

**Canadian Human Rights Tribunal
droits de la personne**

Tribunal canadien des

BETWEEN:

SHANNON WACHAL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MANITOBA POOL ELEVATORS

Respondent

REASONS FOR DECISION

T.D. 5/00
2000/09/27

PANEL: J. Grant Sinclair, Chairperson

I. INTRODUCTION

[1] The complainant, Shannon Wachal suffers from allergies and asthma. Ms. Wachal was hired by the respondent, Manitoba Pool Elevators as a Grain Purchase Records Clerk, County Elevators Accounting Department. She began work on April 15, 1996, at Manitoba Pool's head

office located in the Royal Bank Building, 220 Portage Avenue, Winnipeg. Ms. Wachal worked on the sixth floor of this multi-storey office building.

[2] On August 23, 1996, Manitoba Pool terminated her employment. The reasons given for her termination was excessive absences from work. In the four-month period, Ms. Wachal worked at Manitoba Pool, she was absent a total of 11 days on six separate occasions.

[3] Ms. Wachal claimed that her absences were due to allergic and asthmatic reactions caused by the renovations to the sixth floor offices. She filed a complaint with the Canadian Human Rights Commission dated October 24, 1997, alleging that Manitoba Pool terminated her employment because of her disability and failed to accommodate her disability, contrary to section 7 of the Canadian Human Rights Act.

II. FINDINGS OF FACT

[4] Shannon Wachal has had allergies and asthma since she was six years old. Various factors such as dust, moulds, high humidity and change of seasons can trigger an asthma attack. Ms. Wachal is able to control her asthma by medication and, by avoiding when possible, those conditions that cause her problems.

[5] Ms. Wachal applied for the position of grain purchaser records clerk with Manitoba Pool after learning about the job posting from a friend. The position was a term position for approximately two years, with a six-month probationary period. The job posting also set out that Manitoba Pool is committed to employment equity, and certain named groups, including persons with disabilities were encouraged to self-identify.

[6] When Ms. Wachal was interviewed for the clerk position, she did not advise of her allergies or asthmatic condition. She did not feel any need to do so. She had worked for six years in the head office of another grain company and had not experienced any difficulty in an office environment. Manitoba Pool did not require a medical examination.

[7] At the time, Ms. Wachal was hired, Manitoba Pool had commenced renovations on certain floors of its head office. Renovations to the sixth floor had not yet begun and Ms. Wachal was not told of the planned renovations when she was hired.

A. Job Duties

[8] Ms. Wachal worked Monday to Friday from 8:00 a.m. to 4:00 p.m. Her supervisor was Penny Lee Blundon. Ms. Wachal was assigned scheduled, daily accounting functions that were to be completed at prescribed times throughout the day. In addition to her daily duties, Ms. Wachal was also responsible for preparing two month-end reports, a purchase entry journal and a gross up report. These reports were the cumulation of all of the daily entries that Ms. Wachal made.

[9] The month-end reports were due on the fifth and sixth working days of the following month. It was critical that the reports be completed on the scheduled dates because other departments relied on these reports to meet their reporting deadlines. Ms. Wachal knew from the beginning of her employment of these reporting deadlines.

[10] Ms. Wachal also had the task of preparing the purchase entry journal and gross up reports for Manitoba Pool's July 21 fiscal year-end. These reports were a twelve-month compilation and were due on the third and fifth working days of August. Ms. Wachal was told from the beginning of the importance of these reporting deadlines.

[11] Ms. Wachal would prepare spreadsheets on which she would make the accounting entries. Ms. Blundon did not monitor Ms. Wachal's daily work, but she would review the monthly reports and note on them any errors to be corrected or other changes to be made. Ms. Wachal would make the necessary changes and return the corrected version to Ms. Blundon.

[12] Ms. Blundon's assessment of Ms. Wachal's work performance, given at this hearing, was that she had expected better results, particularly given Ms. Wachal's six years experience with another grain company. However, she felt Ms. Wachal continued to make errors in her work and Ms. Blundon did not see any improvement in Ms. Wachal's work performance. Ms. Blundon never raised these work performance concerns with Ms. Wachal. Nor did Ms. Wachal's final termination letter list work performance as a ground for termination.

B. Work Absences

[13] Ms. Wachal was absent from work on six occasions totalling eleven working days between April 15 and August 23, 1996. The first four absences and the reasons for the absences are as follows:

April 22, 1996 - "missed one day of work due to being in a car accident on Sunday, April 21, 1996"

May 13, 1996 - "away from work due to severe allergic reaction to MSG"

June 6, 7, 1996 - "away due to allergies and sinus problems"

July 8, 1996 - "left the office at 9 a.m. due to problems with allergies"

July 9, 1996 "away sick - due to allergies"

Ms. Wachal self-reported these absences by completing a Confirmation of Leave form for the day she was absent. These forms set out the reasons for the absences, and were signed by Ms. Wachal, Ms. Blundon and Brita Chell, the Manager for Grain Operations Accounting.

[14] Ms. Blundon and Ms. Wachal met on July 10, 1996. Ms. Blundon arranged this meeting because she felt that there was a problem with Ms. Wachal's absenteeism, particularly because it was happening at month-end. Ms. Blundon explained to her that her absences were causing morale problems with other staff who had to do her work when she was away.

[15] Ms. Blundon's recalls that Ms. Wachal's response was there must be something in the building that was bothering her because she hadn't had the same problem in her previous working environment. Ms. Blundon did not enquire any further as to Ms. Wachal's allergies or asthma which Ms. Wachal had given as reasons for her absences in June and July. Ms. Wachal

told Ms. Blundon that she felt badly about her absences and the burden this placed on her co-workers. Ms. Wachal testified that for this reason, she did not feel comfortable discussing her allergy problems in any detail with Ms. Blundon. She did not tell Ms. Blundon her belief that her allergy problems were caused by the renovations. Nor did she ask to be accommodated in some other workspace. At the July 10 meeting, Ms. Blundon asked Ms. Wachal to provide a medical certificate for any future work absence.

[16] There was one occasion when Ms. Wachal did ask for accommodation. The Accounting Department was scheduled to move into the temporary space on the sixth floor on July 23, 1996. Ms. Wachal sent Ms. Blundon an e-mail asking to book off July 23 because she was having problems with her allergies due to the dust from moving. Ms. Blundon's response was that this was no problem and agreed to her absence.

C. Pre-Termination Medical Evidence

[17] Ms. Wachal was absent on two more occasions, on August 7, 8, 1996, and on August 21, 22, 23, 1996.

[18] Ms. Wachal provided Ms. Blundon with a medical certificate from her family doctor, Dr. Bedi for the August 7, 1996, absence. This set out that Ms. Wachal was under his care from August 7, 1996, and could return to work on August 9. The reason given for her absence was "disabled due to illness". Dr. Bedi also provided a medical certificate dated August 22, 1996, for her August 21-23, 1996, work absence. He indicated that Ms. Wachal was "disabled from work since August 21, 1996, due to illness". Ms. Wachal did not give the certificate to Ms. Blundon because she did not see her again. She could not recall whether she gave the certificate to anyone else at Manitoba Pool but thinks she may have given it to Mr. Mulvihill, Human Resources Manager when she met with him on August 26, 1996, to discuss her termination.

[19] With respect to her April and May work absences, Ms. Wachal called Ms. Blundon, told her that she would not be coming in to work and the reasons why. On the other occasions she was away, Ms. Wachal called her co-worker and told her that she was not coming into work, but did not give any reasons for her absence. The co-worker would pass on the message to Ms. Blundon.

D. Absences and Month-End Reports

[20] It appears that Ms. Wachal was at work on the days that the April month-end reports were due. She was absent from work on June 6 and 7, 1996, and on July 8 and 9, 1996, the deadline days for the May and June month-end reports. The fiscal year end reports were due on August 6 and August 8. The month-end reports were due on August 8 and 9, 1996. Ms. Wachal was absent on August 7 and 8. Ms. Wachal was at work on August 6, but was unable to say whether she had completed any of these reports. Her last absences, August 21-23 did not fall on any days when month-end reports were due.

E. Post-Termination Medical Evidence

[21] The Commission filed at the hearing, a medical certificate from Dr. Bedi dated September 5, 1996, a medical report from Dr. June James, dated September 5, 1996, Ms. Wachal's allergist and a medical report from Dr. Bedi dated May 25, 2000. This last medical report was requested by Commission counsel and is a summary of Dr. Bedi's clinical notes concerning his consultations with Ms. Wachal over the period of July 1, 1989 to December 1999.

[22] Ms. Wachal testified that she went to see Dr. Bedi because she needed medical confirmation for her August absences and also required a prescription to get her allergies under control. She also testified that she told Dr. Bedi of her medical problems at work and that the construction was aggravating her condition.

[23] However, when questioned further, Ms. Wachal did not agree that the first time she saw Dr. Bedi about her situation at work was August 7, 1996. In fact, Ms. Wachal said that she had no idea when she saw Dr. Bedi for this problem in 1996, but probably Dr. Bedi had documented all her visits.

[24] The medical report contains a detailed history of Dr. Bedi's diagnosis and prescribed treatment for Ms. Wachal from 1989 to 1999. There is no reference in Dr. Bedi's May 25, 2000 medical report to any consultations with Ms. Wachal in 1996. There is no reference to any allergy or asthma problems Ms. Wachal had in 1996 or the cause of any other problems. The only reference in the report to 1996 is the medication she was using.

[25] In the September 5, 1996, medical report, Dr. Bedi certifies that he knew Ms. Wachal since 1989 and that she suffers from allergies and asthma. He further stated that Ms. Wachal is incapable of working in an environment where there is a lot of dust, pollen or other allergens present. There is nothing more in this report.

[26] In her medical report, Dr. James reports that she first saw Ms. Wachal in 1979 and again at a follow up visit in 1991. There is no indication that Dr. James has seen her since that time. Dr. James also noted that Ms. Wachal began work at Manitoba Pool in May 1996 and shortly after that, construction began on the job. She also noted that Ms. Wachal missed several days of work during a four-month period and made frequent visits to see Dr. Bedi who was able to substantiate worsening of her asthma and appropriate medical leaves of absences were given. This report appears to be based on information provided by Ms. Wachal. As indicated above, no visits or description of the worsening of Ms. Wachal's asthma are documented by Dr. Bedi.

F. Renovations

[27] Ms. Wachal's evidence is that it was the dust and allergens from the renovations on the sixth floor that severely aggravated her allergies and asthma and caused her absences. Her recollection was that the renovations began a few weeks after she began work on April 15, 1996. She was not sure of the exact date. Her best guess was that the renovations must have started sometime before June 6, 1996, because she was absent from work on June 7, 1996.

[28] Barbara Gyselinck, Special Services Manager for Manitoba Pool, was the co-ordinator for all of the renovations. Ms. Gyselinck was much more precise on this question. According to her,

the renovations to the sixth floor were to be done in two phases over the period from June 10 to September 20, 1996. The first phase consisted of renovating a portion of the sixth floor that had been vacated by another department. These renovations commenced on June 10, 1996, and were completed around July 18 or July 20.

[29] Ms. Gyselinck also testified that the Phase I area was effectively sealed off from the office area where Ms. Wachal worked. The two areas were separated by permanent floor to ceiling demising walls except for two very small portions of the walls where temporary floor to ceiling drywall had been erected. The only area where there was some interface was in the sixth floor elevator area which was adjacent to the entrance door to the construction area. Construction workers used one of the elevators as a service elevator to bring in and remove construction materials.

[30] The accounting staff moved into the temporary, renovated office space around July 23. At that time the renovations to their original office area began and were ongoing until around September 20-23, 1996, when they were completed. The accounting staff moved back into the renovated office area at that time.

[31] Manitoba Pool had also obtained temporary office space on the thirteenth floor equipped with computer and phone links to the main offices. These offices were available to any employee whose health might be affected by the renovations. Prior to the renovations on the sixth floor, one employee expressed concerns about paint fumes but apparently had no problems. Supervisors were advised of the availability of these extra offices, but this information was not specifically communicated to the staff. During the renovations, no employee requested accommodation on the thirteenth floor.

[32] According to Ms. Wachal, she was visibly suffering at work from the renovations. She said she sneezed and coughed at various times throughout the day and her eyes were red and watering. She would also use her ventalin inhalers to relieve these symptoms. She also testified that these symptoms were obvious to her co-workers who worked about five feet away from Ms. Wachal.

[33] Ms. Blundon gave evidence to the contrary. During the time the accounting staff was located in the temporary office area, Ms. Blundon's workstation was about 12-15 feet away from Ms. Wachal. She did not notice any of the symptoms described by Ms. Wachal, nor did she see her use an inhaler or any other medication. Nor did Ms. Wachal tell her that she was suffering from allergies because of the renovations or request that she be relocated elsewhere during the renovations.

[34] Brita Chell, the Manager of the Grain Accounting Department occupied an office in the temporary office space. Although she did not have daily contact with Ms. Wachal she would see her from time to time. Her evidence is that she never noticed any of the symptoms that Ms. Wachal claims that she suffered from during the renovations.

G. Decision

[35] There is no issue that Ms. Wachal has a disability, namely, allergies and asthma. Nor is there any dispute that her allergies could be aggravated by dust or moulds that could trigger a debilitating asthma attack. There is also no question that Manitoba Pool terminated Ms. Wachal's employment because of her excessive absences from work.

[36] The questions to be decided in this case are:

- 1) Were Ms. Wachal's absences from work due to her disability;
- 2) If so, did she satisfy her obligation to advise Manitoba Pool of her disability and the effect of the renovations on her health;
- 3) Did Manitoba Pool meet its obligation to accommodate Ms. Wachal including making inquiries as to the nature and extent of her disability and producing adequate accommodation.

Dealing first with the threshold question of the connection between the absences and the disability, it is clear from the evidence that the first two absences in April and May 1996 were unrelated to Ms. Wachal's disability. Whether the remaining work absences were due to disability is problematic and raises a number of questions of credibility.

[37] Ms. Wachal consistently maintained that her absences were due to the allergens produced by the renovations. She attributed her June 7 and 8, 1996, absences to allergies and sinus problems caused by the renovations. But Ms. Wachal could not say when the renovations had started. In my opinion, the evidence of Ms. Gyselinck is clear that the work on the sixth floor did begin on June 10, 1996.

[38] Ms. Wachal's absence in June and July coincided with the May month-end report deadlines. Her absence in early August again coincided with the month-end and fiscal year reporting deadline dates. It was only her last work absence that did not fall on a month deadline date.

[39] Ms. Wachal did not offer any credible explanation as to why the dust and allergens from the renovations caused her to suffer usually at month-end and not on any other days during the month. Nor did she provide any credible explanation as to why she did not tell Ms. Blundon or anyone else at Manitoba Pool, specifically that the renovations were causing her serious medical problems.

[40] Ms. Wachal had the opportunity to raise what she said was the source of her problems at the July 10 meeting with Ms. Blundon. She did not do so. On the one occasion when she did seek to be absent on July 23, Ms. Blundon readily accommodated her request.

[41] In my opinion, there is also a significant gap in the medical evidence. Ms. Wachal testified that she went to see Dr. Bedi to get the medical certificates for her absences in July and August. But when questioned further, she had no idea when she saw Dr. Bedi in 1996 about her medical problems at work.

[42] Dr. Bedi does not refer in his August 7, August 22, 1996, and September 5, 1996, medical certificates to any consultations with Ms. Wachal. The reasons Dr. Bedi gave for her absence was disabled due to illness without any details or explanation as to the nature of either Ms. Wachal's disability or illness.

[43] Dr. Bedi's May 25, 2000 medical report, summarizing his clinical notes, is notable for the absence of any reference to any medical problems that she had with her allergies or asthma in 1996. Dr. James' report appears to be anecdotal and is not supported by any of Dr. Bedi's medical reports.

[44] Neither Dr. Bedi or Dr. James were called to give medical evidence at the hearing. Instead the Commission relied on Dr. Bedi's medical certificates, medical report, and to a much lesser extent on Dr. James' report.

[45] In my opinion, this medical evidence falls far short of supporting the conclusion that Ms. Wachal's absences from work were due to her disability.

[46] Finally, there is Ms. Wachal's evidence that her symptoms at work were such that it was apparent that she was suffering from allergies. There is a conflict of evidence on this question. Ms. Blundon who was working in close proximity to Ms. Wachal did not notice any of her symptoms. Ms. Wachal did not call any of her co-workers to give evidence, although she saw one or two of them from time to time after she left Manitoba Pool. On the basis of my assessment of these two witnesses, I am inclined to accept the evidence of Ms. Blundon on this point.

[47] In conclusion, I find on the balance of probabilities, that the Commission and the complainant have not proved that the complainant's work absences were due to her disability and that her employment with Manitoba Pool was terminated because of her disability. In view of this conclusion, I do not need to deal with the other questions.

[48] The complaint is hereby dismissed.

J. Grant Sinclair, Chairperson

OTTAWA, Ontario
September 27, 2000

**CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD**

TRIBUNAL FILE NO.: T544/0200

STYLE OF CAUSE: Shannan Wachal v. Manitoba Pool Elevators

PLACE OF HEARING: Winnipeg, Manitoba
July 31 - August 1, 2000

DECISION OF THE TRIBUNAL DATED: September 27, 2000

APPEARANCES:

Shannon Wachal On her own behalf

Odette Lalumière For the Canadian Human Rights Commission

Kristen L. Gibson For Manitoba Pool Elevators