

Date: 19980929

Docket: T-1758-97

BETWEEN:

RUTH ELLEN CUMMINGS

Applicant

and

ATTORNEY GENERAL FOR CANADA

Respondent

REASONS FOR ORDER

**Delivered from the Bench at Fredericton, N.B.,
Tuesday, September 29, 1998**

HUGESSEN J.

[1] This is an application for judicial review of a decision of the Veteran's Review and Appeal Board which denied the applicant's appeal from the refusal of her claim to receive a pension pursuant to the *Pensions Act*¹.

[2] The applicant, at the material time, was a member of the Canadian Armed Forces. She was living in Victoria, B.C. but was sent by the military on temporary assignment to live in CPB Halifax while she participated in the International Military Tattoo there. While living in CFB Halifax, the applicant shared living quarters with another female member of the Forces. One night, while they were both asleep, their room was invaded by a male

member of the Forces who attacked both of them with the result that both have now suffered a disability. The applicable statutory provisions are sections 21(2)(a) and 21(3)(f) of the *Pensions Act* and section 3 of the *Veterans Appeal and Review Board Act*:

21. ...

(2) In respect - of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,

(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;

...

(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of

...

(f) any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation

21. ...

(2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix:

a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie - ou son aggravation - consécutive ou rattachée directement au service militaire;

...

(3) Pour l'application du paragraphe (2), une blessure ou maladie - ou son aggravation - est réputée, sauf preuve contraire, être consécutive ou rattachée directement au service militaire visé par ce paragraphe si elle est survenue au cours :

...

f) d'une opération, d'un entraînement ou d'une activité administrative militaires, soit par suite d'un ordre précis, soit par suite d'usages ou pratiques militaires établis, que l'omission

thereof would have resulted in disciplinary action against the member;

d'accomplir l'acte qui a entraîné la maladie ou la blessure ou son aggravation eût entraîné ou non des mesures disciplinaires contre le membre des forces;

...

...

3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

[3] The Board, as I have said, denied the applicant's appeal from the refusal of her application for a pension. It made the following finding of fact, which is in accordance with the review of facts that I have just given:

"at the time of the attack, Miss Cummings was a member of the Canadian Navy taking part in a Nova Scotia International Tattoo. This was a mandatory assignment, and at that time, she had to stay in military approved quarters on the base."

[4] Notwithstanding that finding, the Board reached the following conclusion:

Unfortunately, the sexual assault of the applicant, while she was asleep in military barracks, provided by the military authorities could not reasonably constitute an activity conducted in the course of military training for purposes of paragraph 21(3)(f) of the *Pension Act*.

[5] In my view, the Board has erred in law in its construction of the Statute and it has in particular erred in law in the application of section 3 of the *Veteran's Appeal and Review*

Board Act to section 21 of the *Pensions Act*. The error of the Board is also in its concentration upon the "activity" of the appellant at the time of the attack upon her. It is not the activity that is important but rather whether the injury which she suffered arose in the course of or was directly connected to her military service.

[6] In this case, as the Board itself found, she was required, as a part of her military duty, to sleep in the quarters at CFB Halifax. The situation is, I think, precisely similar to what would have happened if she had been on sea duty where she would have been assigned sleeping quarters in a ship and the attack which took place upon her had taken place while she was sleeping in accordance with the orders she had received.

[7] If she had not been where she was, when she was, she would have been in breach of her orders and very possibly subject to discipline. Equally, of course, if she had not been where she was, when she was, she would not have been the victim of this vicious attack.

[8] In my view, it is this circumstance, the duty imposed upon the applicant by her military superiors, to sleep in the quarters at CFB Halifax, which distinguishes this case from the cases which have been cited. In particular, the *Merineau*² case, and the *O'Connor*³ case, which followed it, had to do with members of the Forces receiving medical treatment to which they were entitled, but to which they were by no means obliged to submit, at the hands of military doctors. Medical treatment which subsequently turned out to be negligently administered. That is an entirely different situation from this one. Likewise, the cases of *Leach*⁴ and *Scaglione*⁵, which have been mentioned, dealt with activities which were clearly entirely voluntary on the part of the serving members concerned. Here, we are

² *Merineau v. The Queen*, [1983] 2 S.C.R. 362, [1982] 2 F.C. 376 (F.C.A.), [1981] 1 F.C. 420 (T.D.).

³ *O'Connor v. Canada* (1995), 94 F.T.R. 93 (T.D.)

⁴ *Leach v. Canada et al.* (1995) 106 F.T.R. 300 (T.D.)

⁵ *Scaglione et al. v. McLean et al.* (1998), 38 O.R. (3d) 464 (Gen. Div.).

dealing with an activity, if one must concentrate as the Board did on the activity, which is a normal human activity required by all of us, namely sleeping, which was required of the applicant to be carried out in a particular place. It is that circumstance which gave rise to the injury which was directly connected to her military service.

[9] In consequence, the application will be allowed, the decision of the Board will be set aside and the matter will be referred back to the Board for redetermination.

“James K. Hugessen”

Judge

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

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