

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Victor Milano

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Triple K Transport Ltd.

Respondent

Decision

Member: Anne Mactavish

Date: September 12, 2003

Citation: 2003 CHRT 30

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[1] Victor Milano is an epileptic. Three months after he had a seizure while at work, Mr. Milano lost his job as a Service Technician with Triple K Transport Ltd. The issue in this case is whether there was a relationship between these two events.

I. Mr. Milano's Employment with Triple K

[2] Mr. Milano is a licenced mechanic, with provincial certification entitling him to repair automobiles, heavy duty equipment, motor coaches and trucks. In addition to holding these licences, Mr. Milano has taken training courses in mechanics offered by companies such as John Deere and General Motors. Mr. Milano's experience with the mechanics trade goes back to the 1960's. His more recent experience includes 12 years running his own forklift company in Florida, where he supervised and performed repairs, including electrical repairs, on industrial lift trucks. He then went to work at John Deere as a Service Foreman. At John Deere, Mr. Milano supervised between 10-20 mechanics performing repairs on trucks and other heavy equipment. Mr. Milano next worked for Adams Industrial Equipment, where he repaired trucks, trailers, off-road vehicles and forklifts.

[3] In April of 1995, Mr. Milano set up his own automotive repair shop. From April of 1995 to July of 1999, Mr. Milano worked with his son-in-law, repairing cars and trucks, and doing Ontario vehicle safety checks. After his son-in-law left the business, Mr. Milano went to work for Abbotsford Trucking as a mechanic. Mr. Milano was diagnosed with epilepsy in 1999, although it appears from his medical records that he first started having problems with seizures as early as 1996. Mr. Milano testified that although his epilepsy is now controlled by medication, in 1999, he was having regular seizures. These seizures interfered with Mr. Milano's ability to do his job, and caused him to lose his driver's licence. Because of his medical problems, Mr. Milano left his employment at Abbotsford Trucking.

[4] Following his departure from Abbotsford Trucking, Mr. Milano worked with his doctor to get his epilepsy under control, and to get his driver's licence back. Once he regained his licence, Mr. Milano began looking for new employment. One of Mr. Milano's acquaintances was an individual by the name of Don Greenough. Mr. Greenough worked at Triple K Transport

Ltd., in Stittsville, Ontario. Triple K is a heavy commodities hauler, primarily involved in hauling steel and steel products for steel producers. Mr. Greenough told Mr. Milano that Triple K was looking for mechanics. Mr. Milano met with Dave Croft, Triple K's Director of Maintenance. During the course of his interview with Mr. Croft, Mr. Milano says that Mr. Croft asked him if he had any health problems, a question that Mr. Milano found strange. Because he thought that his epilepsy was under control, Mr. Milano answered Mr. Croft in the negative.

[5] Mr. Milano was offered a job at Triple K as a Service Technician, or mechanic, and started work on October 23, 2000. Mr. Milano worked on the afternoon shift, from 2:30 p.m. to 11 p.m., under the supervision of Del Higginson. Mr. Milano was hired pursuant to a written employment contract. This contract described Mr. Milano's duties as "... general shop duties - responsible for the maintenance of the fleet of vehicles operated by Triple K Transport Ltd.". Amongst other terms, the contract provided for a "...starting hourly rate of \$18.50 / hour with a review after 3 months".

[6] Mr. Milano testified that he loved working at Triple K - his co-workers were great, and he liked the work. He stated that he was not eased into his position, but immediately went right to work, performing a full range of duties repairing Triple K's trucks and trailers.

[7] On November 10, 2000, Mr. Milano had a seizure at work. Mr. Milano does not remember what happened. However, Don Greenough, who was working beside Mr. Milano at the time, testified that Mr. Milano suddenly fell to the floor. Mr. Greenough called to his colleagues for assistance, and an ambulance was called. Mr. Milano recalls regaining consciousness in an ambulance en route to the Queensway-Carleton Hospital. He stayed at the hospital for a few hours, prior to being discharged with a referral to see a neurologist. Mr. Milano then went to see Dr. Hyman Rabinovitch, who had treated him previously. On November 11, 2000, Dr. Rabinovitch certified that Mr. Milano was ready to return to work, with the restriction that he could not operate a motor vehicle, as Mr. Milano's driver's licence had been suspended once again, because of his having had a seizure.

[8] Mr. Milano returned to work at Triple K. He testified that he was feeling great, and that his medication appeared to be controlling the seizures. According to Mr. Milano, the fact that he was unable to drive the trucks in the repair area did not present a significant problem, as other employees would simply do it for him. While Mr. Milano did not encounter any difficulties with his co-workers after his return to work, he testified that he felt that Dave Croft was treating him differently. Mr. Croft seemed very concerned about Mr. Milano's situation, and asked a lot of questions about his medications. More troubling to Mr. Milano was the fact that Mr. Croft seemed to 'talk down' to him, as if he were mentally defective. Mr. Milano felt very demeaned by Mr. Croft's behavior, and complained to Mr. Higginson about it. He also mentioned his concerns to some of his co-workers. Mr. Milano says that they assured him that this was just "the way that Dave is".

[9] From mid-November, 2000 until February of 2001, Mr. Milano continued work at Triple K, without incident. According to Mr. Milano, it was very busy in the repair shop, and there was always a lot to do. There was no indication that the company was in any financial difficulty, or that lay-offs or terminations were in the offing. As a result, he was stunned when, on February 5, 2001, he was told by Mr. Croft that he was being let go. According to Mr. Milano, Mr. Croft gave him a long speech about the state of the steel business, concluding by saying that Triple K was terminating Mr. Milano's employment. Mr. Croft explained that as Mr. Milano was the last mechanic to have been hired, he would be the first one to go.

[10] Mr. Croft and Mr. Milano agreed that Mr. Milano's last day of work would be February 23, 2001. Although he found it humiliating to have to keep coming to work after he had been fired, Mr. Milano says that he "swallowed [his] pride", and conducted himself in a professional manner.

[11] Shortly after the termination meeting, Mr. Croft provided Mr. Milano with a letter of reference, attesting to the good quality of his workmanship, his willingness to perform any task asked of him, and his positive attitude.

[12] Mr. Milano testified that he was “shattered” by being fired. He couldn’t figure out why his employment was being terminated. Although Mr. Croft claimed that there was a downturn in the steel business, there seemed to be a lot of work to do in the shop at Triple K, and the company was advertising to hire more drivers. As a result, Mr. Milano concluded that negative business conditions were being put forward as an excuse.

[13] Mr. Milano asked himself whether he had said or done something to cause the loss of his job. Eventually, Mr. Milano came to the conclusion that the only reasonable explanation for the termination of his employment by Triple K was the fact that he had a disability. Mr. Milano explained that after three months of employment with Triple K, he would have been entitled to coverage under the company’s health care insurance plan. In Mr. Milano’s view, Triple K did not want to have to provide him with benefits because of his health condition.

[14] Mr. Milano’s suspicions as to the real reason for his termination were heightened when, immediately after he left the company on February 23, Luke Cavanagh started working as a mechanic at Triple K.

[15] The Record of Employment issued to Mr. Milano on February 23, 2001, indicated that the reason for the termination of his employment was “dismissal” rather than “shortage of work”.

II. Triple K’s Explanation

[16] Evidence with respect to Triple K’s explanation was provided by Keith Sabiston, Dave Croft and Luke Cavanagh. Keith Sabiston is the founder, a shareholder in and the Chief Executive Officer of Triple K. Mr. Croft reports to Mr. Sabiston.

[17] According to Mr. Sabiston, Triple K was satisfied with Mr. Milano’s performance on the job. The fact that Mr. Milano suffered from epilepsy, and had a seizure at work, played no part in the decision to terminate his employment with Triple K. Rather, the company was required to let Mr. Milano go because of a downturn in the business.

[18] Mr. Sabiston testified that the vast majority of Triple K's business involves the transport of commodities related to the steel industry, with the company servicing steel manufacturers in Québec, Ontario and Michigan. As a consequence, Triple K's operations are highly sensitive to the performance of the North American steel industry.

[19] In the winter of 2000-2001, the steel industry was not performing at all well. By the end of 2000, nine American steel manufacturers had sought bankruptcy protection. In Canada, Algoma Steel, one of Triple K's major clients, had its rating downgraded. By April of 2001, Algoma was insolvent, and was forced to seek court protection from its creditors. Triple K was owed in excess of \$230,000 by Algoma at the time it filed for court protection, and was an unsecured creditor in the *Companies' Creditors Arrangement Act* proceedings.

[20] Escalating fuel costs led to an increase in Triple K's cost of doing business. Because these increased costs could often not be passed on to the company's customers, the increased fuel costs served to reduce Triple K's profit margins.

[21] An additional pressure on Triple K's financial position was the exposure that the company faced as a consequence of an accident involving one of its tractors. Evidently, the tractor had knocked over a power line in a customer's yard. Because of the cost of insurance, the company elected to self-insure with respect to the accident, and had set up a reserve of \$150,000 to cover the contingent liability.

[22] In November of 2000, Triple K's sales were 25% lower than they had been for the same period in the previous year. At the same time, the company's labour costs were increasing.

[23] The combined effect of these events was that in late 2000 and early 2001, Triple K was in the worst period of decline that Mr. Sabiston had seen in 23 years of business, and was in serious trouble. Mr. Sabiston testified that he was required to mortgage his home in order to raise working capital for the company. Mr. Sabiston also renegotiated and increased the company's bank debt.

[24] Triple K began looking at ways to contain costs. Inventories were reduced, and overtime was eliminated. Four office staff had been let go in 1999, and approximately a dozen drivers left the company in 2000. Attention then turned to the maintenance area. Some maintenance work was contracted out to other companies. In consultation with Dave Croft, Mr. Sabiston also made the decision to terminate Mr. Milano's employment, and to enter into a contractual relationship with Luke Cavanagh. Mr. Sabiston says that Mr. Milano was chosen for termination because he was the last mechanic to have been hired.

[25] Mr. Sabiston explained that Luke Cavanagh had worked for Triple K between November of 1999 and August of 2000. Mr. Cavanagh had expressed an interest in coming back to work at the company. Mr. Cavanagh was not retained to perform routine maintenance work, but was brought in to service and refurbish approximately 20 of Triple K's trailers, including some of the company's oldest trailers, that were not currently in active use.¹ According to Triple K's witnesses, Mr. Cavanagh was required to assess each trailer, to prepare a list of the work that had to be done, and to complete the necessary repairs, so that the trailers could be sold, or could be ready to go, if business picked up.

[26] Because of the weight of the loads that Triple K trucks must haul, the flatbed trailers that the company uses are somewhat specialized in nature, having up to ten axles, in order to support the weight of the load. Dave Croft testified that even experienced, certified mechanics require up to a year of training and experience at the company, in order to be able to service Triple K's specialized equipment. According to Mr. Sabiston and Mr. Croft, Luke Cavanagh had the necessary experience to refurbish this type of trailer with minimal supervision.

¹ In 2000, Triple K operated 56 trucks or 'tractors', as well as 95 trailers. Five additional tractors were added to the fleet late in the year. Mr. Sabiston explained that in early 2000, Triple K had contracted to purchase an additional 12 tractors. When business conditions began to turn sour, Triple K tried to cancel the order, but was compelled to accept 5 of the tractors, that had already been assembled.

[27] Mr. Sabiston explained that Mr. Cavanagh was not hired pursuant to a contract of employment, but rather was engaged as an independent contractor, pursuant to an oral contract, to perform piecework. He reported to Dave Croft, and was paid at a rate of \$22.00 per hour, which amount was not subject to source deductions. Mr. Cavanagh was not entitled to any employment benefits or overtime pay, and the contract could be terminated by either party, on two weeks' notice. Mr. Cavanagh worked between 50 and 60 hours per week at Triple K until he left the company in November of 2001. He has since been rehired by Triple K as an employee, and now works in a managerial capacity, supervising the night shift

[28] Contracting out the work proved to be an efficient method of handling vehicle maintenance, according to Mr. Sabiston. More than half of Triple K's maintenance work is now contracted out.

[29] Although there continued to be a lot of work for the maintenance staff to do at Triple K, continuing poor business conditions ultimately forced the company to lay off five out of eleven maintenance personnel. In early December, 2001, Don Greenough and Ted Letts, and three other individuals were laid off. Mr. Sabiston says that one employee was recalled, but was unavailable for work, whereas Mr. Croft seems to say that no one was recalled. It is common ground that by March of 2002, the employment of all five employees was terminated.

[30] Mr. Sabiston testified that Triple K has willingly accommodated disabled employees. He described cases where drivers with substance abuse problems were provided with rehabilitation services, as well as situations where maintenance workers with hand or wrist injuries were provided with modified duties. Mr. Croft testified that Mr. Milano's driving restrictions did not present the company with any difficulty, as other mechanics were able to drive the trucks when required. Mr. Croft also denied treating Mr. Milano any differently after he returned to work after having had his seizure.

III. The Law

[31] Mr. Milano's complaint is brought pursuant to section 7 of the *Canadian Human Rights Act*. Section 7 makes it a discriminatory practice to refuse to continue to employ an individual because of a prohibited ground of discrimination. Section 3 of the *Act* designates disability as a prohibited ground of discrimination.

[32] In a case of this nature, the burden of proof is on Mr. Milano to establish a *prima facie* case of discrimination. Once that is done, the burden shifts to Triple K to provide a reasonable explanation for the conduct in issue.²

[33] A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in Mr. Milano's favour in the absence of an answer from Triple K.³

[34] In the employment context, a *prima facie* case has been described as requiring proof of the following elements:

- (a) that the complainant was qualified for the particular employment;
- (b) that the complainant was not hired [or, as in this case, was terminated], and
- (c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (ie: race, colour etc.) subsequently obtained the position.⁴

² *Crouse v. Canada Steamship Lines Inc.*, T.D. 7/01 (C.H.R.T.), *Israeli v. Canadian Human Rights Commission*, (1983) 4 C.H.R.R. D/1616 (C.H.R.T.) at p. 1617, aff'd(1984), 5 C.H.R.R. D/2147 (C.M.R.R.T.), *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.)

³ *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985], 2 S.C.R. 536 at 558.

⁴ *Shakes v. Rex Pak Limited* (1981), 3 C.H.R.R. D/1001 (Ont.Bd. Inq.) at p. D/100

[35] While the *Shakes* test serves as a useful guide, the test should not be automatically applied in a rigid or arbitrary fashion in every employment case: rather the circumstances of each case should be considered to determine if the application of the test, in whole or in part, is appropriate. Ultimately, the question will be whether Mr. Milano has satisfied the *O'Malley* test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Mr. Milano's favour, in the absence of an answer from the respondent?⁵

[36] If Triple K does provide a reasonable explanation for otherwise discriminatory behaviour, Mr. Milano then has the burden of demonstrating that the explanation was pretextual, and that the true motivation behind Triple K's actions was, in fact, discriminatory.⁶

[37] The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi*:

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 practiced. (at p. D/5038).

[38] Rather, it is the task of the Tribunal to consider all of the circumstances to determine if there exists what was described in the *Basi* case as the "subtle scent of discrimination".

[39] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows: An

⁵ *Chander and Joshi v. Department of National Health and Welfare*, T.D. 16/95 (C.H.R.T.), at p. 25, aff'd [1997] F.C.J. No. 692, (1997) 131 F.T.R. 301. See also *Singh v. Canada (Statistic Canada)* (1998), 34 C.H.R.R. D/203 (C.H.R.T.), aff'd *Canada A.G. v. Singh*, (April 14, 2000) T-2116-98 (F.C.T.D.), *Morris v. Canadian Armed Forces*, (2001) 42 C.H.R.R. D/443 and *Crouse, supra.* (2000) 37 C.M.R.R. D/501.

⁶ *Crouse, supra.*, *Israeli, supra.*, and *Basi, supra*

inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences of hypotheses.⁷

[40] It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient if Mr. Milano's disability was a factor in Triple K's decision to terminate Mr. Milano's employment.⁸

IV. Analysis

A. Is there a *prima facie* case of discrimination?

[41] In this case, Mr. Milano was hired by Triple K, and it is common ground that Mr. Milano was an experienced and competent mechanic, and that no concerns arose with respect to his performance during the period that he worked at the company. Mr. Milano suffered a seizure while at work. Triple K concedes that Mr. Milano's epilepsy constitutes a disability. A few weeks later, Mr. Milano's employment with Triple K was terminated. Immediately thereafter, Luke Cavanagh began working at Triple K, performing mechanic's duties.

[42] Triple K contends that Mr. Milano and the Commission have failed to establish a *prima facie* case, as the position that Luke Cavanagh was hired to fill was not the position occupied by Mr. Milano. Mr. Milano was hired to perform ongoing or preventative maintenance. That position was not filled after Mr. Milano's employment was terminated. Luke Cavanagh was retained to perform a different job - that is, the refurbishment of the Triple K trailers. As a consequence, Triple K says, the the third element of the *Shakes* test has not been made out, and the complaint should be dismissed.

⁷ B. Vizkelety, *Proving Discrimination in Canada*, (Toronto: Carswell, 1987) at p. 142

⁸ *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 (F.C.A.) at p. D/15.

[43] As will be explained in greater detail further on in this decision, I am not persuaded that Luke Cavanagh worked primarily on the refurbishment of trailers. It is clear from the time records entered into evidence at the hearing that Mr. Cavanagh did work on Triple K trailers. Like other Triple K Service Technicians, however, Mr. Cavanagh also did a lot of work on tractors. I am also not satisfied that the task of refurbishing trailers is one that is sufficiently different from the tasks performed by Triple K Service Technicians that it should be considered to be a different ‘position’, within the meaning of the *Shakes* test.

[44] In 2000, Mr. Milano had over thirty years of experience in automobile and truck mechanics, and as well, had provincial certification entitling him to repair automobiles, heavy duty equipment, motor coaches and trucks. In contrast, Luke Cavanagh finished technical high school in 1991, and had, at most, twelve years of experience as a mechanic, including several years of part-time work while he was attending high school. Mr. Cavanagh had his provincial licence to repair automobiles, motor coaches and trucks, but did not have his heavy duty equipment licence. Both individuals had experience working on trucks and trailers at Triple K, and both were viewed as competent employees. For reasons that will be discussed more fully in the next section of this decision, I am not persuaded that Luke Cavanagh’s more extensive Triple K experience made him better qualified than Mr. Milano to refurbish Triple K’s trailers.

[45] Mr. Cavanagh described himself as “100% healthy”. Unlike Mr. Milano, Mr. Cavanagh is not disabled, did not have a seizure in the workplace, and had no restrictions on his ability to drive.

[46] In my view, the above facts are sufficient to establish a *prima facie* case of discrimination on the basis of disability, thus shifting the burden to Triple K, to provide an explanation.

B. Is Triple K’s Explanation Reasonable or Pretextual?

[47] Triple K submits that it was required to let Mr. Milano go because of a downturn in the business, submitting that this was part of a downsizing exercise that had started in 1999, which

continued through to the end of 2001. The fact that Mr. Milano suffered from epilepsy, and had had a seizure at work, played no part in the decision to terminate his employment. Triple K further contends that Luke Cavanagh was engaged as an independent contractor, as part of an effort to ‘out-source’ or contract-out maintenance work. Triple K further contends that Mr. Cavanagh was retained to perform a particular task, that is, to refurbish the group of twenty trailers, and that he was particularly well-qualified for this task.

[48] I accept that Triple K let four office staff go in 1999. However, I do not accept that these terminations represented the start of an ongoing effort to downsize the company. On July 28, 2000, Mr. Sabiston circulated a memo to Triple K staff, entitled: “Company Campaign to Recruit”. According to Mr. Sabiston’s memo, the company was recruiting to fill positions in all three areas of the organization - drivers, mechanics and administrative staff. Mr. Sabiston noted that employees could be of tremendous assistance to the company in its efforts to recruit additional staff, and asked that employees ‘spread the word’ that Triple K was hiring. He concluded by noting that:

... the company presently sits with 70 people in three areas:

Drivers	48
Mechanics	12
Front office	10
	70 people

Where the company should be:

Drivers	56
Mechanics	16
Front office	10
	82 people

Mr. Sabiston concludes by noting that the company was looking to hire 8 drivers *and 4 mechanics*.

[49] There is at least some evidence to suggest that it was the circulation of this memo that led Don Greenough to suggest that Mr. Milano apply to work at Triple K. Indeed, the fact that

Mr. Milano was hired by Triple K in October of 2000 is evidence of the fact that, at least at that point, the company was not trying to eliminate positions in the maintenance shop.

[50] Triple K further submits that financial pressure forced the company to eliminate overtime, in an effort to contain costs. A review of Triple K's time sheets confirms that the amount of paid overtime did go down, starting in late February of 2001. However, it will be recalled that Mr. Cavanagh was to work up to 60 hours a week, without collecting overtime pay. When the hours that he worked over and above a regular 40 hour week are taken into account, it appears that there was no significant reduction in the total number of hours worked in the repair shop.

[51] Mr. Cavanagh was not entitled to employment benefits. Further, he did not get paid overtime, whereas regular Triple K employees got time and a half for hours worked over the 40 hour limit. As a consequence, Triple K may have realized a small cost saving through the hiring of Mr. Cavanagh. From this saving, however, one would have to set off the additional cost to the company incurred as a result of the higher hourly rate paid to Mr. Cavanagh for the first forty hours he worked each week.

[52] At the end of the day, Triple K gained very little from a financial perspective through the engagement of Mr. Cavanagh.

[53] It is common ground that some of Mr. Cavanagh's time was taken up with the refurbishment of Triple K trailers. A review of the available time sheets for Mr. Cavanagh discloses, however, that he did not just work on trailers, but also worked on trucks. I was only provided with Mr. Cavanagh's time records for the last three months that he worked for Triple K as an independent contractor. These records indicate that, for example, during the week ending September 1, 2001, Mr. Cavanagh worked on a trailer for 10 hours, but spent 46.50 hours working on Triple K trucks. Similarly, during the week ending October 20, Mr. Cavanagh worked a total of 45.50 hours, with more than 21 hours being spent on truck repairs. Three weeks later, Mr. Cavanagh worked a total of 51.25 hours, at least 39.75 hours of which were

spent on truck repairs. As a result, Triple K has not persuaded me that Mr. Cavanagh worked primarily on the refurbishment of trailers.

[54] Further, I do not accept that Mr. Milano could not have done this work. Mr. Cavanagh had previously worked at Triple K for ten months, whereas Mr. Milano had worked at the company for just over three months.⁹ However, Mr. Milano had far more extensive professional experience than did Mr. Cavanagh, and, as well, had superior professional qualifications.

[55] Much was made at the hearing by Triple K of Mr. Milano's confusion in his testimony as to the number of axles on Triple K trailers, the suggestion being that this demonstrated his unfamiliarity with the trailers. Given that more than two years have passed since Mr. Milano worked at Triple K, I am not prepared to conclude from this that Mr. Milano did not have a sufficient degree of familiarity with Triple K trailers to do the refurbishment work.

[56] Dave Croft testified that because of the specialized nature of Triple K's tractors and trailers, it took even an experienced mechanic a year to become familiar with Triple K's equipment. Nevertheless, Mr. Cavanagh was hired to do this ostensibly very demanding job, without any supervision, with only ten months of Triple K experience. On this point, I prefer the testimony of Del Higginson, who stated that within a month of commencing work at Triple K, a mechanic would be up to speed on the nuances of Triple K's procedures and equipment. In concluding that Mr. Higginson's testimony should be preferred over that of Mr. Croft, I have taken into account the fact that Mr. Higginson resigned from Triple K because of a fundamental disagreement with the way that things were being done at the company, and that there is clearly no love lost between Mr. Higginson and Triple K management. Nevertheless, I found

⁹ Although Mr. Cavanagh worked for Triple K for more than three times longer than did Mr. Milano, Mr. Cavanagh' hours of work at the company were just over twice those worked by Mr. Milano, with Mr. Cavanagh having worked 1504 hours, in contrast to the 714 hours worked by Mr. Milano. Further, regard should be had to the testimony of Mr. Cavanagh that he may not have been as productive as other mechanics during those ten months, because of his inexperience, whereas Mr. Milano was able to jump right in and complete whatever tasks he was called upon to perform.

Mr. Higginson to have been a balanced and fair witness, and prefer his evidence on this point to that of Mr. Croft.

[57] Ted Letts and Don Greenough both testified that the work that Luke Cavanagh did refurbishing the trailers was work that any of the Triple K mechanics could do. I have some concerns about the reliability of these individuals' testimony, particularly that of Mr. Letts, as both Mr. Letts and Mr. Greenough were clearly bitter at having been laid off by Triple K in December of 2001. As a consequence, I would be reluctant to rely exclusively on their testimony on this point. However, Del Higginson, who I have previously found to be a reliable witness, was emphatic that Mr. Milano possessed the necessary skill and experience to do the refurbishment job. Mr. Higginson supervised Mr. Milano for the four months that he worked at Triple K. Mr. Higginson was thus in the best position to assess whether Mr. Milano could have done the work that Luke Cavanagh performed.

[58] Even if Triple K really believed that Mr. Milano did not have the requisite expertise to refurbish the trailers, there were other mechanics working at Triple K with years of company experience, who could have worked on the trailers. Mr. Sabiston testified that the company had tried having the work done by Triple K employees, but they ended up getting distracted by other, more pressing work, and the trailer work did not get done. Triple K claims that Mr. Cavanagh was retained to work exclusively on the refurbishment of the trailers, however, as was previously noted, Mr. Cavanagh's time records demonstrate clearly that his efforts were not confined to the refurbishment of Triple K trailers.

[59] Mr. Sabiston and Mr. Croft both testified that Mr. Milano's employment was terminated in February of 2001 because of the downturn in Triple K's business. For the same reason, in December of 2001, the company let five more employees go. However, these individuals were laid off, with the possibility of recall, and with their Records of Employment indicating the reason for their lay-off as being 'shortage of work'. In contrast, in Mr. Milano's case, his employment was terminated, with no possibility that he would be called back to work. Although Mr. Croft was asked why Mr. Milano was treated differently from the other employees in this

regard, I was not provided with a satisfactory explanation for this differential treatment. The obvious conclusion to be drawn from this is that Triple K no longer wanted to have Mr. Milano working at the company.

[60] It is also noteworthy that Triple K attempted to justify the selection of Mr. Milano for termination in February of 2001, on the basis that he was the last man to have been hired, suggesting that the company used a seniority-based system.¹⁰ However, Mr. Sabiston and Mr. Croft agreed that seniority played no role in their choice of individuals to be laid-off ten months later.

[61] I accept that Triple K did come under financial pressure as a result of the depressed condition of the steel industry, and that this may have been a major factor in the lay-off of the five mechanics in December of 2001. However, when the evidence is viewed as a whole, Triple K has not persuaded me that the termination of Mr. Milano's employment some ten months earlier was caused entirely by the poor financial condition of the company. In February of 2001, Triple K clearly did not want Mr. Milano working there any more. Why was that? Given the company's admission that Mr. Milano's performance on the job was satisfactory, the only logical conclusion is that Triple K did not want to have an epileptic working in the maintenance shop.

[62] As a result, I find that the explanation offered by Triple K for the termination of Mr. Milano's employment in February of 2001 is pretextual. Luke Cavanagh was clearly highly regarded by Mr. Sabiston and Mr. Croft. It may well be that their desire to free up a position in the maintenance shop, to allow Mr. Cavanagh to return to Triple K, played a role in the decision to terminate Mr. Milano's employment. Nevertheless, on all of the evidence, I am satisfied that

¹⁰The Commission tried to argue that Mr. Milano was not, in fact, the last person hired in the maintenance area. While it is true that others came to work in the maintenance shop at Triple K after Mr. Milano started at the company, none of these individuals were hired to do the same type of work as either Mr. Milano or Mr. Cavanagh. As a result, I am satisfied that Mr. Milano was indeed the last mechanic to have been hired by Triple K prior to February of 2001.

the fact that Mr. Milano suffered from epilepsy, and suffered a seizure in the workplace, was a significant factor in the decision to terminate his employment. For these reasons, Mr. Milano's complaint is sustained

V. Remedy

[63] Having found liability on the part of Triple K, it remains to be determined what, if any, remedy should properly be provided. In fashioning a remedy, the Tribunal's jurisdiction is governed by section 53 of the *Act*, which contemplates the imposition of remedies designed to prevent future acts of discrimination, as well as compensation for individual complainants. The goal of compensation in cases of discrimination is to make whole the victim of the discriminatory practice, taking into account principles of mitigation, reasonable foreseeability and remoteness.¹¹

A. Systemic Remedy

[64] The Commission asks that I order Triple K to cease discriminating against disabled employees, and to consult with the Commission with respect to its policy relating to the treatment of its disabled employees. The Commission further asks that Triple K management be required to undergo training to sensitize them to the need to accommodate disabled employees.

[65] Given that one of the remedial aims of the *Canadian Human Rights Act* is to prevent future recurrences of discriminatory practices, such an order is, in my view, appropriate in the circumstances of this case. Accordingly, I order that Triple K cease discriminating against disabled employees. Triple K is further ordered to consult with the Canadian Human Rights Commission in order to develop a policy with respect to the accommodation of employees who suffer from disabilities. Within 3 months of the publication of the accommodation policy,

¹¹ See *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.), and *Canada (Attorney General) v. McAlpine*, [1998] 3 F.C. 530 (C.A.)

Triple K shall also provide its senior management with training on the workings of the policy, and the obligations of employers with respect to disabled employees, including the duty to accommodate.

B. Lost Wages

[66] Mr. Milano seeks payment of the wages that he lost from the last day that he worked at Triple K, that is, February 23, 2001, until he became re-employed on a full-time basis in February of 2003, less any income that he received from casual employment in the interim period. In my view, Mr. Milano should be compensated for the wages and employment benefits that he lost in the period from February 23, 2001, to December 3, 2001.

[67] In November of 2001, Mr. Cavanagh's contract was terminated by Triple K. On December 3, 2001, the company laid off five mechanics out of a total mechanical staff of eleven. The Commission and Mr. Milano contend that this lay-off was an attempt by Triple K to 'houseclean', that is, to rid the company of employees that were perceived to be malcontents. There is some evidence to support this view, given that several of the individuals who were laid-off had just had a confrontation with management about practices at the company. Further, in the Spring of 2002, just a few weeks after the end of the recall period, Triple K was advertising to hire more mechanics.

[68] Whatever the company's reasons were for selecting these particular individuals for lay-off, as I have previously indicated, I accept that the company was in some financial difficulty in this period, and that this led to the lay-offs, as well as the termination of Mr. Cavanagh's contract. Had Mr. Milano been working at Triple K in December of 2001, I am satisfied that he would, in all probability, have been laid-off at that time. To the extent that seniority could have been taken into account in the selection of candidates for lay-off, Mr. Milano was the most junior employee. If Triple K was indeed laying-off employees who were perceived as too outspoken, as Mr. Milano and the Commission contend, Mr. Milano may well have fit into this category. Mr. Milano is clearly a very intelligent man, one who is not afraid to stand up for himself.

Indeed, it was clear from Mr. Milano's very effective cross-examinations during the hearing that he is not afraid to challenge those with whom he disagrees. Given the prevailing corporate culture at Triple K, by December of 2001, I find that Mr. Milano would, in all probability, have been identified for lay-off.

[69] Accordingly, I award Mr. Milano the wages and employment benefits that he lost in the period from February 23, 2001, to December 3, 2001, less any income earned by him from other sources during this period. In the event that the parties are unable to come to an agreement with respect to the monies owing to Mr. Milano under the terms of this decision, I may be spoken to.

[70] Had it not been for the discriminatory conduct of Triple K, Mr. Milano would not have been required to attend at this hearing. Having regard to the remedial goal of making a successful complainant whole, Mr. Milano should also be compensated for the wages that he lost as a result of his attendance at the hearing, which he testified amount to \$720.

C. Gross Up

[71] Mr. Milano is currently working. In addition to the wages that he is earning through his new employment, he will now be entitled to a lump sum payment on account of wages. This may well result in negative income tax consequences for him. In my view, it would unfairly penalize Mr. Milano if he were to suffer a more onerous income tax burden, by receiving a lump sum payment now, than he would have incurred had the monies been paid to him as salary in 2001. This would be inconsistent with the remedial goal of making Mr. Milano whole. Accordingly, Triple K shall pay Mr. Milano an additional amount sufficient to cover any additional income tax liability that he incurs as a consequence of receiving payment in this fashion.

D. Out of Pocket Expenses

[72] In preparation for this hearing, Mr. Milano paid \$45 to obtain copies of his medical records. He should be reimbursed for this expenditure.

[73] Further, with the assistance of his son, Mr. Milano retained the Ottawa law firm of Nelligan, O'Brien, Payne to assist him in the pursuit of his human rights complaint. Nelligan's has charged a total of \$11,248.26 for its services in relation to this matter, inclusive of disbursements and GST.

[74] There is a conflict in the jurisprudence emanating from the Federal Court on the question of the jurisdiction of the Canadian Human Rights Tribunal to award a successful complainant his reasonable legal expenses.¹² For the reasons that I gave in *Nkwazi v. Correctional Service of Canada*¹³ and *Premakumar v. Air Canada*,¹⁴ I am of the view that there are compelling policy considerations that favour adopting the interpretation of Section 53 (2) (c) of the *Canadian Human Rights Act* espoused by Gibson J. in *Thwaites* and Rouleau J. in *Stevenson*, that is, to conclude that the ordinary usage of the word "expenses" includes legal expenses.

[75] In my view, in order to satisfy the remedial goal of making Mr. Milano whole, an order requiring that he be reimbursed for his reasonable legal expenses is appropriate in this case. In the event that the parties cannot agree on an appropriate figure for Mr. Milano's legal expenses, I may be spoken to.

¹² See *Canada (Attorney General) v. Thwaites*, (1994), 21 C.H.R.R. D/224 (F.C.T.D.), *Canada (Attorney General) v. Lambie*, (1996), 124 F.T.R. 303 (T.D.), *Canada (Attorney General) v. Green*, [2000] 4 F.C. 629 (T.D.), and most recently, *Canada (Attorney General) v. Stevenson* (2003) F.C.T. 341.

¹³(2001) 41 C.H.R.R. D/109 (C.H.R.T.)

¹⁴(2002) 43 C.H.R.R. D/210 (C.H.R.T.)

E. Pain and Suffering

[76] Mr. Milano asks for an award of \$20,000 - the maximum permissible under the *Act* - for the pain and suffering that he says that he sustained as a consequence of his employment having been terminated by Triple K.

[77] Mr. Milano testified that he was “shattered” by the actions of Triple K, and described in some detail the devastating consequences that the company’s actions had for his self-esteem and emotional well-being. He testified that he had considerable difficulty finding another job, given the fact that he did not have a valid driver’s licence, and explained the severe financial difficulties that he sustained as a result.

[78] While Mr. Milano testified that he was very depressed as a result of losing his job at Triple K, there is no indication that Mr. Milano was required to seek medical assistance to deal with this problem, and he appears to have made a complete recovery.

[79] In all of the circumstances, an award of \$10,000 for Mr. Milano’s pain and suffering is appropriate.

F. Special Compensation

[80] Mr. Milano also seeks an award of \$20,000 as special compensation for what he says is Triple K’s wilful and reckless conduct.

[81] I have already concluded that Triple K wilfully terminated Mr. Milano’s employment at least in part because he suffered from epilepsy. Nevertheless, what occurred in this case appears to be an isolated incident. Mr. Milano was provided with a letter of reference by Triple K, and was allowed to stay for an extra week on top of the two weeks of working notice originally provided by Mr. Croft. Further, unlike the majority of federally-regulated employers, Triple K is

not a large organization. In my opinion, in all of the circumstances, an award of \$5,000 is appropriate here.

G. Interest

[82] Interest is payable on awards of special compensation as well as on lost wages.¹⁵ I order interest be paid on the monies awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest should run from February 23, 2001, and, in the case of the lost wages, should be calculated as the wages would have become payable to Mr. Milano.

H. Retention of Jurisdiction

[83] I will retain jurisdiction in the event that the parties are unable to agree with respect to the quantification or implementation of any of the remedies awarded under this decision.

VI. Order

[84] For the foregoing reasons, I declare that Mr. Milano's rights under the *Canadian Human Rights Act* have been contravened by Triple K, and order that:

- i) Triple K cease discriminating against disabled employees. Triple K is further ordered to consult with the Canadian Human Rights Commission in accordance with the provisions of Section 53 (2) (a) of the *Act*, in order to develop a policy with respect to the accommodation of disabled employees. Within 3 months of the publication of the accommodation policy, Triple K shall also provide its senior management with training on the workings of the policy, and the obligations of employers with respect to disabled employees, including the duty to accommodate.

¹⁵ *Morgan, supra.*

- ii) Mr. Milano be awarded compensation for lost wages, calculated in accordance with this decision;

- iii) Triple K pay to Mr. Milano an amount sufficient to cover any additional income tax liability that he may incur as a consequence of receiving the monies referred to above in this fashion;

- iv) Triple K pay \$10,000 to Mr. Milano for his pain and suffering;

- v) Triple K pay Mr. Milano the sum of \$5,000 as special compensation;

- vi) Interest shall be paid on the lost wages and non-pecuniary compensation awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest on the lost wages shall run from February 23, 2001, and shall be calculated in accordance with this decision.

Signed by

Anne Mactavish
Chairperson

Ottawa, Ontario
September 12, 2003

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T732/3702

Style of Cause: Victor Milano v. Triple K Transport Ltd.

Decision of the Tribunal Dated: September 12, 2003

Date and Place of Hearing: June 16 - 20, 2003

Ottawa, Ontario

Appearances:

Victor Milano, for himself

Giacomo Vigna, for the Canadian Human Rights Commission

Katherine A. Cotton, for the Respondent