

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE
LA PERSONNE

CHARLES A. BREAST

**- and -
CANADIAN HUMAN RIGHTS COMMISSION
- and -
WHITEFISH LAKE FIRST NATION #128**

Complainant

Commission

Respondent

DECISION

MEMBER: Shirish P. Chotalia, Q.C. 2010 CHRT 10
2010/05/07

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V. DECISION

I. COMPLAINT

A. Physical Disability and Family Status - Employment

[1] The Complainant, Charles Breast, is a member of the Whitefish Lake First Nation #128 ("Whitefish") situated 220 kilometers northeast of Edmonton Alberta. Mr. Breast has diabetes. For about 13 years he drove Whitefish's water truck and school bus. In January 2007, he experienced a loss of temporary vision in his right eye. He sought and obtained a leave from work. In late April 2007, Mr. Breast sought to return to work representing that his vision had returned to normal. Mr. Breast states that when he approached Whitefish staff to discuss his return to work, he was threatened and told that he was not welcome back. Since that time, Whitefish has requested specific medical information from him to allow it to return him to work. At the end of July 2007, Mr. Breast gave Whitefish a physician's note to support his desire to return to work. Whitefish then requested further medical particulars from him which Mr. Breast provided in July 2008. Shortly after receipt of the same Whitefish conditionally offered him a sewer truck driving job. Mr. Breast did not accept that offer.

[2] Mr. Breast alleges that Whitefish discriminated against him on the basis of disability by failing to return him to work and by constructively terminating him. He also alleges that Whitefish discriminated against him on the basis of family status by giving his water truck driving job to the former chief's brother.

II. FINDINGS OF FACT

A. Findings in This Case

(i) Medical Leave

[3] Mr. Breast used to drive large trucks to haul water and often worked alone. He worked about 13 to 14 hours per day. The job included driving school buses occasionally. He used to drive the smallest to largest school buses transporting 20 to 60 children aged 15 to 16 years.

[4] On January 8, 2007, he was completing a morning school bus run. After dropping children at school he returned home for lunch. Suddenly, he lost vision in his right eye without warning or symptoms. He contacted Whitefish staff and stated, "There is something wrong with my eye....get someone else ...I cannot do it..." He indicated that he could not drive any further until his vision returned.

[5] Cleo Hunter was Mr. Breast's supervisor. Mr. Hunter was in charge of public works for Whitefish and supervised drivers. Shortly after January 8, 2007, when it became clear that Mr. Breast was not returning to work in the near future, he made arrangements for a relief driver to fill the position. Mr. Hunter telephoned Walter Houle and asked him to fill in as a relief water truck driver on a temporary basis. Water delivery was an essential service to Whitefish. In December 2007, Walter Houle had contacted Mr. Hunter and had told him that

he would be available to work as a relief driver for Whitefish if and when needed. Walter Houle was the brother of the Chief at the time, Chief Tom Houle .

[6] Concurrently, Mr. Breast contacted his physician, who referred him to a specialist. On February 8, 2007, Mr. Breast saw his specialist. The specialist confirmed that he had third nerve palsy arising from his diabetes. Diabetic third nerve palsy is a complication of poorly managed diabetes. It is the most common cranial nerve disorder in individuals with diabetes. Patients may complain of double vision that comes on suddenly, drooping of one eyelid, or pain in the head or behind the eye. There is no specific treatment to reverse the nerve injury. The main stay of the treatment is very tight control of blood glucose levels. Sometimes the eye is patched. Although many patients get better over time, some have permanent eye muscle weakness. The specialist could not advise Mr. Breast when his eye would heal. The specialist provided him with a one-line note stating "due to a medical condition, Mr. Breast cannot operate a motor vehicle". There was no indication of the specific condition and whether it was a temporary or permanent condition. This note was dated February 8, 2007. Mr. Breast gave this note to Whitefish which then granted him a medical leave from work without an anticipated date for return.

[7] Shortly after receiving this note, Mr. Hunter posted a notice for a two week period at Whitefish's office, Whitefish's two stores, and the health centre, seeking applicants for the position of water truck driver. He received only 1 application, being that of Walter Houle. As Walter Houle had been doing a good job hauling water on a temporary basis, Mr. Hunter hired him for the position. He did not consult the Chief and Council and made this decision himself. In the economic climate at the time, Whitefish was experiencing difficulties retaining and recruiting drivers for either the water or sewer truck. Mr. Hunter advised the Chief and Council of the hiring only after he had hired Walter Houle. At no time did the Chief or Council tell Mr. Hunter to hire Walter Houle.

(ii) Medical Slip Required for Return to Work

[8] By April 2007, Mr. Breast had regained his vision. At the end of April 2007, Mr. Breast told Mr. Hunter that he was ready to return to work, and Mr. Hunter told him that he had to get a "Dr's ok" indicating that he was fit to go back to work. Mr. Breast said he could not provide this to Whitefish because he had taken traditional healing. Mr. Hunter told him that there was a sewer truck driver position that was vacant, and that this "job was open to him" if he got a medical slip confirming that he could return to work. The salary and benefits of the sewer truck driver position and the water truck driver position were the same. The sewer truck position involved human waste and occasional exposure to unpleasant odour.

[9] Mr. Breast was unhappy with this offer. On or about April 27, 2007, he telephoned Chief Houle, who at the time of the present hearing was a Whitefish Councillor. Mr. Breast told him that he wanted to return to work and that he could not get a medical slip because he was seeing a traditional healer. Chief Houle told him: "Charles, you don't have to tell him you are seeing a traditional healer. You can go for a medical exam any time." Mr. Breast also told the Chief that Mr. Hunter had offered him a job as a sewer truck driver and that he was being "demoted". The cellular telephone reception was poor during the call and at that point, the telephone reception cut off. Chief Houle went outside and telephoned Mr. Hunter. Chief Houle testified that he asked Mr. Hunter to advise him of the status of the water truck job because he was "... not up to speed with what was happening". Mr. Hunter told Chief Houle that "we had posted the job" and "Wally's driving the truck." Chief Houle asked, "Is there any other job we can give Charles?" Mr. Hunter advised him that "yes", there was an opening for a sewer truck driver position, conditional upon his obtaining a medical slip. Mr. Hunter

indicated that as Mr. Breast had taken a medical leave, he had to provide a medical slip to return to work.

[10] On the same day, Mr. Breast called a number of other Council members to try to return to work without a medical slip. He telephoned Councillor James Jackson, (who was Chief at the time of the present hearing). Mr. Jackson told him to bring in something to show that he was "fit to work". Mr. Breast indicated that he had seen a traditional healer. Mr. Jackson referred him back to Mr. Hunter and Mr. Steinhauer, Whitefish human resources administrator, as Council did not get involved in individual employment issues. Mr. Breast then contacted Councillor Sandy Jackson regarding the same issues, and told him that he had taken traditional healing. Mr. Sandy Jackson testified that he told him to provide a medical certificate for a return to work as the "Nation required a medical certificate".

[11] During his leave, Mr. Breast was having financial difficulties at home. Sometime after his telephone call to Chief Houle, the Chief visited Mr. Breast's home to try to assist him. The Chief contacted a social worker, requesting assistance. The social worker told Chief Houle that the worker had followed the policy and there was no further assistance that could be offered to Mr. Breast. Chief Houle then gave him some money, in his words, to "put some food on the table".

[12] At some point in time, after April 26, 2007, Mr. Breast discovered that his water truck driving job had been given to Walter Houle, but he did not raise this with Whitefish as an issue of concern to him until he filed his complaint in January 2008. Mr. Breast himself was related to many people in the Whitefish community, including at least three Council members as of the date of the hearing. Whitefish staff consisted of about 130 employees, many of whom are Whitefish members. Many members and employees are related to other members or employees through blood or marriage.

(iii) Contents of Required Medical Documentation for Return to Work

[13] At the end of July, Mr. Breast gave Whitefish a medical slip dated July 27, 2007, written by his physician that stated in one line, "This letter is to confirm that Mr. Charles Breast was fit for work duties as of April 26, 2007". Shortly thereafter, on July 31, 2007, Melvin Steinhauer sent Mr. Breast a letter enclosing a Form 17 being a *Request for Medical Information*. The Form 17 asked the physician to describe the nature of the employee's condition. The physician was also asked to describe any symptoms or characteristics of the condition that were expected to negatively affect the employee's ability to perform his or her regular work duties, and the employee's ability to provide regular attendance. It asked the physician to advise if, or to what extent, the symptoms or characteristics of the condition that interfere with the employee's job performance or attendance could be successfully managed or controlled through medication, treatment initiatives or other means. It sought the physician's prognosis of the employee's medical condition, whether it was permanent or temporary, and if it was likely to improve and when. It asked if the symptoms of the condition might worsen, and if so, to describe any anticipated further impact on the employee's ability to perform the job duties or attend at work. At the top of the form, the job in question was to be identified by the physician. The form also sought the physician's opinion regarding any specific initiatives (medication, treatment, workplace adaptation) that would enable the employee to successfully perform the essential duties of the position (including but not limited to, maintaining a level of attendance that enabled him or her to perform the essential duties). Finally, it sought any additional information that the physician felt may assist in attempting to successfully accommodate the employee in the workplace.

[14] In the covering letter, Mr. Steinhauer requested Mr. Breast to provide the form to his physician along with a copy of the letter, so that Whitefish could obtain the information it needed to confirm that he was fit for work as a driver. The letter confirmed that this request was in accordance with its recently enacted employment policies. It also confirmed that once Whitefish had received medical information on the Form 17 indicating his fitness, Whitefish would reinstate him to active employment as a sewer truck driver with the same wages and benefits that he had received before his leave of absence.

[15] In the same letter, Mr. Steinhauer confirmed that Mr. Breast had advised Whitefish that he had obtained traditional treatment and that Mr. Breast believed that he was ready to return to work. The letter outlined that one of the issues that led to his medical leave of absence was in relation to his difficulties in maintaining his blood sugar levels. In this last regard, Whitefish needed additional information from his physician about how that issue was presently being managed. Whitefish confirmed that the driver position was a safety sensitive position, and that Whitefish had to ensure Mr. Breast's safety as well as that of others, and address potential liability for Whitefish.

[16] On July 31, 2007, Whitefish was in the process of enacting employment policies that covered accommodation issues. The policies and the Form 17 were officially approved by Whitefish Council on August 31, 2007. Under the policies, employees had an obligation to provide Whitefish with reasonable notice of any need for accommodation. Employees were also to provide a report from their physician with enough relevant information to allow the need for accommodation to be verified. In most cases, a completed *Request for Medical Information* Form 17 would be sufficient. Employees were to meet with the Human Resources Administrator to discuss accommodation options and to participate in these discussions in good faith. The policies stipulated that employees were required to accept reasonable accommodation.

[17] On September 6, 2007, Mr. Breast sent to Alberta Driver Fitness a medical report confirming that his diabetes had stabilized. On September 7, 2007, Alberta Driver Fitness wrote to Mr. Breast that it had conditionally approved him to continue to drive a truck subject to an annual diabetic report and the wearing of adequate lenses. However, he did not give this letter to Whitefish.

[18] On January 22, 2008, Mr. Breast filed the within complaint. Counsel for Whitefish made several requests after that date for a completed Form 17. On June 26, 2008, Whitefish again requested this information, and indicated that it was seeking to work with the Commission to resolve his complaint. Mr. Breast saw his physician and had the form completed on July 7, 2008, as it related to his position as a "driver". Then the Commission forwarded it to Whitefish's lawyer on July 10, 2008. The Form 17 confirmed that Mr. Breast's diabetes was well controlled, that he had no lasting symptoms, and that the third nerve palsy had cleared up and his vision had returned. It confirmed that the nerve injury was a temporary injury and that the condition was not expected to worsen. In a section called adaptation, the form requested his physician to indicate if any specific initiatives to enable him to return to perform the essential duties of his position were required, and the physician indicated that none were required.

[19] On July 16, 2008, Whitefish wrote to Mr. Breast and acknowledged receipt of the Form 17. It also confirmed that it had now received a copy of the letter from Alberta Driver Fitness conditionally approving his continued operation of a motor vehicle. Based on this

information, Whitefish offered to reinstate Mr. Breast to the position of a sewer truck driver on the following four conditions. Mr. Breast was to:

1. test his blood sugar level daily and at least every four hours while on the job;
2. not drive if he had low blood sugar levels and report any hypoglycemic condition to his supervisor immediately;
3. keep an emergency food kit in the truck at all times;
4. provide an annual medical and diabetic report required by Alberta Driver Fitness as part of his operator license conditions.

The letter was followed by a paragraph wherein Mr. Breast was to sign, indicating he was in agreement with the terms of the letter and accepted reinstatement on those terms.

[20] Mr. Breast discussed the letter with his wife. He testified that he had no difficulty with any of these conditions, as he was already testing his blood twice a day, and would not drive if he had low blood sugar. Further, he always carried his lunch with him and complied with the conditions of Alberta Driver Fitness. Mrs. Breast testified that she implored her husband: "Take that job...look at how we are living."

[21] Accordingly, in late July 2008, he and his wife met with Melvin Steinhauer, to discuss his return to work. However, once Mr. Breast met Mr. Steinhauer in his office, he told him that Whitefish had no right to impose any medical conditions on him as only his physician could tell him what to do. Mr. Breast told him that he did not want the sewer truck driver position, and refused to sign the letter accepting the job. Mr. Steinhauer became upset as he had hoped that Mr. Breast had come to accept the job and the conditions. Mr. Breast also became upset. Mr. Steinhauer pointed and waved his finger at him and told him to cool down. Then Mr. Steinhauer thanked Mrs. Breast and the couple left his office.

[22] At no time did Mr. Breast sign the letter accepting the sewer truck driving position on the outlined conditions.

[23] In late August 2008, Mr. Breast filed a complaint under the *Canada Labour Code*, alleging that he had not received termination pay and severance pay from Whitefish as required by the *Code*.

B. Agreed Facts and Access to Justice

[24] Through active pre-hearing case management and exploration of the issues with counsel at the opening of the hearing, a number of facts were agreed to by both counsel. As well, the issues were narrowed to a few discrete ones. Prehearing conferences resulted in the shortening of a case anticipated to take 2 or more weeks to 1 week. The agreement of facts and narrowing of the issues at the inquiry further expedited the hearing such that it took 2 days of hearing time instead of the scheduled 5 days. Also, the medical evidence of Mr. Breast's family physician and specialist, and that of Whitefish's expert, Dr. Francescutti, was entered without the need to subpoena the physicians: the agreement to this effect resulted in savings to both parties of monies that would likely have been expended to cover the costs to have the physicians testify. The medical evidence was tendered for the truth of its contents and the parties waived their respective rights to cross-examine on the same. Through narrowing of the issues to only those in dispute, the parties agreed to curtail both the testimony of the witnesses and the argument.

[25] Also, from the start of this hearing until the conclusion of the hearing, I had encouraged the parties to reach a settlement outside of the hearing process given that the complaint was lodged by a First Nation member against his First Nation. Unfortunately, a settlement was not reached. However, I acknowledge and thank both counsel for making attempts to facilitate a settlement throughout this hearing.

C. Dispute over Factual Issues

[26] In making the above findings of fact, I carefully considered all of the evidence. There was a discrepancy between the evidence of Mr. Breast, and that of the Whitefish witnesses and the documentary evidence. When there was a conflict between the evidence of Mr. Breast and the other evidence, I chose to rely on the latter for the following reasons:

[27] Mr. Breast testified that he did not have a good memory of significant events. He could not explain discrepancies in dates and times, including those contained in his complaint. For example, his complaint is dated January 22, 2008; yet, it speaks to an event that occurred after this date: the complaint states that Mr. Breast took the Form 17 to his physician. In fact, Mr. Breast took the Form to his physician on or about July 7, 2008 who completed the form on July 7, 2008, being six months after the complaint date. Another more pertinent example is found in the complaint where he stated, "My medical leave had nothing to do with my diabetes...", indicating instead that the reason for his leave was due to an infection in his left eye. This statement negatively affects his credibility, as Mr. Breast knew on the date of the filing of the complaint that his eye malfunction was due to third nerve palsy which resulted from his diabetes. On the first page of the complaint form, Mr. Breast has initialed beside the following statement: "I have reasonable grounds for believing I have been discriminated against. I declare that the following information contained in my complaint is true to the best of my knowledge."

[28] Mr. Breast testified that he did not advise Whitefish that he had obtained traditional treatment. This was contradicted by the testimony of Chief Houle, James Jackson, and Sandy Jackson. It was also contradicted by the written letter of Mr. Steinhauer, dated July 31, 2007, the accuracy of which Mr. Breast did not challenge after receiving it or at the hearing. Further, a finding that he did indeed advise Whitefish that he had taken traditional healing is rational and consistent with the other evidence. It explains the initial reason why Mr. Breast did not provide Whitefish with a medical slip from April 2007 to July 2007 for a return to work, and why his physician's slip of July 27, 2007 confirmed that he had been fit to return to work as of April 26, 2007. Initially, Mr. Breast did not think he could obtain a medical slip.

[29] Mr. Breast testified that he could not remember if Form 17 was enclosed with the July 31, 2007 letter sent by Mr. Steinhauer. In light of the clear wording of the letter and the evidence of the other witnesses, I accept that the Form 17 was enclosed with that letter. I find that Mr. Breast was being inexplicably evasive with respect to a material issue in the hearing.

[30] With respect to Mr. Breast's allegations that during their meeting of July 2008, Mr. Steinhauer tapped him aggressively three times on his forehead with his finger, I accept the testimony of Mrs. Breast over that of Mr. Breast, as I found her evidence to be more credible than his. She testified in his favour and could have exaggerated her evidence to his benefit, but did not. Her evidence was that Mr. Steinhauer waved his finger at Mr. Breast.

[31] I also prefer the evidence of Chief Houle over that of Mr. Breast. I found Chief Houle to be a largely dispassionate witness, and someone who was, and remains, sympathetic to Mr. Breast. He bore no malice towards Mr. Breast: he tried to assist him and told him not to worry about not having seen a physician; that Mr. Breast could obtain the medical slip, even

after the fact, to return to work. Chief Houle contacted Whitefish staff to find out the status of the water truck driver position, and if there were other employment opportunities for Mr. Breast. Chief Houle visited Mr. Breast's home to help him, and did help him financially, and tried to convince the social worker to help him. I found Chief Houle to be candid and direct. I found that he demonstrated sincere empathy towards Mr. Breast when he testified that he also used to drive a truck, and that he was diabetic as well, and had to go for an annual medical examination. Accordingly, I accept the testimony of Mr. Hunter and of Chief Houle that Chief and Council were not involved in individual employment decisions, and that the Chief did not know in April 2007 that his brother was driving the water truck at this time in a permanent capacity.

[32] Finally, I prefer the evidence of Mr. Hunter to that of Mr. Breast, as Mr. Hunter was direct and forthright, even when his evidence could have been seen as detrimental to Whitefish's case. For example, in cross-examination, he was asked if he knew about the Form 17 in April 2007. He candidly stated that he did not know about the Form 17 then, or subsequently, until Whitefish's lawyer told him about it in preparation for this hearing. He also acknowledged that other diabetic drivers were not required to submit a Form 17 although he did not clarify when this was the case and if other employees had taken a medical leave after July 2007. Thus, while this could have constituted damaging evidence to the Respondent's case, the evidence demonstrated that Mr. Breast was the first employee to receive the Form 17, close to the time of its enactment in July 2007. There was insufficient other evidence as to whether other employees, diabetic or not, had taken a medical leave and had sought a return to work, and thus ought to have been required to submit a Form 17.

III. LAW

A. Establishing a *Prima Facie* Case of Discrimination

[33] Section 7 of the *Act* legislates that it is a discriminatory practice, directly or indirectly, to refuse to continue to employ an employee, or in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Disability is included amongst the prohibited grounds of discrimination set out in s. 3 of the *Act*. According to s. 25, "disability", for the purposes of the *Act*, means "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug". "Family status" is also a prohibited ground of discrimination set out in s. 3.

[34] In a human rights case before this Tribunal, the Complainant must first establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a decision in favour of the Complainant, in the absence of an answer from the Respondent. The Respondent's answer should not be considered in the determination of whether the Complainant has made out a *prima facie* case of discrimination. (See *Ontario (Human Rights Commission)* and *O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536; and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204). It has been held that the allegations made by the Complainant have to be credible in order to support a conclusion that a *prima facie* case exists (*Dhanjal v. Canada (Human Rights Commission)*, (1997) 139 F.T.R. 37 at para. 6). When dealing with a course of conduct, as opposed to a pre-existing policy, one should start by examining whether the transaction between the parties, taken as a whole, results in adverse treatment on a prohibited ground (*Hutchinson v. Canada (Minister of the Environment)* (C.A.), 2003 FCA 133, [2003] 4 F.C. 580).

B. Defences

[35] Once a *prima facie* case of discrimination is established, the burden shifts to the Respondent to provide a reasonable explanation demonstrating that the alleged discrimination either did not occur as alleged, or that the conduct was somehow non-discriminatory or justified. (*Maillet v. Canada (Attorney General)*, 2005 CHRT 48, para. 4; *CHRA*, s. 15; see also *Canada v. Lambie* 1996 CanLii 3940 (F.C.)). It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a Complainant to succeed. It is sufficient that the discrimination be but one basis for the employer's actions or decisions. (*Holden v. Canadian National Railway Co.* (1990) 14 C.H.R.R. D/12 (F.C.A.)).

[36] If the Respondent wishes to avail itself of the bona fide occupational requirement justification, it must demonstrate that it met its duty of accommodation to the point of undue hardship further to s. 15 of the *CHRA*. The search for accommodation is a multi-party inquiry, and in the case of disability, the Complainant must facilitate the search for meaningful accommodation by responding to reasonable employer requests for relevant medical information regarding his or her limitations, in order to allow the employer to initiate a proposal (*Tweten v. RTL Robinson Enterprises Ltd.* 2005 CHRT 8; *Graham v. Canada Post Corporation*, 2007 CHRT 40, paras. 91-94.) It is well accepted in the jurisprudence that an employee cannot dictate to an employer the precise terms of an accommodation. See for example, *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4. At para. 22 of this judgment, the Court noted that accommodation is not necessarily a one-way street, and that, when an employer makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not cooperate, his or her complaint may be dismissed. The Complainant cannot expect a perfect solution. (See also, *Hutchinson supra* at para. 77). There is no duty of instant or perfect accommodation, only reasonable accommodation. The reasonableness of the employer's accommodation must be evaluated considering the knowledge of the employer, together with the cost, complexity and expense of any physical accommodation required, and other similar factors. (See *Callan v. Suncor Inc.*, 2006 ABCA 15, para. 21)

C. Evidence

[37] The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), discrimination is not a practice which one would expect to see displayed overtly. In fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practised. Rather, one must consider all of the circumstances to determine if there exists the subtle scent of discrimination. Fundamentally, however, the Complainant must establish a link between his disability, and/or family status, and the employer's decision to refuse to continue his employment (*Mills v. Culp Transport Inc.* 2009 CHRT 17). (See also *Benoit c. Bell Canada*, 2005 CF 926 at paras. 15-16).

IV. ANALYSIS

A. Family Status

(i) Adverse Differential Treatment in the Course of Employment

a) No *Prima Facie* Case Established and Reasonable Explanation Provided

[38] Initially, Mr. Breast had argued that his water truck position was given to the Chief's brother because of that fraternal relationship. Accordingly, Mr. Breast argued that he had established a *prima facie* case of discrimination on the basis of family status. I do not agree. Other than the complaint's assertions, no other evidence was led suggesting that Walter Houle's relationship with the Chief at the time was a factor in the initial decision to hire him

as a relief driver; nor, that it was a factor in the subsequent decision to hire him as a permanent water truck driver. Further, the evidence demonstrated that Mr. Breast himself was related to many people in the Whitefish community, including at least three Council members. While initially Mr. Breast suspected that Walter Houle had been hired without due process, his suspicions were not sufficient to establish the same. In accordance with the decision of *McAdam v. Big River First Nation*, 2009 CHRT 2 at para. 47, a complainant cannot simply put forward abstract beliefs or suspicions that he or she is a victim of discrimination without presenting some concrete observations or independent information to support or confirm that belief. (See also *Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785 at para. 30-31).

[39] In light of the foregoing, I do not find that the evidence led by Mr. Breast was "complete and sufficient" to establish a *prima facie* case on this ground (*O'Malley*).

[40] Further, even if a *prima facie* case had been established, at the end of the hearing, Mr. Breast's lawyer, Mr. Stolfa, conceded in argument that Whitefish had established a reasonable non-pretextual explanation for the hiring of the Chief's brother. The water truck driver position supported an essential service; Whitefish needed to fill the position immediately. Further, after Walter Houle had served in the position of relief driver for a period of two weeks, Whitefish's solicitation of applicants for the position was advertised throughout Whitefish offices, and Whitefish received only Walter Houle's application for the position. The Chief and Council were not involved in the decisions to hire Walter Houle temporarily, and then permanently. Indeed, Whitefish was having a difficult time retaining and recruiting any drivers, for either water or sewer truck jobs.

B. Disability

(i) Adverse Differential Treatment

a) *Prima Facie* Case Established

[41] Mr. Breast suffered from a disability, being diabetes, and his return to work was predicated upon medical documentation surrounding the accommodation of this disability. One particular manifestation of his disability, being his diagnosis of diabetes-related third nerve palsy was a factor in Whitefish's decision as to whether and when to return him to work. I therefore find that Mr. Breast has established a *prima facie* case of discrimination on the basis of disability.

b) Mr. Breast Failed to Facilitate the Accommodation Process

(ii) Medical Information

[42] Whitefish's requirement that Mr. Breast obtain medical information pertaining to his inabilities and limitations insofar as they affected his capacity to execute work as a driver, was a reasonable request and consistent with its duty of accommodation and, in particular, its duty to ensure his safety as an employee, and the safety of other Whitefish community members. The one-line medical note that Mr. Breast provided to Whitefish did not contain sufficient medical information to allow Whitefish to initiate a viable accommodation proposal. In the circumstances of this case, Mr. Breast had a duty to properly notify Whitefish of his physical abilities and limitations—a duty he did not fulfill.

[43] Accommodation is a two-way street, and in this case I find that Mr. Breast failed to meet his obligation to cooperate in the accommodation process. He failed to provide the necessary medical information from July 2007 until July of 2008. It was the Commission, in July of 2008, that forwarded the medical information encompassed in Form 17 to Whitefish.

Immediately thereafter, Whitefish proposed an accommodation plan which Mr. Breast himself testified he was comfortable with, as he was already adhering to the proposed practices in driving his own truck every day. He testified that he tested his blood twice a day, kept a lunch with him, adhered to the Alberta Driver Fitness driving license requirements, and would not drive if he had a problem with his blood sugar level. The accommodation plan was consistent with the opinion of Whitefish's expert physician specializing in community medicine. His report confirmed that Whitefish's plan for returning Mr. Breast to work, in an unsupervised environment, was consistent with the Canadian Medical Association Guidelines and Canadian Diabetes Association Guidelines for diabetic drivers.

[44] Tellingly, as of the hearing date, Mr. Breast was still unwilling to sign the July 2008 conditional offer of reinstatement demonstrating that he was still unwilling to accede to the reasonable requests of Whitefish, and accept the position of sewer truck driver. As in the *Twetten* case, in this case, Mr. Breast failed to adequately participate in the search for accommodation, and ultimately failed "to walk at all on a two-way street".

[45] I considered whether the Form 17 requirement for a return to work was applied in an arbitrary fashion, and find that there was insufficient evidence to support such an allegation: i.e. I am unable to conclude, on the evidence, whether other employees, diabetic or not, had taken a leave and had sought a return to work and thus ought to have been required to submit a Form 17, but were not so required. While some witnesses testified in passing about the fact that Mr. Breast was the only person to have been required to provide a Form 17, and that they themselves had limited or no knowledge of the Form 17, sufficient evidence of the situation with respect to other members who left the employ of Whitefish for medical reasons, and who were then returned to work after July 31 2007, was not tendered.

a) Whitefish Offered Reasonable Accommodation - Alternate Vacant Sewer Truck Job

[46] Mr. Breast asked me to find that Whitefish's offer to place him in the vacant sewer truck driving position was not reasonable as it was, in his submission, a job with lower status, and involved being exposed occasionally to an environment with bad odour. He argued that Whitefish offered him this job in bad faith, believing that he would not accept it. His arguments were difficult to follow, in that he testified that he "never had a problem" with taking this sewer truck job. When asked by his counsel as to whether the sewer truck driver job was of lower status, he could not confirm this. Further, in the hearing, he sought to be reinstated to the sewer truck driver job. Given that both positions had the same wages and benefits, even though the sewer truck position involved occasional odour, based on the evidence before me, I find that Whitefish provided a reasonable accommodation plan to accommodate Mr. Breast's disability. In these circumstances, his refusal to take the vacant sewer truck job in lieu of his water truck driver position was not reasonable, and he could not hold out for his preferred prior job. He failed to facilitate the accommodation process.

(iii) Termination of Employment

a) No *Prima Facie* case established

[47] Mr. Breast argued that he was constructively terminated from his position: that based on his meeting with Melvin Steinhauer in late July 2008, the job of a sewer truck driver, as outlined in Whitefish's letter of July 16, 2008, was not open to him. Mr. Breast argued that in spite of the clear wording of the letter, when Mr. Steinhauer allegedly tapped him on the forehead with his finger, this constituted non-verbal communication to Mr. Breast that the sewer truck job was not available to him, and that he was not welcome to commence work. I do not accept this argument, as I have found for the reasons outlined above, that Mr.

Steinhauer only pointed and waved his finger at him. I have also found that the sewer truck job was open to Mr. Breast from the spring of 2007 until this hearing, irrespective of the events that unfolded in the July 2008 meeting; specifically, it was open to Mr. Breast, from the spring of 2007 until this hearing, to communicate to Whitefish that he wished to take the sewer truck driver job. From July 16, 2008, he had simply to sign Whitefish's formal offer and return it to the Whitefish office. From the date of his receipt of the letter of offer, Mr. Breast did not accept this offer. I do not find that he was terminated by Whitefish, constructively or otherwise.

[48] Whitefish's counsel argued that the preliminary determination of compliance by an inspector with respect to Mr. Breast's *Canada Labour Code* complaint demonstrates that he was not constructively terminated. However, in deciding this case, I place no weight on the preliminary determination of the *Canada Labour Code* inspector.

V. DECISION

[49] For these reasons, I dismiss the complaint, as it has not been substantiated. I have considered the evidence, both discretely and collectively, and find no discrimination within the meaning of section 7 of the *CHRA*.

"Original signed by"
Shirish P. Chotalia, Q.C.

OTTAWA, Ontario
May 7, 2010

PARTIES OF RECORD

TRIBUNAL FILE:	T1397/2309
STYLE OF CAUSE:	Charles A. Breast v. Whitefish Lake First Nation # 128
DATE AND PLACE OF HEARING:	February 8, 2010 February 11, 2010 Edmonton, Alberta
DECISION OF THE TRIBUNAL DATED:	May 7, 2010
APPEARANCES:	
Christopher Stofa	For the Complainant
(No one appearing)	For the Canadian Human Rights Commission
J. Trina Kondro	For the Respondent

