

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

MICHAEL J. WILCOTT

Grievor

and

**TREASURY BOARD
(National Defence)**

Employer

Before: Jean Charles Cloutier, Board Member

For the Grievor: Michael Tynes, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Halifax, Nova Scotia,
March 3 and 4, 1998.

DECISION

Mr. Michael J. Wilcott is a firefighter (FR-1) employed by the Department of National Defence in Halifax since 1980. On September 28, 1994, during his periodic medical, the grievor was diagnosed as suffering from diabetes and was diagnosed as having developed insulin-dependent diabetes. Mr. Wilcott was removed from his position of operational firefighter.

Mr. Wilcott grieved this decision on August 11, 1995:

I grieve that I have been dismissed from my position as an operational firefighter and am being forced to use my sick leave contrary to M-FR22.

Corrective Action Requested

That I be allowed to return to my position as an operational firefighter and that my pay and benefits be restored retroactive to the day of my dismissal.

The first level reply, dated 11 September 1995, reads as follows:

A meeting was held on the 25th August 1995 to discuss the contents of the complaint you submitted as a grievance # 95-A-HAL-068. Since you were unable to show that any action occurred in the 25 days prior to the submission of your complaint, I cannot consider this a grievance. I am, however, prepared to address your concerns and treat them as a complaint outside the grievance process.

Our records show that the last action taken by management in relation to you was in February when you were offered an eight week, one time only, alternate employment (Mar-Apr. 95). This was intended to give you time to decide on your future employment. Since then we have not been advised of your intentions nor has management taken any further action.

You consider the actions taken by management are a dismissal from your job. You are still employed and continue to receive salary and benefits derived from your employment. The department has offered to seek alternate employment for you within your medical limitations. Therefore you have not been dismissed from DND.

As you are aware, I received a medical assessment from the physicians at Health Canada on 9 January 1995 stating that you are unfit as an operational firefighter. Based on this I am unable to employ you as an operational firefighter. I have offered to assist you in locating alternate employment and

will continue to make efforts in that direction. Thank you for providing a resume on 25 August 1995. This will assist in my efforts to place you.

As I have stated, you have not been dismissed and therefore, I do not concur with your complaint.

The final level reply, dated 14 April 1997, reads as follows:

Your grievance alleging that management has dismissed you from your operational functions as a firefighter has been reviewed at the final level of the grievance procedure.

My review indicates that you have not been dismissed from your operational functions but rather that you have been removed from them because of your medical condition. This came about as a result of the decision by Health Canada to find you Class C, unfit for work following your periodical examination in September 1994. Health Canada determined that you suffered from a permanent condition which prevented you from continuing as an operational firefighter. As a result, local management had no other choice but to remove you from your duties and assign you to a temporary position. Since then, you have been absent on sick leave and at no point during that period were you ever dismissed from your position. For that reason, I deny your grievance and therefore, the corrective measure requested will not be granted.

Lucette Charron, your representative, at the final level of the grievance procedure has been advised of my decision.

At the outset, both parties agreed and stated that this case was not to be considered as a discharge but rather one of conflicting medical opinions. Furthermore, it should be noted that the employer's objection to the timeliness of this grievance which was raised in its reply at the first level of the grievance procedure was not pursued in the hearing before me. In addition, although clause M-FR22 of the Master Agreement is mentioned in the grievance, it was not referred to in the hearing before me.

Summary of the Evidence for the Grievor

Dr. Deborah Knight is a medical doctor who obtained her degree in 1974. She practices internal medicine at the Dartmouth Medical Centre and between 60 to 80 percent of her patients are diabetics. The grievor was referred to her in 1992 by his

family doctor, Dr. A. Wadden. The grievor was diagnosed as suffering from diabetes and put on insulin injections twice a day as indicated in Dr. Knight's letter dated November 12, 1992 (Exhibit G-1). Letters from Dr. Knight to Dr. Wadden, dated December 10, 1992 (Exhibit G-2), March 3, 1993 (Exhibit G-3), July 13, 1993 (Exhibit G-4), February 25, 1994 (Exhibit G-5) and August 16, 1994 (Exhibit G-6), all indicate that the grievor continues to inject insulin daily (morning and evening).

Further to an annual medical in 1994 by Dr. Karen MacDonald of Health and Welfare Canada, Dr. Knight was asked for a report on the grievor's health. A letter was sent by Dr. Knight on November 1, 1994 (Exhibit G-7) in which it is stated that oral agents were initially tried but did not respond; therefore, the grievor was placed on insulin. In her letter, Dr. Knight states, and I quote:

... I do not think the fact that he is insulin dependent should be a contraindication to him performing his duties. He has been doing it now for two years and has proven that he is quite capable of functioning in his present occupation despite being an insulin dependent diabetic and I would certainly recommend that he continue to be employed in his present occupation.

Dr. Knight testified that, due to the fact that the grievor knew his situation and controlled his weight and diet very well, there were no reasons why he should not continue to work as an operational firefighter. Dr. Knight testified that the grievor was a "type 2", which meant control with insulin, whereas a "type 1" is insulin dependent. Dr. Knight did not remember having ever seen his job description and said that she had never seen the "Occupational Health Assessment Guide" produced by Treasury Board regarding firefighters. Dr. Knight also testified that the grievor had occasional hypoglycemic episodes in the past. These episodes never occurred at work and he is not known to have had any in the last few years. Dr. Knight confirmed the fact that the grievor will in all probability be on insulin for the rest of his life.

The next witness was the grievor, Michael J. Wilcott, who has been working as a firefighter for the Department of National Defence since 1980 in Halifax. He confirmed working shift work and that Dr. Knight has been treating him for diabetes since 1992. In 1992, he spent three weeks in the hospital for various tests regarding his diabetes and this was generally known by his colleagues at work and also his supervisor as they visited and were told of the reason why he was in the hospital.

Between 1992 and 1994 (year of his physical exam at Health and Welfare Canada), he continued working as an operational firefighter and also admits to having had two or three episodes of hypoglycemia at home during that period. The grievor stated that he was and still is a volunteer firefighter with the Lawrencetown District 9A Fire Department. In his capacity as volunteer firefighter, he has responded to over 400 calls since 1992 and never has his diabetes been a problem. The grievor also mentioned that although physicals are to be annual, due to a reorganization as to dates, etc., he was not asked to report for such between the years of 1991 and 1994. Mr. Wilcott was informed on the 9th of January 1995 (Exhibit E-7) that he was unfit for work as an operational firefighter.

The grievor stated that he is presently on a special diet which he monitors closely and that he uses insulin daily before breakfast and dinner. Mr. Wilcott also stated that he feels that his diabetes is well under control and that he is physically fit to perform the duties of a firefighter.

Summary of the Evidence for the Employer

The first witness was Dr. Karen MacDonald who obtained her degree in medicine in 1984 and has been with Health Canada as Medical Officer-in-Charge, Clinic Services, since 1988. Dr. MacDonald was certified in Occupational Medicine in 1994.

Dr. MacDonald proceeded to Mr. Wilcott's annual medical on September 28, 1994 during which she diagnosed him as having developed insulin-dependent diabetes. Dr. MacDonald referred us to the "Occupational Health Assessment Guide" (Exhibit E-1), in which paragraph 2.8.2 states:

2.8.2 OCCUPATIONAL REQUIREMENTS

1. Must not have:

- an inability to tolerate work at heights or in enclosed spaces.*
- a tendency to panic while wearing a respirator.*
- an impairment which results in unpredictable sudden loss of consciousness.*

- *a musculo-skeletal condition which prevents the heavy lifting required in performing the duties.*
- *insulin-dependent diabetes.* [emphasis added]
- *a clinical impairment which renders him/her unable to perform a physical ability test for firefighting duties without danger to self or others.*

This document is produced by Treasury Board and section 2.8 is entitled "FIREFIGHTERS (Both part-time and full time) (TB GROUP 9)". The "Occupational Health Assessment Guide" was prepared by the employer and its contents rely heavily on the principles established by the Canadian Task Force on the Periodic Health Examination and by the Task Force on Health Surveillance of Workers.

Dr. MacDonald testified that the grievor was a "type 1", insulin-dependent diabetic, and referred to the Merck Manual (16th Edition) to demonstrate her belief (Exhibit E-2) and that he would be forced to use insulin for the rest of his life.

Dr. MacDonald referred the grievor's medical file, which included her findings, to the Medical Advisory Board on 9 November 1994 (Exhibit E-4). On December 14, 1994 (Exhibit E-5), Dr. J. Kirkbride, Chairperson, Occupational and Environmental Health Services, Medical Advisory Board, informed Dr. MacDonald that the Board concurred with her findings. By letter dated 9 January 1995 (Exhibit E-6), Dr. MacDonald informed the Department that she had signed the "General Physical Examination Report" that read: "CLASS C - Unfit for Work".

In cross-examination, Dr. MacDonald reiterated the fact that Mr. Wilcott was an insulin-dependent diabetic of "type 1" and that there was a risk to himself and others if he was to perform the duties of a firefighter due to the fact that there are possibilities of recurrence of his hypoglycemic episodes.

The next witness was David A. Geddes, who has been the Base Fire Chief for many years with the Department of National Defence and the grievor has been working for him as a firefighter. The witness was made aware of Mr. Wilcott's medical condition further to his periodic medical (Exhibit E-6). Chief Geddes testified that he had no other option but to remove the grievor from being an operational firefighter because of the "Occupational Health Assessment Guide" (Exhibit E-1) requirements

and the “General Physical Examination Report” (Exhibit E-6) stating "CLASS C - Unfit for Work".

In cross-examination, Chief Geddes testified that Mr. Wilcott has passed successfully all physical fitness tests required for firefighters.

Arguments

For the Grievor

The arguments from the grievor's representative may be summarized as follows.

The grievor's representative submitted that this was a unique case and a difficult situation. Mr. Wilcott is a good employee (firefighter) and performed his duties well between 1992 and 1995, the period when he was on insulin.

Is the “Occupational Health Assessment Guide” (Exhibit E-1) reasonable in its requirements? We have two conflicting medical opinions, but Dr. Knight has been treating Mr. Wilcott for five years whereas Dr. MacDonald only saw him once. Also, Dr. Knight treats diabetic patients on a daily basis; therefore, she is a qualified physician. Another reason why Dr. Knight's testimony should be preferred is that 80 percent of her patients are diabetics. The grievor's diabetes is well controlled; he is physically fit and is not overweight; therefore, he is capable of assuming the duties of a firefighter, as was confirmed by Chief Geddes.

Mr. Wilcott has not had any hypoglycemic episode in the last three years and he now knows how to handle any signs of such.

The grievor's representative requested that the grievor not be declared unfit and that he be returned to his FR-1 duties; he also seeks the restoration of all benefits.

I was referred to the following cases: *Nicholson* (Board file 166-2-20448); *Steve* (Board files 166-2-20058 and 20773); and *Lépine* (Board files 166-2-16967 and 16968).

For the Employer

The arguments from the employer's counsel may be summarized as follows.

Counsel stated that it was evident that the grievor did not meet the health standards set out by the employer, Treasury Board and Health Canada, for firefighters. Dr. MacDonald not only diagnosed that Mr. Wilcott was an insulin-dependent diabetic and unfit for work as a firefighter, but submitted her findings (Exhibit E-4) to the Medical Advisory Board who concurred with her (Exhibit E-5). This decision was not superficial and it is clear that Mr. Wilcott did not meet the occupational requirements as stated in paragraph 2.8.2 of the "Occupational Health Assessment Guide" (Exhibit E-1). Dr. MacDonald understands the standards and explained why she considered Mr. Wilcott as being a "type 1" insulin-dependent person by referring in detail to the Merck Guide (Exhibit E-2).

The "Occupational Health Assessment Guide" (Exhibit E-1) is set out for the safety of firefighters and also for the safety and security of the public, colleagues and clients. In her letter dated November 1, 1994 to Dr. MacDonald (Exhibit G-7), Dr. Knight states:

... I do not think the fact that he is insulin dependent should be a contraindication to him performing his duties. He has been doing it now for two years and has proven that he is quite capable of functioning in his present occupation despite being an insulin dependent diabetic and I would certainly recommend that he continue to be employed in his present occupation. [emphasis added]

I was referred to the following decisions: *Kolshi* (Board files 166-2-25899, 25900 and 26020); *Nicholson* (supra); *Steve* (supra); and *Lépine* (supra).

Decision

The overriding issue in this case is, on the one hand, the right and the obligation of the employer to take reasonable steps to ensure that its employees are fit to perform their job and, on the other hand, there is the employee's right to be allowed to continue to work and to make a living unless and until his employment is terminated for cause.

It is not disputed here that the employer had the right to insist that the grievor be medically assessed periodically to determine his fitness to work. However, Dr. Knight did confirm, in writing, that the grievor was an insulin-dependent diabetic and also stated, in her recommendation, that the grievor “continue to be employed in his present occupation”. Dr. Knight testified that she did not remember having read the grievor’s job description, nor was she aware of the “Occupational Health Assessment Guide”.

However, Dr. MacDonald diagnosed the grievor as having “type 1” diabetes and confirmed that the grievor was an insulin-dependent diabetic. To make certain that her diagnosis was correct, Dr. MacDonald sent all of the findings (the grievor’s complete medical file) to the Medical Advisory Board for review.

The Medical Advisory Board is composed of medical doctors who gave their opinion in a memorandum dated December 14, 1995 (Exhibit E-5), and I quote:

... Because of the inherent unpredictable circumstances of a firefighters working life, when meals may be interrupted and heavy exertion may suddenly be required, the Board does not consider Mr. Wilcott fit to work as a firefighter.

Both Dr. Knight and Dr. MacDonald testified that the grievor’s insulin-dependent diabetes is not one that may improve in the near future but, to the contrary, they believe that Mr. Wilcott will in all probability need his diabetes controlled through insulin medication for the rest of his working life.

Furthermore, the “Occupational Health Assessment Guide” is very clear and concise in its wording in stating that a firefighter “must not have: insulin-dependent diabetes”[emphasis added]. Having considered the evidence adduced as well as the submissions of the parties, I am of the opinion that to allow an insulin-dependent diabetic to perform firefighter duties could put in jeopardy his own life, the life of his colleagues, clients and the general public as there is always the possibility of the recurrence of a hypoglycemic episode.

In light of this conclusion, I strongly recommend that the employer should consider the possibility of arranging for another position for the grievor in the organization.

For all these reasons, this grievance must be denied.

**Jean Charles Cloutier,
Board Member**

OTTAWA, April 30, 1998.