Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 22
Date: July 18, 2018
File No.: T1984/6413

Between:

Bradley Scott Maxim

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Pacific Railway

Respondent

Decision

Member: Ronald Sydney Williams

Table of Contents

I. Background

[1] This is a decision regarding a complaint by Bradley Maxim ("the Complainant") against his employer, Canadian Pacific Railway ("CPR" or "the Respondent"), alleging he suffered discrimination by being subjected to adverse differential treatment on the basis of disability and perceived disability.

[2] The claim is based on section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 ("*CHRA*"):

> 7. It is a discriminatory practice, directly or indirectly,
> (a) to refuse to employ or continue to employ any individual, or
> (b) in the course of employment, to differentiate adversely in relation to an employee,
> on a prohibited ground of discrimination.

[3] Pursuant to section 3(1) of the *CHRA*, a prohibited ground includes "disability".

[4] The Complainant alleged in his Statement of Particulars that he suffers from a significant impediment caused by Reye's syndrome and encephalitis resulting in anxiety, depression and social phobia. He further claimed that the Respondent misdiagnosed these issues for being perceived as having a substance abuse problem such as dependency upon alcohol and/or drugs. The Complainant denies having a substance abuse problem.

[5] In his Statement of Particulars the Complainant alleged that the discrimination by the Respondent was on the basis that it:

> 1. failed and/or refused to accommodate his disabilities in the workplace by denying disability accommodation while working on a work crew in May 2008 and continuing to this day;
>
> 2. subjected him to adverse and differential treatment on the basis of a perceived disabilities – namely, a substance abuse problem – including imposing onerous, restrictive and invasive conditions of employment; and
>
> 3. Failed to accommodate Mr. Maxim through modified duties or accommodated return-to-work when he was cleared to return to work by his doctors.

[6] The Respondent alleged in their Statement of Particulars that it had accommodated the Complainant's co-morbid mental health issues and polysubstance dependence issues to the point of undue hardship over the past nine years. Further, the Respondent concedes in its Statement of Particulars that the Complainant suffers from a disability and as a result, was restricted to non-safety sensitive positions.

[7] A 5 day hearing took place in Toronto, Ontario where the parties had the opportunity to present their cases and bring forth their evidence and witnesses. The Complainant was self-represented and the Respondent was represented by counsel. The Commission did not participate.

II. Decision

[8] For the reasons set out below, I have determined that the Complaint should be dismissed.

A. Scope of Referral

Harassment

[9] Although the Complainant was not represented by counsel at the hearing, he had previously retained counsel who had prepared a detailed Statement of Particulars which was filed with the Tribunal. In addition to the allegations pursuant to section 7 of the *CHRA*, the Complainant's Statement of Particulars also alleged that the Respondent failed to provide the Complainant with a harassment-free work environment.

[10] Harassment was not raised as an issue at the hearing. Further, no evidence was presented at the hearing which would give rise to a claim for harassment. As such, this allegation is deemed abandoned by the Complainant and is not considered in this decision.

B. Factual Overview

Alleged disabilities

[11] The Complainant testified that while a young teenager, he was afflicted by Reye's Syndrome that left him in a coma for over two weeks, and upon waking he needed to re-learn the basic functions of walking, speaking and such other associated functions which, according to the Complainant, has left him with some long term affects, including a speech impairment

[12] The Complainant alleged that since being afflicted by Reye's Syndrome he has suffered from anxiety, depression, social phobia and panic attacks.

[13] The Complainant testified that he began some experimentation with marijuana and alcohol in the eighth grade of school, which escalated to significant use of alcohol, marijuana and cocaine from his teenage years to his twenties and thirties.

[14] The Complainant denies having a substance abuse problem. The Respondent argues that the Complainant suffers from poly-substance disorder and is in denial.

CPR & Safety positions in the workplace

[15] Section 20 of the *Railway Safety Act*, R.S.C., 1985 c. 32 (4th Supp.) defines a "safety critical position" as any railway position directly engaged in the operation of trains in main track or yard service and any railway position engaged in rail traffic control".

[16] In addition to designating safety critical positions as noted in the *Railway Safety Act*, the Respondent states that individual railroads identify positions which, while not directly engaged in the operation of trains or rail traffic control, are "safety sensitive positions".

Employment with CPR

[17] Unless otherwise noted, the following facts regarding the Complainant's employment with CPR are undisputed.

[18] The Complainant was employed by the Respondent on April 2005 as a labourer.

[19] The Complainant worked on Regional Work Crews requiring him to travel away from home. CPR provided lodging for its work crews, requiring two to a room. As a result of his anxiety, depression and phobias, the Complainant alleges he had difficulty sharing a room. During his first and second years he would request a single room, or commute to work.

[20] Mr. Maxim was permitted to have single room during his third season of employment while on the work crew which was far from his residence he asked for a single room as he testified that he had difficulty relaxing in a room with others.

[21] Late in his third season, he was promoted to a Group 1 Machine Operator, which is a safety sensitive position.

[22] During his fourth season Mr. Maxim was provided a temporary single room based on a letter from his family doctor, but was advised that without further medical evidence to obtain disability accommodation, his request may be denied.

[23] During his fourth season, Mr. Maxim was provided a temporary single room based on a letter from his family doctor. The Respondent advised the Complainant that further medical evidence was required in order to confirm the medical need for accommodation in the form of a single room.

[24] Mr. Maxim alleges in his Statement of Particulars that he was ultimately denied permanent disability accommodation on the basis that the Respondent required additional medical information to substantiate his request.

[25] In response to the Respondent's request for additional medical information regarding the Complainants need for a single room due to depression and anxiety, the Complainant provided an assessment by the Department of Mental Health Services at the Rouge Valley Health System. The assessment concluded that the Complainant was suffering from anxiety and a depressive disorder. It also indicated that he was a binge drinker and had abused marijuana and alcohol.

[26] There was no evidence during the entire Hearing, that while on the work site, Mr. Maxim was under the influence of any alcohol or drug use.

[27] As a result of the assessment from the Rouge Valley Health System, the Respondent had concerns of substance abuse and whether the Complainant was fit for work in a Safety Sensitive Position. As such, they requested that the Complainant attend an Independent Medical Examination ("IME") by an addiction medical specialist. The Complainant consented and saw Dr. Bobrowski, who concluded in his report dated July 17, 2008, that Mr. Maxim was alcohol dependent, cannabis dependent and cocaine dependent.

[28] Mr. Maxim was placed on short term disability and was required by the Respondent to undergo various treatment programs for substance abuse. In 2009 he was permitted to return to work, in his Safety Sensitive Position, on the condition that he sign a 2 year Relapse Prevention Agreement requiring him to completely abstain from any alcohol or drug use. These conditions were pursuant to the Respondent's official policy on Employee Addictions, which also required the Complainant to agree to random drug and alcohol testing and reporting obligations for a 2 year period. Lastly, counseling was to be provided by the CP Rail Employee and Family Assistance Program ("EFAP").

[29] Not long after returning to work, the Complainant injured his shoulder, requiring him to be off work once again. He was only able to return to work in May 2010. Shortly thereafter, he re-injured his shoulder, and was off work again. CPR allowed him to return to work in July 2013, notwithstanding the Complainant's desire to return in the summer of 2011.

[30] During his period of convalescence, the Complainant advised CPR that he had had a drink, which was a breach of his Relapse Prevention Agreement. As a result, the Complainant agreed to a further Independent Medical Examination which was completed by Dr. Gillmore. Dr. Gillmore noted in his report dated September 15, 2011 that Mr. Maxim was alcohol and drug dependent, but believed his addictions were stable and in remission.

[31] As a result of Dr. Gillmore's report and standard procedures for rehabilitation of employees, the Respondent required the Complainant to agree to a further Prevention Agreement and complete abstinence from alcohol or drug use, with its attendant monitoring and group therapy sessions.

[32] The procedures required of the Complainant are steps followed by the Respondent's Occupational Health Services Department which is set out in their *Safety Sensitive Medical Guidelines for Substance Abuse Disorders*.

Witnesses & documentary evidence

[33] This Tribunal and its formulating statute, the *CHRA*, and its Rules of Procedure, demand that this Tribunal act with wide discretion and reasonableness where required. The Rules of Procedure deliberately enable the Tribunal to be flexible in its hearing of evidence and deliberations.

[34] Mr. Maxim presented two witnesses to substantiate his claim: his estranged wife and a friend, Mr. Mazor. His wife stated that Mr. Maxim enjoyed having the occasional drink, during holidays and limited to three drinks at a time. Mr. Mazor testified as to Mr. Maxim's good character. Mr. Maxim did not call any expert witnesses or physicians as witnesses at the hearing.

[35] Mr. Maxim brought documentary evidence to the hearing, including for example, letters from Dr. Yatsynovich and Dr. Gallay. However, the Complainant did not bring the individuals who prepared the documents to testify at the hearing. In the absence of witnesses, depending on the type of document, it could be prejudicial to the Respondents who could not cross-examine the authors of the documents. As such, despite the flexibility afforded to self-represented complainants at Tribunal hearings, in many circumstances, little weight could be given to these documents.

[36] The Respondent called the following witnesses:

- Sylvia Afonso: Return to work specialist for CPR
- Jacqueline Bartkiekwicz: Manager, Occupational Health Programs
- Dan Berek: Supervisor, Machine Operations
- Dr. Jake Bobrowski
- Dr. John Cutbill: Formerly Chief Medical Officer at CPR
- Dr. Trevor Gillmore
- Justine Evans, CPR employee

- Kathryn Seredynski: Occupational Health Nurse for CPR
- Dr. Lambros: Corporate physician with CPR
- Lisa Trueman: Director of Health Services at CPR

III. Issues

[37] Has the Complainant established a *prima facie* case of a discriminatory practice?

[38] If the answer to the above is in the affirmative, has a *bona fide* occupational requirement ("BFOR") been established?

IV. Law

A. Has the Complainant established a *prima facie* case of a discriminatory practice?

[39] A Complainant has the burden of proof to establish a *prima facie* case. A *prima facie* case is "…one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent…" (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, at para. 28).

[40] To demonstrate *prima facie* discrimination in the context of the *CHRA*, the Complainant must prove, on a balance of probabilities, that:

1. he has a characteristic or characteristics protected from discrimination under the *CHRA*;
2. he experienced an adverse impact with respect to a situation covered by section 7 of the *CHRA*; and
3. the protected characteristic or characteristics were a factor in the adverse impact.
4. (see *Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 33; see also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, at paras. 55-69).

V. Analysis

A. Characteristic protected under the *CHRA*

[41] The first element to determine is whether Mr. Maxim has a characteristic which is protected under the *CHRA*.

[42] Mr. Maxim denies any dependency or abuse of alcohol or drugs and testified that no alcohol or drugs were ever consumed or used at the work place. Mr. Maxim does however allege that he suffers from anxiety and depression.

[43] Generally speaking, the Complainant argued that he was subjected to adverse and differential treatment on the basis that the Respondent misdiagnosed his disability. It was the Complainant's position that his disabilities were as a result of his childhood affliction from Reye's Syndrome. The Tribunal accepts that his manifested disabilities of speech and depression may well have their source as a result thereof, however, other than the testimony of Mr. Maxim, no other evidence was provided.

[44] In the spirit of fairness and flexibility, the Tribunal heard the untested scientific evidence presented by the Complainant, as well as his testimony regarding his lack of addiction. The Complainant further argued that the Respondent's requirement to undertake addiction remedial and supervisory procedures was not required, but rather the Respondent ought to accommodate his disabilities, namely depression and anxiety, as he saw them.

[45] The Respondent on the other hand concedes that the Complainant suffers from poly-substance dependence disorder. The Respondent has also conceded that there was *prima facie* discrimination. Nonetheless, the Tribunal must complete an independent analysis to ensure that all elements of *prima facie* discrimination have been met.

[46] At the hearing Mr. Maxim testified that he had one puff of a joint (marijuana) per week during the years 2005, 2006 and 2007. Mr. Maxim admitted that he liked the way alcohol made him feel and stated that he used alcohol, to relieve pain, when he was without pain pills. He further explained that he did not properly fill out his pre-employment

medical examination report by not accurately describing his history of alcohol or drug use, his past physical injuries or mental health issues. Mr. Maxim testified that his alcohol use was always away from work and on his days off. There was no conflicting evidence from the Respondent.

[47] Dr. Bobrowski, an accepted expert in addiction Medicine completed an examination of the Complainant on July 10, 2008. Dr. Bobrowski then prepared an independent medical report dated July 17, 2008, which concluded that Mr. Maxim suffered from poly-substance dependence. His accepted report also stated that the Complainant suffered from an active substance abuse disorder.

[48] Dr. Gillmore conducted a second examination of the Complainant in 2011. Dr. Gillmore's report dated September 15, 2011 indicated that the Complainant acknowledged a problem with alcohol between the ages of 14 to 22. It stated that

> the man would drink a total of 22 to 24 beers per 24 hours. He [Maxim] defined an average intake of at least 10 beers per 24 hours and he agreed that this had been progressive, involving daily drinking.

Mr. Maxim advised that "He can go for weeks without drinking, but will usually binge at up to one week per month, and during these periods will consume up to 6 to 8 beers per day." The report also stated that he had never been charged with driving while intoxicated, or drunk on the job.

[49] It was also noted in the 2011 report that Mr. Maxim had been a heavy marijuana user until age 22 and "he has continued to 'indulge' but often only at the level of puffs with alcohol binges". Marijuana was used to manage anxiety prior to his initial IME. While the report indicates the use of non-prescriptive and prescriptive drugs for many years, he had never been treated for any addictive disease.

[50] The Tribunal was most impressed by Dr. Trevor Gillmore, an expert witness in the field of Addictions Medicine and Occupational Medicine who conducted an independent medical examination of the Complainant on August 31, 2011, and prepared a report dated September 15, 2011. The purpose of his examination was to determine whether the

Complainant was fit to occupy a Safety Sensitive Position with the Respondent (Exhibit R-2, Tab 72, Report dated September 15, 2011).

[51] Dr. Gillmore's report found him alcohol and Cannabis dependent and Cocaine dependent. He stated that his dependence on Alcohol and Cannabis is in early partial remission (Exhibit R-2, Doc 72, page 10.). At the time of the report the Complainant stated that he had not had alcohol since October 2010. Notwithstanding this current sobriety at the time of the examination, Dr. Gillmore believed that Mr. Maxim was not actively engaged in working his recovery and that he lacked insight into the insidious and chronic nature of the disease of addiction (ibid).

[52] Dr. Gillmore stated to the Tribunal that a substance abuse-disorder is never cured, and that it is life long and the best is a state of continued remission. The Tribunal accepted his testimony wherein he stated that he believed the Complainant minimized his addiction and that he did not believe that he suffered from an addiction disorder.

[53] The Tribunal heard the testimony of Drs. Gillmore and Bobrowski wherein they stated that an individual diagnosed with a substance use disorder is incapable of using alcohol or drugs for pleasure due to the physiological changes to their brains and are not in control of their substance abuse. They are always in risk of significant relapse. While the Complainant challenged Dr. Bobrowski's dysfunctional changes to the brain, it was without scientific support.

[54] The fact that there was no evidence presented by the Respondent that Mr. Maxim was a user of alcohol or cannabis on the work site fails to substantiate his claim that his disabilities did not include the disease of addiction. The Tribunal acting in its most liberal fashion, must act with reasonableness. The Tribunal cannot dismiss the testimony of Drs. Bobrowski, Gillmore and Cutbill and their respective reports confirming the disability of addiction.

[55] The testimony of both Drs. Bobrowski and Gillmore were persuasive that in addition to other maladies, Mr. Maxim was alcohol and drug dependent. The Tribunal accepts their findings, that Mr. Maxim was and remains afflicted with the disease of substance use disorder.

[56] As a result, the Tribunal is satisfied that on a balance of probabilities, the Complainant does suffer from a poly-substance abuse disorder, a protected characteristic under the *CHRA*.

(i) Adverse Impact

[57] As previously noted, once a protected characteristic has been identified, the Complainant must also prove, on a balance of probabilities, that he experienced an adverse impact which would fall under the *CHRA* and that the protected characteristic was a factor in the adverse impact.

(a) Prevention programs and refusal of safety sensitive position

[58] The Respondent submits at paragraph 69 of its Statement of Particulars that there is, in this case, *prima facie* discrimination against the Complainant:

> "That is, the Complainant was restricted, and continues to be restricted, from performing certain kinds of work on the railway due to disabilities. The disabilities in question are Polysubstance Dependence and co-morbid mental health issues."

The Respondent alleges that the restrictions imposed upon the Complainant are such that he is limited to working in non-safety sensitive positions.

[59] The Complainant testified that he was subjected to signing agreements to the effect that he would participate in a medical treatment program, refrain from consuming any alcohol, attend counselling and submit to random alcohol and drug testing. The Complainant also testified to being removed from his safety sensitive position and offered an alternate position.

[60] The Tribunal finds that the Respondent imposed certain restrictions upon the Complainant, resulting in an adverse impact.

(b) Protected characteristic a factor in the adverse impact

[61] Given the above, the Tribunal concludes that the Complainant's disability, poly-substance abuse disorder, is the reason behind the Respondent's restrictions imposed upon the Complainant. As such, there is a link between the disability and the adverse impact, establishing *prima facie* discrimination.

B. Has a BFOR been established?

[62] Once the Complainant has successfully established a *prima facie* case of discrimination, based on the grounds of his disability, it is for the Respondent to argue that its conduct is a BFOR which is thereby a complete defense to the Complainant's claim. The *CHRA* provides:

> 15 (1) It is not a discriminatory practice if
> any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

[63] Determination of a BFOR has been provided by the Supreme Court of Canada in the "*Meiorin*" case. McLachlin J., speaking for the Court stated "…[a]n employer may justify the impugned standard by establishing on the balance of probabilities:

> 1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> 3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3 ("*Meiorin*") para 54)

[64] The purpose of accommodation is to ensure that an employee who is able to work can do so and that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship. “That said, the duty to accommodate is not without limitation. Rather, an employer has a duty to accommodate an employee to the point of undue hardship…” Undue hardship is fact driven. (*Tolko Industries Limited v. Industrial, Wood and Allied Workers of Canada*, (Local 1-207), 2014 ABCA 236, at paras 34, 35. See also *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43, at para 14)

[65] The Respondent submits that the nature of its workplace and the safety sensitive position that was occupied by the Complainant, justifies adverse differential treatment against the Complainant given his poly-substance abuse disorder. The Respondent argues that its operations and the Complainant’s position are safety sensitive, and the requirement to monitor and treat substance abuse disorder is rational, honest, and necessary to ensure safety. Absent the safety measures taken including the policies and standards, the Respondent would face undue hardship in accommodating the Complainant because of the significant safety risk he poses in the workplace as a result of his disability.

[66] It is important to note that the Complainant was not terminated by the Respondent at the time of the Complaint; he was still employed by the Respondent in a non-safety sensitive position.

(i) Were the Respondent’s policies and actions rationally connected to the Complainant’s job or function being performed?

[67] The Respondent had policies in place to deal with employees that had addiction problems. The Respondent, relying upon IME’s from Dr. Bobrowski and Dr. Gillmore, insisted that the Complainant follow certain addiction agreements for the safety of the Complainant, other employees and the public at large if returning to work in a safety sensitive position.

[68] The Respondent cited the decision in *Canadian National Railway Company v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (CAW–Canada), [2000] C.L.A.D. No. 465 ("*CAW*"), as to the safety sensitive nature of the rail industry.

> "… [A] railway can expect to be held to a standard of intense scrutiny with respect to the due diligence it exercises in ensuring the fitness for duty of its employees", and that "Every employee has the right to expect a safe and healthy workplace. Therefore, every employee is required to report and remain fit for duty free of the negative effects of alcohol and drug use, and to comply with the standards set out…" (paras 11, 194)

[69] In its written Brief of Law, the Respondent referred to the obligations of a safe work place, as regulated under the *Criminal Code*, R.S.C., 1985, c. C-46 and the *Canada Labour Code*, R.S.C., 1985, c. L-2. The Tribunal was referred to the duties set out in the *Canada Labour Code*, section 124 which imposes a general duty on the Respondent to ensure the health and safety of every employee at the workplace. Other legislation was referenced by the Respondent as to its safety obligations such as the *Railway Safety Act* and the *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34.

[70] The Tribunal heard and accepted the evidence of Mr. Dan Berek, Manager and Machine Operator, who testified as to the job requirements of a machine operator. He explained the nature of the work involved, presented risks of injury to the operator, fellow work crew members and the public at large.

[71] The Tribunal heard evidence from Lisa Trueman, Director of Health services for the Respondent, as to the Respondent's "Fitness to Work" Policy for an employee, which considers the individual's specific job requirements, the nature of the medical condition of the employee and the level of potential risk to the employee, and others in the work place. In addition, the Respondent presented evidence as to its Alcohol & Drug Policy.

[72] The Courts have in effect imposed a duty of care or accommodation upon employers, for those employees who are substance addictive. The Tribunal accepts, that pursuant to the Supreme Court of Canada's decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.,* [2013] 2 S.C.R. 458, employers are empowered to take steps to ensure an employee, suffering from an

addiction problem is fit for work. The requirement of the employee includes entering into rehabilitation agreements, random physical testing and reporting. This Tribunal sees this as a duty of care on the Respondent, and failure to impose such a rehabilitation program in a safety sensitive work place would be a failure on the Respondent to accommodate the Complainant's disability of addiction. The Tribunal agrees with the Respondent's submission, that the restrictions imposed on Mr. Maxim, once becoming aware of his addiction disorder, are in keeping with legal precedent and safety standards, in safety sensitive workplaces. This Tribunal has found that there are serious safety issues presented by an impaired employee in the workplace which have safety sensitive issues. (See *Dennis v. Eskasoni Band Council*, 2008 CHRT 38 at para 90)

[73] The Tribunal accepts, given the evidence, that the policy and actions of the Respondent were rationally connected to its goal of satisfying its obligations of maintaining a safe workplace. Thus, the Tribunal is satisfied that the first step of the defence has been established.

(ii) Did the Respondent adopt its standard in honest and good faith?

[74] At this step in the analysis, a respondent must establish that it adopted the standard or policy with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant (*Meiorin*, at para. 60).

[75] Mr. Dan Berek testified regarding the heavy machinery that the Complainant was certified to operate and bid on. He explained that this machinery operated by the Complainant was in a place where other employees worked, and he also explained the possible hazards to the public at large. The issue of safety was therefore fundamental to the employment of the Complainant and the Complainant was in a safety sensitive position.

[76] Evidence was given by the Director of Health Services for the Respondent as to CPR's guidelines and policies with respect to an employee diagnosed with substance abuse disorder, particularly in a safety sensitive position. The Respondent in collaboration

with the Railway Association of Canada had established a list and criteria for safety sensitive positions. The Director of Health Services for the Respondent explained that the position held by Mr. Maxim fell into this category of being a safety sensitive position. Procedures were also in place which set out duty standards for safety critical and safety sensitive positions.

[77] The Tribunal finds that the evidence established that the guidelines and policies were in place for all individuals within a safety sensitive position and were considered necessary to meet the Respondent's obligations of a safe workplace.

[78] Given the above, the Tribunal finds that the policies and practices imposed upon the Complainant were adopted in honest and good faith.

(iii) Is the standard reasonably necessary to accomplish its goal such that the Respondent cannot accommodate the Complainant without undue hardship?

[79] At this step of the analysis the Respondent must demonstrate that it cannot accommodate an employee with a poly-substance abuse disorder by allowing them to work in a safety sensitive position, without experiencing undue hardship considering health, safety and/or cost (s. 15(2) of the *CHRA*). The Respondent alleges that undue hardship would be experienced in this case based on the safety of the Complainant, other employees and the public at large.

[80] The Complainant has denied that his disabilities include alcohol and drug dependencies, and that his disability is limited to anxiety resulting from Reye's syndrome. As a result, the Complainant argues that he has no poly-substance abuse disorder and should not be required to follow and participate in programs required by the Respondent as a condition to return to a safety sensitive position.

[81] The Respondent submits that it is the specific safety sensitive nature of the Respondent's work place that satisfies the BFOR principle. As stated by the Arbitrator in *CAW* at paragraph 211

> "…I am satisfied that such testing is justified, and represents a reasonable exercise of management's rights in the highly safety sensitive transportation industry. Section 35(1) of the Railway Safety Act authorizes railway companies to perform their own periodic medical examinations of designated employees. It is clearly within the legitimate interests of a railway to reasonably ensure that persons who move into risk sensitive positions do not suffer from an active drug or alcohol addiction or dependency."

And continuing at paragraph 213:

> "…Accepting that drug or alcohol dependency is a disability protected by the Canadian Human Rights Act, and that the identification and restriction from service of persons with those disabilities can be said to be prima facie discrimination, such discrimination would be amply justified, in relation to risk sensitive positions, on any fair application of the BFOR defence. Alternatively, to the extent that employees whose use of alcohol or drugs is unrelated to any addiction or dependence, those individuals can claim no protection under the Canadian Human Right Act, as they cannot claim a protected disability. In that context, therefore, nothing in the Company's drug and alcohol policy relating to the testing of employees for drug and alcohol consumption can be said to discriminatory [*sic*] or in violation of any protected status under the Canadian Human Rights Act."

[82] The evidence and arguments from the Respondent demonstrate that it relied upon IME's, their Chief Medical Officer and their policies and procedures to determine when and how it would be appropriate for the Complainant to return to work in a Safety Sensitive Position. For example, Dr. Gillmore's Report concluded that Mr. Maxim was fit to return to work in a Safety Sensitive Position provided that he complied with certain treatments and monitoring which should be maintained for a period of 2 years.

[83] The Tribunal also heard from Dr. Cutbill, former Chief Medical Officer and an expert in Occupational Health Medicine. It was his responsibility to review all of the medical evidence with the policies of the Respondent to ensure that the Complainant returned to work in a manner that was safe for Mr. Maxim, his co-workers and the public at large.

[84] Dr. Cutbill told the Tribunal that based on his belief, Mr. Maxim had a high risk of relapse due to a number of criteria and the historical reports of Drs. Gillmore and Bobrowski. As such, it was Dr. Cutbill's opinion that Mr. Maxim be required to enter into EPA and EFAP agreements, in-patient dependency treatment programs, attend AA and

provide periodic urine samples [see Exhibit R – 2 Doc 72). As with the testimony of Drs. Gillmore and Bobrowski, the Tribunal found Dr. Cutbill's testimony persuasive.

[85] The Tribunal accepts their testimony that an individual diagnosed with a substance use disorder is incapable of using alcohol or drugs for recreational use, as the disease creates physiological changes to the brain. Occasional use, as admitted by the Complainant, is not a disclaimer to suffering from the disease. The Tribunal finds that the Complainant's testimony regarding his use of alcohol and marijuana, combined with the expert testimony from the doctors, supports the Respondent's position that the measures imposed upon the Complainant were reasonably necessary.

[86] In addition, the Respondent submitted that the Complainant would not have been returned to work in such a position given his restrictions, nor would the union have allowed it at the time. Mr. Berek, Manager CPR and member of the local return to work committee for Southern Ontario, stated that the Complainant would not have been returned to work in a position that fell outside of the functional abilities described by his doctor. Furthermore, the Union would not agree to bump a more senior employee to allow Mr. Maxim to take a position as a machine operator helper.

[87] The Tribunal accepted the statements of Mr. Berek that the Complainant would not have been returned to work in a position that was outside of his functional abilities, as stated by his physicians. Further, any return to work was also subject to the collective agreement of the Union dealing with seniority and qualifications. I accept that it would have been highly unlikely that Mr. Maxim would have returned to his position of a Machine Operator helper, without compliance of the Respondent's standards and policies.

[88] The Respondent in this case relied upon statements made by the Alberta Court of Appeal's decision in *Stewart v. Elk Valley Coal Corporation*, 2015 ABCA 225, with respect to accommodation. The majority speaking for the Alberta Court of Appeal stated at paras 84-85:

> "The logic of accommodation is that it is the counterweight to discrimination. The objective of the accommodation obligation is to remove the barriers of arbitrariness or stereotypical assumptions or attitudes about disability and to replace them with a mindset of inclusion. Employers are encouraged - and

> compelled - to proceed proactively to habilitate the disabled worker by methods of accommodation whereby the disabled worker is able to participate meaningfully in the work force like non-disabled persons….It seeks to engage employers in the process of enabling their employees to perform the jobs that they are given in a manner which benefits the employer's operation while treating the disabled employee as equally entitled to the full measure of respect (and in that regard the full measure of self-respect and personal responsibility) of other employees."
>
> "To accept …an onus on employers to wait for a flagrant demonstration of an addiction disability on the part of employees – to which an accommodate response is mandated- cannot be reconciled with such a philosophy…."

[89] The ABCA's judgment in *Stewart* was appealed to the SCC (2017 SCC 30). The majority of the SCC did not find it necessary to consider the issue of reasonable accommodation and thus rendered no opinion in respect of the above statements from the ABCA. While the Tribunal recognizes that unlike a judgment of the SCC, the ABCA judgment is not binding upon us, the above paragraphs constitute a provincial appellate court holding in respect of the duty to accommodate under human rights legislation, which holding has not been disturbed on appeal, and as such they have significant persuasive value.

[90] The Respondent's duty to accommodate the Complainant is tempered by the knowledge that it has as to the disability. Accepting that the Respondent's work place is safety sensitive; and recognizing that substance abuse disorders, which are denied by individuals afflicted, and even if in remission, may suffer relapses at any time. A user of alcohol or drugs, not only places the user in a position of danger but also fellow employees and the public.

[91] The Tribunal finds that the Respondent was in a position where it was aware of the Complainant's disability and had to take measures to ensure the safety of the Complainant, its employees and the general public. The Tribunal finds that the Respondent's policy and standards to ensure the safety of its workplace are reasonably necessary and the Respondent could not set them aside for the Complainant without suffering undue hardship in accordance with the third step of the *Meiorin* test.

(iv) Employee's duty to participate in accommodation

[92] Even if the Tribunal had not concluded that the Respondent satisfied the *Meiorin* test for undue hardship, the Complainant failed in his obligation to participate in the accommodation process.

[93] Accommodation of the Complainant cannot be done in isolation by the Respondent alone. It requires as a minimum the co-operation and willing participation by the employee with the disability. It has been held that when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. (*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970)

[94] The Complainant has denied his addiction and therefore ended his participation in the Respondent's accommodation process. The Alberta Court of Appeal stated the following with respect to accommodation in *Stewart v. Elk Valley Coal Corporation*:

> [88] There is a convolution of logic in using "denial" as a basis for excusing the employee who needs accommodation from bringing that up to the employer as other persons are expected to do. The movement towards treating drug addiction or dependency as a physical disability was grounded in the recognition that there were stereotypical attitudes about the capacity of people to control their addictions. Denial, indeed, is arguably part of that phenomenon.…
>
> [89] The appellant's approach amounts to a suggestion that even an employee in a highly safety sensitive position who knows precisely what he is doing can unilaterally and in a secretive manner disregard the profound safety obligations of his employment not only to the employer but to his co-workers. The absolution for doing so is said to arise from error or misconception on the part of that employee - namely denial. In our view, legitimizing such a subjective manner of defining one's safety-related employment duties in hazardous work environments loses touch with the test in ***Meiorin***, and with the objectives of anti-discrimination laws.

[95] As noted above, this was neither confirmed by the majority of the Supreme Court nor was it found to be incorrect. It is the decision of the majority of the ABCA. The Tribunal finds that although it is not binding on this Tribunal, it is informative.

[96] In the case before this Tribunal, the evidence of the Complainant revealed that he admitted to periodic uses of alcohol, but refused to view his occasional use of a "few pops"

as being systematic of addiction disease as described by the expert witnesses. As previously noted, the Tribunal accepts the expert evidence that the fear of relapse from periods of remission is real. Further, the Tribunal finds it places an obligation on the Respondent to accommodate that addiction.

[97] The Tribunal found that on the evidence of the representatives of the Respondent, that the accommodation offered to Mr. Maxim, while requiring discipline, was reasonable, considering the high risk safety issues of a railway. It is not for the employee to determine the reasonableness of the accommodation, or deny that the accommodation is necessary and at the same time claim that the Employer has failed to accommodate his disability. Mr. Maxim refused the monitoring process as a result of denying that he had an addiction problem. So long as there is a duty to accommodate the employee, and the accommodation is reasonable, if the employee refuses to participate, or participates piece meal, the obligation of the employer is satisfied. As such, the Tribunal finds that the Complainant failed in his obligation to participate in the accommodation process.

VI. Conclusion

[98] For all of the reasons above, this complaint is dismissed.

Signed by

Ronald Sydney Williams
Tribunal Member

Ottawa, Ontario
July 18, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1984/6413

Style of Cause: Bradley Scott Maxim v. Canadian Pacific Railway

Decision of the Tribunal Dated: July 18, 2018

Date and Place of Hearing: October 19 to 23, 2015

Toronto, Ontario

Appearances:

Bradley Scott Maxim, for himself

No one appearing, for the Canadian Human Rights Commission

Richard C. Tanner and Paige Ainslie, for the Respondent