Date: 20090119

Docket: T-717-08

Citation: 2009 FC 46

OTTAWA, ONTARIO, JANUARY 19, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

WILLIAM DAVID GERARD JONES

and

THE ATTORNEY GENERAL OF CANADA

REASONS FOR ORDER AND ORDER

[1] The applicant is a self-represented litigant who served as a marine engineer in the Canadian Forces for almost 30 years. He brought this application for judicial review to challenge a decision to release him from the Forces on medical grounds more than ten years ago.

[2] On April 13, 2007, Madam Justice Layden-Stevenson allowed a previous application for judicial review by the applicant (2007 FC 386), on the ground that his right to procedural fairness had been breached by the Career Review Board (Medical) ("CRB(M)")[For ease of reference, a glossary of all the acronyms found in these reasons is appended as "Schedule A"]. At the time, this was the administrative unit tasked with making recommendation to the Director of Personnel Career

Administration in all cases where the medical category of a member had been lowered below the acceptable minimum for his classification. More specifically, she found that the applicant did not receive a fair hearing, as he was not notified of the date of the CRB(M) hearing and did not receive the disclosure package to which he was entitled. Before coming to that conclusion, it is worth noting that she also concluded it was one of those rare cases where an application for judicial review must be entertained despite the fact that there was an alternative remedy (grievance mechanism) which the applicant had not pursued.

[3] In a subsequent order (T-714-06, December 20, 2007), Madam Justice Layden-Stevenson varied her previous order after being told that the CRB(M) was cancelled and replaced by another process, the Administrative Review/Medical Employment Limitations (AR/MEL). As a result, she ordered the following:

> The application for judicial review is allowed and the matter is remitted for determination in accordance with the AR/MEL process, which has replaced the now defunct Career Review Board (Medical), provided always that the AR/MEL is differently constituted than the former CRB(M).

[4] As a result of this Order, a new process was set in motion, the outcome of which was the confirmation of the earlier decision to release the applicant from the Armed Forces. It is from that second decision that the applicant is now seeking judicial review.

THE FACTS

[5] Mr. Jones is obviously a bruised man. He was discharged from the Canadian Forces after more than 29 years of service, with an impeccable record, for what he considers to be retaliation by the Admiral and Commanding officers of his base. In his view, his only fault was to bring to the attention to the Chief of the Defence Staff (CDS) the deficiencies and shortcomings they were faced with in his trade. He repeated on a number of occasions during the hearing that he was merely doing his job and standing up for "his men" in stressing that the government cannot commit to an ever increasing number of missions while at the same time cutting budget and human resources. There is no doubt in my mind that Mr. Jones was a very dedicated man, and he came across as a most loyal member of the Forces despite all that he has gone through.

[6] I am relieved from chronicling all that happened between the incident Mr. Jones considered to be the trigger of his problems, during the summer of 1996, and his eventual discharge from the Armed Forces, which was communicated to him on September 22, 1997. In her decision, Madam Justice Layden-Stevenson thoroughly summarizes the most salient and relevant facts, and there is therefore no need for me to go over them once more.

[7] I must emphasize, as my colleague did, that Mr. Jones was quite eloquent in the presentation of his case. As most self-represented litigants, he was obviously unfamiliar with the niceties of legal arguments and with some of the rules of this Court. His task was made somewhat more daunting by the difficulty of conveying in a comprehensible way for a laymen the complicated structure and jargon of the Armed Forces. If the content of his record was, at times, disjointed and

difficult to follow, he certainly made up for it in his oral submissions. I hasten to add that counsel for the respondent was equally very cooperative and helpful, and made Mr. Jones' and this Court's task a lot easier in bringing clarity when needed.

[8] Taking the matter where it was left by Madam Justice Layden-Stevenson, what follows is a short summary of what took place following her Orders.

[9] The AR/MEL process is outlined in Defence Administrative Order and Directive (DAOD) 5019-2 titled "Administrative Review". An AR/MEL is the process used to evaluate the career administrative action required when a Canadian Force (CF) member has a medical condition that no longer meets the medical requirements of the CF or their occupation. The AR/MEL process involves a CF officer who is an Administrative Review (AR) analyst, responsible for conducting the AR analysis, and the Approving Authority (AA) as identified in the Director General Military Careers Approving Authority Table, responsible for reaching a decision on the AR. The AR analyst is provided with the CF member's medical employment limitations that have been approved by medical authorities at the Directorate of Medical Policy. The AR analyst then processes the file in accordance with the DAOD. The AR analyst is not given information regarding the CF member's underlying medical condition, only the employment limitations.

[10] On September 19, 2007, the AR/MEL disclosure package was mailed by priority post to the applicant for disclosure, in conformity with DAOD 5019-2. The covering letter outlined the

disclosure of information procedure, and it was accompanied by a copy of the documents that would be used by the Approving Authority to reach a decision.

[11] The first attached document is a case file synopsis. In the general information part, it refers to the applicant's medical employment limitations as described by the Surgeon General in form CF 2088 (Notification of Change of Medical Category or Employment Limitations). These limitations are: "1) Unfit field, sea, isolated and UN postings; and 2) Fit PT but may be limited in type, duration, frequency and intensity of the exercise". It then discusses the Universality of Principle requirement, and then concludes with the following remarks:

> In this case, the member's MELs [medical employment limitations] presented in paragraph one prevent the aforementioned from meeting the BFOR [Bona Fides Operational Requirement] associated with the subsection 33(1) of the *National Defence Act* (NDA) as these MELs prevent the performance of duties in a military environment, including but not limited to: frequent movement, relocation, isolation, and temporary duty away from home or unit as well as working over extended periods of time in hostile environments, exposed to life threatening situations.
>
> As CPO1 Jones cannot be advantageously employed or be retained, release would be the only alternative.

[12] The package sent to the applicant also included a copy of the Notification of Change of Medical Category or Employment Limitations for the Applicant (CF 2088), referred to in the synopsis, the applicant's record of service dated September 30, 1993, and a copy of a few administrative documents.

[13] On October 12, 2007, the applicant sent a latter to the AR analyst, requesting information and copies of other documents. An exchange of emails followed between the applicant and the analyst, as a result of which paper copies of the documents requested by the applicant were sent to him.

[14] In addition to contacting the analyst in charge of his file, the applicant also contacted a Resource Management Support Clerk at the Directorate Military Careers Administration to discuss his case. The analyst instructed the clerk to inform the applicant that he should stop calling the clerk to get information and instead contact her, the analyst, directly, which the applicant did.

[15] On January 8, 2008, the applicant sent a fax to the clerk in which he asked a few questions with respect to the AR/MEL process. While the analyst in charge of his file was on vacation, one of her subordinates responded to his questions. He stated that the AR/MEL process for former CF members is substantially the same as for serving CF members. He also confirmed that as the applicant was no longer a CF serving member, he did not have a Commanding Officer; there would be no reason to appoint one as all correspondence is sent directly to the applicant, not through a chain of command. Finally, he also explained that assisting officers are assigned in proceedings under the military justice system, not for an administrative process.

[16] On February 4, 2008, the applicant's written submissions in response to the disclosure package were received by the analyst. They were passed on to the Director Military Careers Administration and Resource Management (DMCARM), the Approving Authority for AR/MEL.

Within one or two days, the Director returned the applicant's representations to the analyst, ordering her to do a complete review of the representations, summarize the documents and provide recommendations.

[17] In late March or early April 2008, the analyst provided to the DMCARM a copy of the disclosure package that had been sent to the applicant on September 19, 2007, the applicant's representations and a draft letter to the applicant for the signature of the DMCARM.

THE IMPUGNED DECISION

[18] On April 2, 2008, the DMCARM concluded that the applicant's medical employment limitations were in breach of the Universality of Service principle, and that release was merited. It states that the decision follows the Order of Madam Justice Layden-Stevenson, and that no evidence that arose or came to the applicant's knowledge after September 15, 1997, can be considered in that process.

[19] It then goes on with an explanation of the procedure, a short explanation of the Universality of Service principle, and a summary of the evidence that was considered. The analysis section bears quoting at full length, as it captures the reasoning behind the decision to release the applicant and purports to answer his submissions:

> There is no mandatory requirement for temporary categories to be assigned prior to a permanent category being approved. As stated in CFP 154, Chapter 3, para 9, "As soon as the member's condition is stable or is not expected to significantly improve in the foreseeable future, a permanent

> category should be assigned, even before the end of the 12-month period of temporary category."
>
> There is no indication that your file was treated any differently than others being processed by DPCA at that time. The notification message sent to Esquimalt in March 97 was a standard message sent to notify personnel that a CRB(M) file had been opened.
>
> As explained in CANFORGEN 014/97, the CF 285 gave very little information that would assist the CRB(M) in making a decision, given the restrictive nature of the MELs and the application of the U of S principle. The fact that a CF 285 was not issued is irrelevant.
>
> When the CRB(M) was conducted, it included a medical officer from D Med Svcs. The other CRB(M) members were not medical officers, and they would not have access to nor be made aware of your personal medical information. The CRB(M) also had the recommendation of the career manager and the Section head. The only medical information they required was the CF 2088, and the approved MELs, which described the employment limitations. I have had the benefit of the same evidence the CRB(M) had in its possession.
>
> Having carefully reviewed all the documentation and the representation that you provided, I conclude the MELs awarded by D Med Svcs based on the recommendations of the local physician and the Base Surgeon breached U of S. You were unfit field, sea, and isolated and UN postings. You were not at all times and under any circumstances able to perform any functions that you may have been required to perform. To be clear, I find that you were in breach of U of S.

[20] In the final portion of the decision, the DMCARM repeats that the applicant's medical employment limitations were in breach of the Universality of Service principle. Relying on the

National Defence Act and the policies that were in effect in 1997, the DMCARM also reaffirms that release was merited. Finally, he reiterates that the decision is a substantive rehearing of the applicant's case as it stood in 1997, with the additional benefit of his contemporary submissions, but is not a review of the decision rendered a decade ago.

ISSUES

[21] This application for judicial review raises three issues:

- What is the applicable standard of review of the decision of the DMCARM to release Jones from the CF?
- Was there a breach of procedural fairness in the context of the process followed to reach that decision?
- Was the decision to release the applicant reasonable?

ANALYSIS

[22] Following the recent decision of the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, there are now only two standards of review: correctness and reasonableness. The Court also made it clear that it is not necessary for a court to repeat the standard of review analysis if existing jurisprudence has already determined the appropriate degree of deference.

[23] This Court has not previously been called upon to determine the standard of review applicable to a decision of the DCMARM because those decisions would normally be subject of the CF grievance process. However, the Court has previously determined that final decisions of fact in the CF grievance process by the Chief of Defence Staff are subject to the standard set out in

s.18.1(4)(f) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for those issues, that is, they are reviewable only if they are erroneous, made in a perverse or capricious manner or without regard to the evidence. As for mixed question of fact and law, they must be assessed against a standard of reasonableness: see *Armstrong* v. *Canada (Attorney General)*, 2006 FC 505. I agree with the respondent that the reasoning leading to that conclusion should be equally applicable in the case of a decision made by the DMCARM. The expertise of the DMCARM, the purpose of the legislation in issue and the question in issue all favour the application of such a standard.

[24] The AR/MEL process is an integral part of the efficient functioning of the CF. The nature of the problems at issue involves evaluating the needs of the CF. To carry out this function, intimate knowledge of and sensitivity to the needs of the military institution are required. The CF generally and the DMCARM specifically are in the unique position of determining the requirements of its members to fully meet their needs and the effect that MELs will have on a member's employability with the CF. As a result of making hundreds of decisions each year about employability of members following the AR/MEL process, the DMCA has a high degree of institutional expertise. This factor strongly militates in favour of deference.

[25] Moreover, the purpose of the *National Defence Act* is to provide for the management, direction and administration of the CF. More specifically, the CF has been empowered with the discretion to release members where their medical restrictions impact upon their ability to serve and they cannot meet *bona fide* occupational requirements. This is not a polycentric issue, but it is more akin to litigation between two parties. Once again, this factor suggests a fair amount of deference

for the decisions made by the DMCA. Indeed, the necessity for the CF to have broad discretion in assessing employability and possibly releasing members is recognized in section 15 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6, which makes the need to accommodate members subject to the Universality of Service principle.

[26] Finally, the question in this case is one of mixed fact and law. The DMCARM was required to review the identified Medical Employment Limitations (MEL), identify the *bona* fide occupational requirements (BFORs) and apply the Universality of Service principle. A decision involving a question of mixed fact and law should be given significant deference, where the main function of the decision maker involves determination of facts and a straightforward application of legislative provisions particularly where knowledge of and sensitivity to the needs of the military is required.

[27] To the extent that some of the allegations made by the applicant relate to issues of procedural fairness, on the other hand, there is no need to conduct a pragmatic and functional analysis. Such issues are reviewed as questions of law, and no deference is due. As the Court of Appeal stated in *Sketchley* v. *Canada (Attorney General)*, 2005 FCA 404, at para. 53, "[t]he decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty".

[28] The applicant has raised a number of issues, both procedural and substantive, in his written and oral submissions. I will do my best to address them all in the following paragraphs of these

reasons, even if they were sometimes disjointed and repetitive. But before doing so, a few preliminary remarks are in order.

[29] First of all, a number of allegations made by the applicant rest on hearsay evidence or speculations. This is no doubt explainable by the fact that Mr. Jones is not an expert on rules of evidence and may not be entirely familiar with the nature of a judicial review, as he himself was quick to acknowledge. That being said, and bearing in mind that self-represented litigants must be provided some flexibility in putting their case forward, I must nevertheless give little weight to these statements.

[30] The same goes for the letters from medical doctors and others appended to Mr. Jones' written submissions to the AR/MEL, upon which Mr. Jones relies in his affidavit. These letters must be taken with caution, as their authors did not file affidavits in this Court and could therefore not be cross-examined by the respondent.

[31] On the other hand, many of the arguments raised by Mr. Jones relate to the process that was followed in 1997 by the CRB(M). These arguments were dealt with by my colleague Madam Justice Layden-Stevenson at the occasion of Mr. Jones' first application for judicial review, and she found them sufficiently compelling to order a new administrative review of his discharge in accordance with the AR/MEL process. It is therefore this second process and the conclusion reached by the DMCARM as a result of that process that is now the subject of this judicial review, and not what took place in the context of the first administrative review. That being said, the

DMCARM was correct in stressing that his decision is a substantive rehearing of Mr. Jones as it stood in 1997, as opposed to a review of that decision. As a result, the only evidence that could be considered was that which arose or came to the knowledge of Mr. Jones before the first decision was made in September of 1997.

[32] One more *caveat* need be made before embarking upon the analysis of the applicant's submissions. The respondent contends that the decision under review is not the MELs or the medical categories that were assigned to Jones. The decision changing the applicant's medical limitation was made on February 25, 1997, (see Form 2033 and 2088, A.R., p. 193 and 196), and is not the subject of review according to the respondent. The only decision under review, following this line of argument, would be the DMCARM's decision as to employability given those MELs.

[33] I agree with the respondent that the medical process and the decision to change the medical restrictions of the applicant are not, technically speaking, properly the subject of this application for judicial review before this Court. These decisions were subject to a different decision maker, the Director of Medical Services, and the DMCARM's task was to take these restrictions as they were and to determine whether Mr. Jones was still employable and deployable or whether he should be discharged.

[34] While I appreciate the logic of this argument, I am not totally convinced of its persuasiveness in a case like this one. As I indicated at the hearing, it seems to me the reasonableness of the DMCARM's decision cannot be entirely insulated from the medical process.

If it can be established that the medical assessment was flawed, either in terms of process or substantively, it would clearly have an impact on the decision to retain Mr. Jones in the CF or to discharge him. I agree that the applicant should have submitted a grievance in relation to his medical assessment; but for the same reasons given by Madam Justice Layden-Stevenson in concluding that the applicant was not precluded from seeking judicial review of the medical release decision, I am of the view that he should not be prevented to raise his arguments with respect to the medical limitations underlying the decision of the DMCARM to release him from the CF.

[35] These preliminary remarks having been made, I shall now describe briefly the AR/MEL. This process is set forth in DAOD 5019-2 on Administrative Review (R.R., pp. 492 ff.)

[36] The AR/MEL is the process used since 2006 to review all cases where a member no longer meets the minimum medical standards for their military occupation, in order to determine their suitability for further service. The AR/MEL process is initiated when a member has been assigned a permanent MEL by the relevant medical authorities. The document which initiates the AR/MEL process is the CF 2088 form ("Notification of Change of Medical Category or Employment Limitations"), wherein a medical officer or a physician indicates a change in medical category and the specific MELs of the member by completing Parts I and II of that form.

[37] The Command Surgeon then reviews the medical assessment provided under Part II of the CF 2088 and approves it by signing Part III, and adding more details if necessary. At the time of

Mr. Jones' original release in 1998, the Director Medical Treatment Service completed Part IV of the CF 2088 for the Surgeon General.

[38] After the medical officers complete Parts I, II, III and IV of the CF 2088, the form is sent to the DMCARM. An AR analyst reviews all the information, prepares a synopsis and makes a recommendation. All documents to be considered by the approving authority in the AR/MEL process are then provided to the member. The member may then make representations.

[39] The member's Commanding Officer will make a recommendation as to the member's employability under part VI of the CF 2088 and then forward the CF 2088 back to the DMCARM.

[40] The member then acknowledges that the member has been made aware of the changes to his medical category and the possible consequences of the AR/MEL process by signing Part V of the CF 2088.

[41] The file is then presented to the DMCARM who then reviews all the material, makes a decision and informs the member of the decision. The DMCARM does not consider the underlying medical condition but only the medical employment limitations and the impact they would have on employability.

[42] The DMCARM has a number of administrative options following review, including but not limited to, retention with career restrictions, retention without career restrictions, occupational transfer and release.

[43] The applicant has alleged that the CF 2088 was flawed in many respects. First of all, the applicant argued he was mistakenly described as being "unfit sea, unfit field, unfit isolated or UN taskings" as a result of being downgraded from G2 to G4. The applicant speculated that this must have been a clerical error, as this description fits more closely the G5 category. For that proposition, he relies on a letter written by Dr. Thomas Ripley on January 18, 2008, at the request of Mr. Jones. Dr. Ripley provided psychiatric services to members of the CF in 1997, and it is in that capacity that he interviewed Mr. Jones on October 28, 1997. In his letter, he writes:

> I believe that Mr. Jones' final Medical Category was G4b O3. In my understanding, this medical category assigned is for individuals who "may be on prescription medications, the expected discontinuation of which, for even a few days, is considered likely to create an unacceptable risk to the health and/or safety of the person (or to co-workers)". In fact, this is not the case with antidepressant medications. In general, improvement with antidepressant medications is a gradual process occurring over many weeks, and relapse of depression, if medications are discontinued, also occurs in a gradual fashion. In my opinion, Mr. Jones would more accurately have been classified as G3d, which applied to individuals "who may require and take prescription medications, the unexpected discontinuance (unavailability) of which will not create an unacceptable risk to the member's health and/or safety".
>
> I further note that the Career Review Board Medical states: "unfit field, sea, isolated, and UN postings". It

> is my understanding that this requires a G5b category, instead of the category assigned to Mr. Jones.
> (A.R., p. 231)

[44] Before assessing this argument, it is necessary to take a step back to better understand the medical standards and what they stand for. In order to assist in determining what medical standards are required under the Universality of Service principle and whether or not members can perform the General Military Duties of the Canadian Forces, the Medical Standards for the Canadian Forces (Canadian Forces Publication 154, Appendix 1, Annex D and Appendix 2, Annex D; R.R., p. 557-560) were developed. Each member of the CF is assigned a medical category by CF medical staff. The medical category helps identify employment limitations resulting from medical conditions in order to determine appropriate health care and employment capabilities for a member.

[45] Chapter 3 of the CFP154 describes the medical category factors as follows:

> V – Visual Acuity
> CV – Colour Vision
> H – Hearing
> G – Geographical Limitation
> O – Occupational Limitation
> A – Air Factor

[46] The CFP 154 also sets forth the Bona Fide Occupational Requirements for members in Task Statements which list both the physical and stress factors representing the minimum operational requirements under the Universality of Service principle for all members generally, and for particular occupations. The minimum medical category for enrolment as a member of the CF is: V4-CV3-H2-G2-O2-A5. The minimum medical category in the CF for a Marine Engineering Artificer (the applicant's occupation at the time of his release) was: V4-CV2-H3-G2-O2-A5.

[47] In 1994, Mr. Jones was diagnosed with major depression and was hospitalized for several weeks. In September 1996, Dr. Passey diagnosed Mr. Jones with major depression in partial remission and noted that he had undergone numerous trials of pharmacotherapy which were only partially successful. He added that Mr. Jones continued to have a number of stressors in his life including difficulties with senior people at work. He also recommended assigning him a lower permanent medical limitation category of G4 O3 in the following terms:

> I believe this individual has had a very fair trial of therapy to date. I have referred him for a sub-speciality opinion at the Mood Disorder Clinic at UBC which will probably take place in Oct. Regardless of the outcome there he remains unfit for sea duty, isolated postings, and overseas duty. It is unlikely that this is going to change in the near future and therefore I must recommend a G4 O3 permanent category. With the restrictions that he is unfit for isolated duty, UN duty, or sea duty, requires regular medication and regular follow-up by a doctor at least monthly for the immediate future. I have discussed this case with LCol Davidson and he is in agreement with these recommendations and wishes them to be actioned as soon as possible. I have also discussed the issue of a permanent category with CPO1 Jones and he is reluctantly in agreement with this.

[48] On or before December 1996, Mr. Jones was assessed by Dr. Angus, who determined that his depression had resulted in more substantial permanent medical limitations and then completed a form CF2033 (Medical Examination Record), recommending a lowering of Mr. Jones' medical limitation categories. More specifically, he recommended that his Geographical Limitation (G) category be lowered from G2 to G4, and that his Occupational Limitation (O) be lowered from O2 to O4.

[49] In his affidavit, Dr. Angus affirms that he explained to Mr. Jones that one consequence of lowering his military occupation and medical categories was that the CRB(M), which was the procedure in existence before the AR/MEL, would convene to review his employability and that he could be released as a result of the review.

[50] In accordance with Canadian Forces Administrative Order 34-26, Dr. Angus was obligated to complete a Form CF 2088; he did complete Parts I and II of the form the same day.

[51] In light of the foregoing, I cannot accept Mr. Jones' submission that the mention "unfit sea, unfit field, unfit isolated or UN postings" is a mistake. It appears the medical category is assigned only after the assessment has been made, and not the other way around. As a result, the mention cannot be explained away as deriving from a typo in the category. Moreover, the medical category appears to be only a simple way to determine a member's medical fitness and to indicate if someone's restrictions have moved up or down; it is not even mentioned in the DMCARM's decision. In any event, the G4 category is perfectly consistent with the mention. Contrary to what Dr. Ripley states, Mr. Jones was not assigned a G4b but a G4, which may capture any of the paragraphs in that category. One of those categories is G4a, which reads as follows:

> **G4** – assigned to the member:
> **a**. who, because of medical limitations inherent to the medical condition itself or because of the unacceptable risk to the health and/or safety of this person or to fellow workers imposed by the operational environment on the medical condition, is considered unfit for **two or more** specific military environments (i.e., sea, field, operational taskings or isolated postings);
> (R.R., p. 567)

[52] This is precisely the situation Mr. Jones found himself, and I therefore fail to see how it can be established that the G4 category was a mistake. The description found in Dr. Angus assessment was indeed consistent with previous assessments, and correlates perfectly with the G4 category. Dr. Ripley's speculation is therefore just that, and since he did not file an affidavit and could therefore not be cross examined, I give very little weight to his letter.

[53] I also reject the applicant's submission that he was not "unfit sea" as a consequence of his medication. It may well be, as Dr. Ripley indicated in his letter, that the discontinuation of his medication for a few days would not create an unacceptable risk to the health and/or safety of Mr. Jones himself or his co-workers. It is equally possible (though there is no evidence on this) that there were a few ships with doctors on board. But these are only answers to the G4b category, not to the fact that he was considered "unfit for two or more specific military environments".

[54] Mr. Jones also raised what he considers to be deficiencies in form CF 2088. For example, he points to the fact that there are no comments in Part III from the approving medical officer, in his case Dr. Ross, whose signature is not even dated. He also drew the Court's attention to Part VA, which he did not sign; the signature of a member would attest that he had been advised of any limitations affecting his employment and the ensuing medical category. He did sign Part VB, attesting that he has been briefed on the career consequences that could result from a CRB(M) decision, but he argues that it was not sufficient to worry him, as he had already spent most of his career on sea duty and was very unlikely to be sent again on a ship. Even if he was unfit for sea missions, which he denies, he therefore submits that this limitation could not affect him any time

soon. Mr. Jones added that there was no evidence as to whether either Dr. Angus or Dr. Ross knew anything about the marine engineering trade or his job at the Canadian Forces Fleet School, or for that matter as to any of the jobs that were open to him in the military, and could therefore not pronounce on his employment limitations.

[55] Mr. Jones further submits that Commanding Officer Blatchford had no reason to initiate his medical release. In Part VI of form CF 2088, designed for the Commanding Officer's recommendations, Cdr Blatchford wrote: "In my view, CPO1 Jones is a highly dedicated, honest and forthright serviceman. Unfortunately, his ability to exercise leadership commensurate with his rank has been seriously eroded by factors largely beyond his control. Notwithstanding, the G4 O3 category assigned, I recommend Medical Release". Yet, contends Mr. Jones, the same Cdr Blatchford had no concern with his limitation when he signed his performance review dated July 4, 1996. Quite to the contrary, he wrote in the narrative part of that form (A.R., p. 170):

> "CPO1 Jones is an effective divisional chief. His concern for his direct subordinates and other members of the MOC is noteworthy, as is his ability to take concerns to a successful conclusion. He is held in high regard by members of his own MOC and, as MOC Advisor, has successfully liaised on numerous occasions with other MOC Advisors and Managers. He is a proven leader, whose knowledge of his occupation and personnel gained him the respect of his peers".

[56] Finally, Mr. Jones alleges that Dr. Angus and Dr. Ross were pressured into making their reports. In support of his allegations, he relies on a letter sent by Dr. Angus on October 25, 1999 to a colleague who had sent Mr. Jones to him for consultation (A.R., p. 187), where he remembered saying to Mr. Jones at the time (on October 29, 1996) "that the speed with which his release medical (…) was being processed was MOST unusual". He also wrote in that letter: "To this day, it appears

to me that someone in a position of considerable power was exerting pressure to have him released quickly. As an example of this, attached is the release flow sheet from the Medical Boards section of the Base Hospital. The terms "ASAP" and "red flagged" were highly unusual". In his affidavit, Mr. Jones also recollects Dr. Ross and Dr. Passey telling him they had been given orders from the Admiral's Staff Command Surgeon; he even surmised that Dr. Ross altered Dr. Angus' medical examination record (form CF 2033) when she countersigned it as the approving medical officer two months later.

[57] I will now address each of these points made by the applicant, starting with these last allegations that some people did not act in good faith or, worse even, committed illegalities. These are obviously very serious allegations, and they should not be taken lightly. This is precisely why courts have been loathed to give credence to such allegations when they are based on hearsay evidence. In the present case, Mr. Jones relies almost entirely on his own recollections and perceptions, as recorded in his affidavit. It is true that Dr. Angus letter of October 25, 1999, is troubling. But nowhere does he say he was pressured; he may have been of the opinion that the process was unusual, but this is immaterial. Furthermore, he states quite explicitly in his affidavit filed in support of the respondent's position:

> 10. My findings and recommendations as set out in the CF 2033 and CF 2088 were the sole result of my professional opinion and at no time was I pressured to alter my findings or recommendations by anyone in the CF or anyone at all.
> (R.R., pp. 384-35)

[58] Mr. Jones chose not to cross examine Dr. Angus on his affidavit, nor, for that matter, any of the affiants submitted by the respondent. Moreover, neither Dr. Passey nor Dr. Ross filed an

affidavit, therefore depriving the respondent of the possibility to cross examine them. The Court is therefore left with mere allegations unsupported by any admissible evidence. This is clearly not sufficient to impugn the trustworthiness of the above named individuals. It may be that Mr. Jones' case was processed more expeditiously than usual, or even that his medical examination and the ensuing lowering of his medical categories leading eventually to his release could have been prompted by what senior officers considered to be his offensive or inappropriate behaviour. But there is no evidence of that on the record, and even if there were, it would not be sufficient, in and of itself, to vitiate the medical findings that led to the release decision.

[59] Looking at the entire medical file of the applicant, as appended to the affidavit of Major John J. Reilly (R.R., pp. 390 ff.), it is abundantly clear that Mr. Jones was suffering from medical issues related to his depression. Mr. Jones' psychiatrist, Dr. Passey, is the one who set the process in motion when he opined that Mr. Jones was unfit for sea duty, isolated postings and overseas duty and recommended as a result that Mr. Jones be given a G4 O3 permanent category. This diagnosis was entirely consistent with his previous medical history, as documented in the exhibits of Major Reilly's affidavit. I note in passing that Dr. Passey was not only of the view that Mr. Jones' limitations were unlikely to change in the near future, but that he required "regular medication and regular follow-up by a doctor at least monthly for the immediate future". This last finding, according to the Medical Category System (R.R., p. 565), would in itself have justified the G4 category.

[60] That Mr. Jones would disagree with his medical assessment is perfectly understandable. He stressed on many occasions during his oral submissions that he was diagnosed with a major depression “in partial remission”, that he reacted to his medication, that his performance reviews were good and that he could handle all of his work and travel for meetings. But this is not inconsistent with the finding that he was unfit for sea, field and isolated or UN postings. At the end of the day, the medical authorities came to the conclusion that his medical limitations had to be lowered; this is a judgment call better left to medical experts, absent any glaring impropriety or discrepancies in his medical record.

[61] As to the deficiencies allegedly marring from the CF 2088 form, they are of little significance. For instance, the absence of remarks from the approving medical officer is not a flaw; if Dr. Ross had nothing to add to Dr. Angus’ assessment; she was only required to sign, as she did. As for the fact that Mr. Jones did not sign Part VA, it is also of little import. He did sign Part VB, whereby he recognized that he was briefed on the career consequences that could result from a CRB(M) decision. Implicit in that recognition is that he was aware of having been assigned different medical limitations, otherwise there would be no need for a CRB(M) decision. Moreover, Dr. Angus swore in his affidavit that he did discuss the CRB(M) process with Mr. Jones and the possible consequences of that process, including the possibility of his release. I am therefore of the view that the absence of Mr. Jones signature in Part VA does not vitiate form CF 2088.

[62] Mr. Jones’ argument that his limitations could not impact him as he was not likely to be sent to sea must similarly be rejected. The low likelihood of being deployed cannot trump the

Universality of Service principle. This principle is firmly embedded in section 33 of the *National Defence Act*, which reads as follows:

Liability in case of regular force	Obligation de la force régulière
33. (1) The regular force, all units and other elements thereof and all officers and non-commissioned members thereof are at all times liable to perform any lawful duty.	**33.** (1) La force régulière, ses unités et autres éléments, ainsi que tous ses officiers et militaires du rang, sont en permanence soumis à l'obligation de service légitime.

[63] This principle is spelled out in more detail in a policy found at page 521 of the Respondent Record. It provides that any CF member must at all times and under all circumstances be able to perform any General Military Duties of functions in any military situation, including combat or other duties beyond the scope of their trade or military occupation. This includes, but is not limited to, the requirement to be physically fit, employable and deployable. As previously mentioned, the fundamental importance of this principle to the functioning and effectiveness of the CF is recognized in subsection 15(9) of the *Canadian Human Rights Act*, which provides that the duty to accommodate under section 15(2) of that Act is subject to the Universality of Service principle:

Exceptions	Exceptions
15. (1) It is not a discriminatory practice if	**15.** (1) Ne constituent pas des actes discriminatoires :
(*a*) any refusal, exclusion, expulsion, suspension,	*a*) les refus, exclusions, expulsions, suspensions,

limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

(*b*) employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph;

(*c*) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

(*d*) the terms and conditions of any pension fund or plan established by an employer, employee organization or employer organization provide for the compulsory vesting or locking-in of pension contributions at a fixed or determinable age in accordance with sections 17 and 18 of the *Pension Benefits Standards Act, 1985*;

restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

b) le fait de refuser ou de cesser d'employer un individu qui n'a pas atteint l'âge minimal ou qui a atteint l'âge maximal prévu, dans l'un ou l'autre cas, pour l'emploi en question par la loi ou les règlements que peut prendre le gouverneur en conseil pour l'application du présent alinéa;

c) le fait de mettre fin à l'emploi d'une personne en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi;

d) le fait que les conditions et modalités d'une caisse ou d'un régime de retraite constitués par l'employeur, l'organisation patronale ou l'organisation syndicale prévoient la dévolution ou le blocage obligatoires des cotisations à des âges déterminés ou déterminables conformément aux articles 17 et 18 de la *Loi de 1985 sur les normes de prestation de pension*;

e) le fait qu'un individu soit l'objet d'une distinction fondée sur un

(*e*) an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable;

(*f*) an employer, employee organization or employer organization grants a female employee special leave or benefits in connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children; or

(*g*) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is *bona fide* justification for that denial or differentiation.

Accommodation of needs

(2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational

motif illicite, si celle-ci est reconnue comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne rendue en vertu du paragraphe 27(2);

f) le fait pour un employeur, une organisation patronale ou une organisation syndicale d'accorder à une employée un congé ou des avantages spéciaux liés à sa grossesse ou à son accouchement, ou d'accorder à ses employés un congé ou des avantages spéciaux leur permettant de prendre soin de leurs enfants;

g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.

Besoins des individus

(2) Les faits prévus à l'alinéa (1)*a*) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)*g*), s'il est démontré que les mesures destinées à répondre aux besoins d'une

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

Universality of service for Canadian Forces

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

personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

Universalité du service au sein des Forces canadiennes

(9) Le paragraphe (2) s'applique sous réserve de l'obligation de service imposée aux membres des Forces canadiennes, c'est-à-dire celle d'accomplir en permanence et en toutes circonstances les fonctions auxquelles ils peuvent être tenus.

[64] As a result, it did not matter whether Mr. Jones was likely or not to be deployed, and if so, where he would be posted. In the same vein, I would also dismiss Mr. Jones' argument that his deployability need only be assessed once the decision to post him in a particular assignment has been made. This would run contrary to the logic behind the Universality of Service principle.

[65] For the same reason, I reject Mr. Jones' submission that neither Dr. Angus nor Dr. Ross were familiar with the requirements of his trade or of any of the other jobs where he could have been deployed. Their task was not to correlate Mr. Jones' medical condition with the requirements

of any particular or general task statement (or job requirement), but to determine whether their diagnosis of Mr. Jones translated into any limitations on employment, in light of the medical standards found in the medical category system (CFP 154, ch. 3; Annex "Q" to Major Hurley's affidavit, at p. 565 of the R.R.). A careful reading of that policy, and in particular of the Geographical Factor, reveals that the assessment to be made by the medical personnel is focussed on the medical condition of the member and on the resulting restrictions in terms of climate, accommodation/living conditions and medical care available. It does not require any specific knowledge of the requirements associated with any particular trade.

[66] As for Mr. Jones' argument that there were no reasons to initiate the CRB(M) process since his performance reviews were impeccable, it also ought to be dismissed. First, I note the performance review relied on by Mr. Jones covers the period from June 1995 to March 1996. In the following performance review covering the period from April 1996 to March 1997, Cdr Blatchford does reiterate what he wrote in CF 2088, which he had completed two months before, that Mr. Jones' "ability to exercise leadership commensurate with his rank has been seriously eroded by factors largely beyond his control". In any event, the fact that Mr. Jones may have performed well and met all the requirements of his job is no indication that he could be posted somewhere else and that he would encounter no problems despite his medical employment limitations.

[67] The applicant also made a number of other submissions with respect to the process that was followed in the first administrative review. For example, he argued that the CRB(M) could not be set before the Commandant had signed the CF 2088 and recommended medical release. Similarly,

Mr. Jones' queries why no explanation was given by the CRB(M) as to why they overruled the recommendation of Mr. Jones' Career Manager to retain him with restrictions instead of discharging him. These issues, however, are not material in assessing the decision of the AR/MEL that is now being reviewed as a result of the previous order of this Court quashing the CRB(M) decision.

[68] Mr. Jones also had some qualms with the process followed in the AR/MEL process that is the subject of the present judicial review. He submitted that a commanding officer should have been identified for him, and that he should have had the benefit of an assisting officer. I agree with the respondent that there was no need for a commanding officer, as Mr. Jones was no longer a CF serving member; as a result, all correspondence was sent to him directly and there was no chain of command to be kept informed of his case. As for an assisting officer, I am also in agreement with the respondent that assisting officers are only assigned to assist members in proceedings under the military justice system. Since an AR/MEL is an administrative process, there was no requirement to appoint an assisting officer. Mr. Jones could have been represented by counsel, as he was in earlier stages of these proceedings, but he chose to represent himself before the AR/MEL and before this Court, and he did so quite effectively.

[69] Mr. Jones also intimated that the support clerk that was named as a contact concerning the process of disclosure of information was ordered not to cooperate with him. This is vigorously denied by the respondent. In her affidavit, Major Hurley indicated that the clerk, who is not one of the staff officer analysts for the AR/MEL process and who is therefore not familiar with the specifics of the applicant's case, consulted with her after having received calls from the applicant

wanting to discuss his case. Major Hurley testified in her affidavit that she instructed the clerk to inform the applicant that he should stop calling the clerk to get information and instead contact her directly, as she was familiar with the case and could provide him with the assistance he needed. This offer was taken up by the applicant, and the record bears out the version of Major Hurley and the help that was provided to the applicant throughout.

[70] Having found that the medical assessment underlying the administrative review process was not flawed, there remains to be determined whether the decision to release the applicant was itself reasonable. Again, Mr. Jones raised a number of arguments to challenge that decision.

[71] Mr. Jones contends that a Personnel Selection Report Form (CF 285) should have been filled along with the CF 2088. Such a form was required to be included in any CRB(M) where the career recommendation was release, occupation transfer or posting, and was essentially designed to canvass other possibilities than discharge. But this requirement was removed in February 1997, before the Commanding Officer's recommendation was made in May 1997. There was therefore no specific and automatic requirement for such a form, even if nothing prevented the AR/MEL to look at other options.

[72] Mr. Jones also argued that there was an accommodation policy in place at the time he was released, and that the AR/MEL erred in not even considering it. However, he was unable to provide any evidence of that policy, which may have been purely informal. The official Accommodation

Policy only came into effect on April 1, 2000, and did not apply to members who were released prior to June 30, 1999 (Exhibit "O" of Major Hurley's affidavit, R.R. p. 561).

[73] It is true that, according to the Queen's Regulation in Order 15 (A.R., p. 349), a member who has been considered in breach of the Universality of Service principle may be retained in some circumstances. Section 15.05 states:

> An officer or non-commissioned member of the Regular Force who is suffering from a disease or injury that necessitates his release as medically unfit may, at the discretion of the Chief of the Defence Staff or the officer commanding the command, be retained for prolonged treatment, institutional care or medical observation for a further period of not more that six months, at the end of which time he shall be released unless otherwise directed by the Minister.

[74] It is not entirely clear from the record whether that section was in force at the time of Mr. Jones' release. Whether or not it was implemented, two things must be borne in mind. First, the decision was left entirely at the discretion of the CDS. Secondly, Mr. Jones would only have been retained at most for a period of six months. This is not much relief for him.

[75] Mr. Jones also argued that he should have been retained considering the shortage of staff in the CF at the time of his release. The Guidelines for Retention of Members with Medical Restrictions (A.R., p. 370) do indeed recognize as paramount the Universality of Service principle and set forth that members with MELs that prevent them from performing the specific duties of their occupation and their general military duties where and when required may be recommended for retention in four specific circumstances. The respondent is correct to point out that Mr. Jones'

circumstances did not fall within any of the four prescribed circumstances set forth in the Guidelines, which explains why no recommendation for retention was made.

[76] The applicant further argued that he should have been given a temporary category before being assigned a permanent one, so that more information could have been compiled on his situation before a final decision was made. But there is no entitlement to be provided with a temporary medical category, particularly when long standing limitations have been determined to be permanent by medical professionals. Mr. Jones was diagnosed with major depression in 1994, and the decision to release him was taken three years later, so there was ample time to document his case. In any event, whether a temporary medical category was assigned in no way negates the reasonableness of the DMCARM decision.

[77] In the end, after having given due consideration to all of Mr. Jones' submissions and carefully reviewed the record that was before the AR/MEL, I am unable to conclude that the decision to release Mr. Jones ought to be quashed. In view of the medical employment limitations assigned to Mr. Jones, the conclusion that he was in breach of the Universality of Service principle and the decision to release him cannot be characterized as being unreasonable; whether the Court agrees with it or not, it definitively "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, op. cit. supra, par. 47).

[78] I understand that this is not the decision the applicant was hoping for. Mr. Jones dedicated all of his life to the CF, and he obviously remains very loyal to that organization despite his

perception of having been ill-treated and unjustly discharged. This is most certainly a very sad story, which has taken its toll on Mr. Jones' health, family, life and well being. Unfortunately, the remedy does not lie with the judicial process. The evidence that has been presented to me does not substantiate Mr. Jones' claim, and as a result, I find myself unable to conclude that the decision to release him was unreasonable in the circumstances. Accordingly, this application for judicial review is dismissed.

SCHEDULE "A"

AA	Approving Authority
AR	Administrative Review
AR/MEL	Administrative Review/Medical Employment Limitations
BFOR	*bona fide* Occupational Requirement
CDS	Chief of the Defence Staff
CF	Canadian Forces
CF 2088	Canadian Forces Notification of Change of Medical Category or Employment Limitation
DMCARM	Director Military Careers Administration and Resource Management
CPO1	Chief Petty Officer First Class
DAOD	Defence Administrative Order and Directive
CRB(M)	Career Review Board (Medical)

ORDER

THIS COURT ORDERS that this application for judicial review be dismissed, with costs to the respondent.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-717-08
STYLE OF CAUSE:	**WILLIAM DAVID GERARD JONES v. THE ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	October 2, 2008
REASONS FOR ORDER AND ORDER:	de Montigny, J.
DATED:	January 19, 2009

APPEARANCES:

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Mr. Ward Bansley	FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA

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