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DECISION RENDERED ON JUNE 24 1980
T.D. 3/80

CANADIAN HUMAN RIGHTS ACT

BETWEEN:

SEVERIEN PARENT

Complainant

- and -

DEPARTMENT OF NATIONAL DEFENCE,
AND THE ATTORNEY GENERAL OF CANADA

APPEARANCES:

Russell Juriansz for the Canadian Human
Rights Commission

David T. Sgayias for the Department of
National Defence and
The Attorney General of
Canada

A HEARING BEFORE:

André Lacroix, appointed a Human Rights
Tribunal pursuant to Section 39 of the Act

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DECISION

The complaint expressed by Severien Parent and filed with the
Tribunal reads as follows:

"This employer let me go because of my medical situation
(epilepsy) and refuses to consider me for further employment
because of my epileptic condition."

The facts as related by the witnesses were never seriously in
dispute by either party and I will attempt to summarize the
evidence for the purpose of easier reference.

The complainant Severien Parent suffered from Polio in early
childhood resulting in paralysis, epileptic seizures, and described
himself as almost totally crippled. He relates that through his
efforts and treatment when he reached the age of 17 or 18 years, he
managed to regain many of his physical attributes leaving him in
his present condition described as : an epileptic, who requires
daily medication to control seizures; a partially paralyzed left
side of his body. It is also not disputed that he has not had an
epileptic seizure since 1970.

Because of Mr. Parent's condition and almost continuous
hospitalization he has no formal schooling.

His previous employment experience consist of driving
vehicles, mainly delivery type trucks for some four employers, his
work at

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that time also involved the loading and unloading of materials. He holds a Class D & F drivers license issued by the Province of Ontario.

Through his member of parliament and Canada Manpower he did apply for employment as a driver with Canadian Force Base at Petawawa in 1975, and was eventually hired as a casual driver in December 1976. The evidence also clearly indicates that Mr. Parent's employment at the base was on a term basis during special federal employment programs, and he was consistently provided with the terms of his employment in writing and acknowledged by him in writing. His employment was terminated in accordance with his last term appointment in September 1978, at which time he was referred to Canada Manpower. Since that date Mr. Parent has not found employment as a driver the only work which he feels capable of doing.

The evidence further discloses that at the time of his initial application for employment at the Petawawa base, Mr. Parent filled out a medical questionnaire in which he discloses his condition and specifically his epileptic condition. After a review of his condition and other representations, he was classified as a driver of light vehicles. That classification remained on his employment records throughout Mr. Parent's employment at the base.

During his period of employment at the base Mr. Parent did drive a variety of vehicles, primarily cargo vehicles involved in the delivery of material he was not however involved in loading or unloading, a function which he feels he is no longer able to perform. Subject to certain limitation as to the size and type

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of vehicle which were not included in his classification Mr. Parent performed his work satisfactorily and no criticism has been expressed by his superiors. In fact all indications point to the fact that Mr. Parent was a well motivated worker willing to volunteer for all work available.

Following his termination in September 1978, Mr. Parent was referred to Canada Manpower where he indicated his area of employment as a driver, he had not been referred to any employer at

the time of the hearing. He indicates and it is argued by his Counsel that he was not referred to the Base for employment as a driver because of his physical handicap.

The evidence of the Personnel director at the base describes typical employment practices as they apply to civil personnel. They consist of well documented procedures and the usual extensive variety of forms. Mr. Muldowney followed well established hiring practices and the applicable statutes, all of which is documented and filed as exhibits. It is clear from his evidence and the documentary evidence filed, that Mr. Parent was hired on a casual basis, and on term appointments coinciding with labour incentive programs and that he did terminate Mr. Parent's employment in accordance with the terms in writing.

He also describes the medical assessment of Mr. Parent's condition, the review of it and the restrictions imposed on him

whereby he was to drive "light vehicles only".

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The evidence discloses that as a result of interventions by the anti-discrimination branch of the Civil Service, the direct request of Mr. Parent; the requests for review passed on by Mr. Muldowney, that Mr. Parent's medical condition was in fact fully assessed, and the correspondence and classification were confirmed by Dr. Parliament of National Health and Welfare and stated to the base Personnel Officer in this Letter of August 31st, 1978 (Exhibit C-11) which states:

"This will acknowledge receipt of your letter of August 21st, 1978, in Mr. Parent's fight for a job as a driver for Department of National Defence. The information you submitted was on our file at the time we informed you (19-7-78) and took part in our assessment as to his fitness to be a driver. On the basis of todays' knowledge and standards there is no way we can change a permanent restriction. Mr. Parent, after due consideration, is considered fit to drive light commercial vehicles only (panel trucks). He cannot drive heavy equipment, emergency vehicles or passenger transport. This is exactly what is specified by the Ministry of Transport. I do not believe the Department of National Defence will accept the legal liability imposed by ignoring this restriction."

Dr. Parliament described the basis for his assessment related to Mr. Parent's epileptic condition and relies on a 'guide for Physicians in determining fitness to drive a motor vehicle'

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prepared by the Canadian Medical Association (Exhibit R-17), and specifically section 7, 2, 3 of the Guide which reads as follows:

"An applicant who has had epileptic seizures in the past or is presently taking medication to prevent seizures cannot safely operate passenger transport or heavy commercial vehicles (Classes 1, 2, 3 or 4 license) because of the difficulty in avoiding fatiguing situations which might initiate convulsions."

The above section of the guide accurately describes Mr. Parent's condition.

The applicability of the guide was questioned, particularly in the light of the fact that the Province of Ontario had seen fit to waive similar standards in December 1977 by granting Mr. Parent a class D & F driver's license (Exhibit R-13).

The examination of Captain John Francis of the base described in greater details the job description relevant in this case, which job description constitute the requirements used by the Personnel Officer to hire staff.

The job description particularly of M.D.O. 4'S is very detailed and in writing (Exhibits R-2, R-3), it describes the function and type of vehicles used by that classification of employees.

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Captain Francis describes that M.D.O. 4 is divided largely into two sections being a general purpose section, and C.E. (Construction Engineering) transport section in support of base construction and maintenance.

Generally speaking the personnel of M.D.O. 4 is not assigned a particular function but employees are in a pool and directed to specific tasks from time to time.

The type of vehicles used in the group consist of:

- staff cars
- station wagons
- panel trucks
- carryalls
- ambulances (road and crash)
- trucks (1, 2, 3 and 5 ton cargo capacity)
- agricultural tractors
- dump trucks (3 and 5 ton capacity)

Captain Francis states that the breakdown of use of personnel and vehicles is estimated as follows:

(a) in the C.E. Section, approximately 75% of the vehicles and time is involved with passenger transportation and about 25% involved with cargo transport (Page 133)

(b) in the general purpose section passenger transport

represents about 75 to 80% of M.D.O.'s personnel and the remainder in cargo or other transport (Page 138 of the transcript).

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Captain Francis did state the reasons and objectives of operating the M.D.O. 4 Section as they do and more specifically the ambulance service.

The issues identified by both Counsels in this hearing are as follows:

(a) Counsel of Canadian Human Rights is seeking an interpretation of the Act that would require an employer to take positive steps to make changes in an employment system and a refusal to make these changes would constitute discrimination in a correct interpretation of the Canadian Human Rights Act (See Page 185, Transcript). Counsel admits that Section 14 is not in issue and did not call upon the Respondent to establish that the limitation imposed on the employment of the Complainant was not a bona fide occupational requirement.

(b) Counsel for the Respondent states that the complaint states two allegations:

(1) that the employer let him go because of his medical situation,

(2) and secondly that the employer refused to consider Mr. Parent for further employment because of this epileptic condition. (See Page 211 of Transcript).

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Counsel for the Respondent concedes that if an employer seeks to establish a bona fide occupational requirements as an excuse for some practice, that the onus lies on the employer, but argues that the burden shifts on the complainant to bring evidence on a balance of probabilities that he was refused employment because of his epileptic conditions.

Dealing firstly with the circumstances of the termination of the employment of Mr. Parent, I find that Mr. Parent was at all relevant times a casual or temporary employee and that his termination relates to availability of work and not to his physical condition. The evidence clearly indicates the conditions and period of his employment, and there is no evidence to support the contention that he was terminated for reasons related to his physical condition.

This leaves the allegation that the employer refuses to consider Mr. Parent for future employment because of this physical

condition.

The evidence discloses and I find that the employer would not have hired Mr. Parent as a permanent driver employee because he does not meet the medical qualifications for the position in question being M.D.O. 4 classification. While the employer retains employees with medical handicaps, it would not as a policy hire a new employee unless the said employee qualified medically.

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Section 7 of the Act provides that:

"It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or on a prohibited ground of discrimination."

There is no evidence that Mr. Parent was referred to the base for employment by Canada Manpower, subsequent to his termination in September, 1978, nor is there evidence that he was refused employment by this employer.

It is alleged that the reason Mr. Parent was not referred to Canadian Force Base, Petawawa by Canada Manpower, is because the employer had indicated to Canada Manpower that he would not qualify as a driver and since that was the only area of occupation sought by Mr. Parent, referrals would be useless.

The evidence in that respect is not conclusive and somewhat speculative as apparently Canada Manpower did not refer Mr. Parent to any employer after September of 1978. (Transcript Page 56)

The evidence presented respecting the hiring of indeterminate employees from September 1978 to date indicates that four or five workers were hired and that normal procedures were followed in that 'closed competition' within the Public Service were held, and no referrals from Canada Manpower were required. (Pages 122, 123 of the transcript)

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Is there therefore sufficient evidence to support the

proposition that the Complainant was refused employment by reason of his physical handicap as set out in the complaint?

Counsel for the Canadian Human Rights Commission argues that to pursue a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination, is discriminatory in that the practice itself even though not intended to be discriminatory, and even if applicable fairly to a group of employees, is in breach of the Act and that an employer has the obligation to change the

said practices to accommodate individuals and groups unless it can be demonstrated by the employer that such practices or requirements are essential for the good conduct of its business.

In support of this proposition Counsel for the Human Rights Commission cited several American decisions and Provincial decisions, most of which are summarized and reviewed in the case of Colfer vs Ottawa Police Board of Commissioners by Peter A. Cummings.

I do accept the propositions that the Act must be given a liberal interpretation; I further accept the proposition that if an employment procedure or practice tends to deprive a particular group from employment opportunities; that such a practice can be discriminatory unless the employer can demonstrate justification for such practice or procedure for the job expected of the employee. I further accept that intent is not an issue if the practice by its result is discriminatory.

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Counsel for the Human Rights Commissions suggests that the employer in this case can and should allow changes in its employment practice for M.D.O. 4 employees to provide an employment opportunity for the Complainant.

The evidence demonstrated that approximately 75% of the work involved in the job classification involved passenger transportation for which Mr. Parent is not qualified to do under National Health and Welfare Standards; the duty of ambulance driving, was also outside the capacity of the complainant; the remaining work consisted largely of cargo transport, which the complainant is classified to do as a driver, but is not able to load or unload which is one of the described functions expected from these employees. In effect what Counsel is requesting from the employer is a change on its job description for that class of employees to allow a position for a driver of light cargo vehicle for which Mr. Parent is qualified to perform.

The employer's evidence relating to the organization of M.D.O. 4 Section, its operation and what was expected from its employees, the duty driver system, is in my view justifiable on the whole, and commensurate with a reasonable operating system for the objectives of the employer. I do not find anything discriminatory in such practices.

Should the employer go further to ensure opportunities to prospective employees like Mr. Parent? I must say that if the only

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restrictions affecting Mr. Parent's prospective employment was the

limitation as to ambulance driving, I would entertain the view that accommodation should be made, however the restrictions do touch on several other aspects of the job descriptions such as : passanger transport, the use of heavy vehicles and the loading and unloading of cargo, for which the complainant is also restricted.

I have been most impressed by the evidence of Mr. Parent, particularly his genuine desire to be employed gainfully and as a result become independent. He has had an unusual measure of setbacks in his life but has kept a burning ambition to be self sufficient which I hope he will achieve.

However, on the evidence before me I have come to the conclusion and findings hereinafter listed:

(1) I find that Mr. Parent's employment was not terminated by reason of his physical handicap.

(2) I find that Mr. Parent was not refused employment by reason of his physical handicap.

(3) I further find that the employment practices as applied at Base Petawawa for M.D.O. 4 drivers are not discriminatory in the circumstances before me and constitute a bona fide occupational requirement

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(4) I therefore conclude that discrimination pursuant to the Act has not been established and I therefore dismiss the complaint.

DATED at Sudbury, this 10 day of June, 1980.

André Lacroix
Chairperson Tribunal

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