph 7 of the Appellant's Notice of Appeal, as amended, alleges that the Tribunal erred in its finding that the Respondent engaged in a lengthy assessment of the Appellant's abilities. The Tribunal Chair was obviously cognizant of the requirement imposed on employers by the Nowell case to make an individual assessment in these circumstances. The Tribunal Chair stated at page 34 of the Tribunal Decision:

"But it was upon a lengthy individual assessment of his capabilities within, what both parties admit to be a hazardous work environ, that Buddy Lee was eventually deregistered."

The assessment of the Appellant extended over a period of five years. While the evidence of a lack of co-ordination only pertained to four specific days of work by the Appellant during that period, each related to a different employer and the evidence with respect to the lack of co-ordination is consistent. In one instance, some of the most compelling testimony was given by a business agent of the union who pulled the Appellant off the job after observing him for a few minutes.

Paragraph 2 of the Appellant's Notice of Appeal, as amended, alleges that the Tribunal erred in finding that the evidence established that the Appellant's physical condition presented a safety hazard to himself or others. The Respondent's position was that the Appellant's lack of co-ordination constituted a safety hazard and adversely affected his ability to efficiently and economically perform his job without endangering himself. With respect to safety and productivity, the Tribunal found at

page 36 that the evidence supported the Respondent's analysis that there was little work on the waterfront which Buddy Lee could perform safely or productively. This finding was buttressed by reference to several incidents where the Appellant's performance adversely affected his productivity. The transcript contains testimony with respect to several incidents where the Appellant's safety was compromised by his lack of co-ordination. The Appellant's unsteadiness while working on raw logs in the

hold of a ship and while working on the loading of grain containers mounted on trucks are two examples of this.

The Tribunal concluded at page 38 of the Tribunal decision that there was a "sufficient" risk of employee failure to warrant the Appellant's deregistration and his consequent exclusion from longshoring work. The term "sufficient risk of employee failure" was used by McIntyre J. in Etobicoke at p. 20-21 where he said:

> "In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a bona fide occupational qualification and requirement has been shown the board of inquiry and the Court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure ... "

This quotation was referred to by Marceau J. in Canadian Pacific Limited v. Mahon, (1987) 8 C.H.R.R. D/670 (Fed. C.A.) [cite] where he stated at page D/4268, paragraph 33496:

> "When I read the phrase in context, however, I understand it as being related to the evidence which must be sufficient to show that the risk is real and not based on mere speculation. In other words, the 'sufficiency' contemplated refers to the reality of the risk not its degree."

The Review Tribunal has concluded that the original Tribunal adoption of the "sufficient risk of employee failure" principle was correct in law. The conclusion of the Tribunal that there was a sufficient risk of failure by the Appellant was based on the earlier findings by the Tribunal that the safety of the Appellant had been endangered by his lack of co-ordination. The latter finding was clearly supported by the testimony of several

witnesses who testified before the Tribunal. The Review Tribunal does not find any palpable and overriding error with respect to the original Tribunal's finding that there was sufficient risk of the Appellant's failure to be coordinated to warrant the Appellant's deregistration as a longshoreman.

Paragraph 4 of the Appellant's Notice of Appeal, as amended, relates to whether the Tribunal gave sufficient weight to evidence. In the words of Ritchie J. Stein v. The ship Kathy "K", at page 808, it is not part of the function of a Review Tribunal to

"... substitute its assessment of the balance of probability for the findings of the judge who presided at the trial."

The Review Tribunal has concluded that it is not proper for the Review Tribunal to substitute its assessment in place of the original Tribunal's assessment of whether the evidence satisfied the balance of probability burden of proof.

With respect to paragraph 5 of the Appellant's Notice of Appeal, as amended, while the Respondent is responsible for any discriminatory actions by the Appellant's fellow workers during the course of their employment, the evidence did not establish that the actions were related to a prohibited ground of discrimination. The actions in question were not materially different from actions directed toward other workers.

In argument, counsel for the Appellant raised a question with respect to whether the Tribunal had erred by not applying the Guidelines issued by the Commission pursuant to section 27(2) of the Act. Counsel for the Respondent argued that because the guidelines had been revoked prior to the decision of the Tribunal it was not necessary for the Tribunal to consider the Guidelines in its decision. The application of the Guidelines was not raised in the Appellant's Notice of Appeal, as amended, and therefore, the issue of the Guidelines need not be dealt with by the Review Tribunal.

4. Order

For the reasons set out above, this appeal is dismissed.

Dated at Ottawa, Ontario, on thisday of January, 1995.

Keith C. Norton, Q.C., B.A., LL.B
Chairperson

Barry M. Gelling
Member

Lyman R. Robinson, Q.C.
Member