CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

DAVID MILLS

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
J.E. CULP TRANSPORT INC.

Respondent

DECISION

MEMBER: Edward Peter Lustig 2009 CHRT 17
2009/05/25

I. THE COMPLAINT

[1] This is a decision regarding a complaint dated July 21, 2006 by David Mills, as Complainant, against J.E. Culp Transport Ltd., as Respondent, alleging that the Respondent discriminated against him "... for failing to provide a work environment free from discrimination and harassment on the grounds of disability (leg injury), which culminated in the failure to employ and accommodate his needs contrary to sections 7 and 14 of the *Canadian Human Rights Act*." The Complainant alleges that the impugned conduct occurred as a result of him becoming temporarily disabled and unable to perform his work as a truck driver with the Respondent following a motorcycle accident outside of work, on or about September 25, 2005, in which he broke his leg. The Complainant alleges that he was not rehired by the Respondent on account of a disability, in spite of receiving a note and a letter from his doctor on March 14th and March 15th, 2006 clearing him to return to work and despite his willingness to return to work at a time when the Respondent had been advertising for and hiring new drivers.

[2] The inquiry by this Tribunal into the Complaint was requested by the Canadian Human Rights Commission (the "Commission") as being warranted pursuant to s. 44 (3) (*a*) of the *Canadian Human Rights Act* (the "*Act*") by letter dated May 20, 2008.

[3] The Complainant appeared and gave evidence at the Hearing as did his spouse Sally Pye. Their evidence was extremely brief. The Complainant was represented at the Hearing by Cecil Norman and U-Sheak Koroma of the firm Human Rights Advisory Services, as agents. The Respondent's President James Culp, its Vice-President, Helene Culp and its senior

operational employee, Susan Murphy, all appeared on behalf of the Respondent and gave detailed evidence at the Hearing. The Respondent was not represented by a lawyer or agent at the Hearing. The Commission did not appear at the Hearing.

II. DECISION

[4] For the reasons set out below, I have determined that the Complaint has not been substantiated and is therefore dismissed.

III. SECTIONS 7 AND 14 OF THE ACT

[5] The Complaint cites the above noted sections of the *Act* as the discriminatory practices that the Respondent engaged in on the basis of the Complainant's disability. These sections read as follows:

7. it is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

14. It is a discriminatory practice,

(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(b) in the provision of commercial premises or residential accommodation, or

(c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

The prohibited ground of discrimination cited in the Complaint is disability pursuant to s. 3 (1) of the *Act*.

IV. FACTS

[6] The Respondent has operated a trucking business based in Beamsville, Ontario since 1985. It maintains a fleet of approximately 40 to 50 trucks that it owns. Its business is based on a number of contracts with individuals, companies or organizations that require products to be hauled. There are long haul contracts/routes for refrigerated products and short haul contracts/routes for solid waste products. The long haul (refrigerated) contracts/routes cover longer distances and take several days of travel generally to the south of the United States. The short travel (solid waste) contracts/routes are day trips between waste transfer stations around the Golden Horseshoe in Ontario and waste disposal sites just across the border in the United States. The contracts are primarily verbal. The business fluctuates considerably depending on the needs of customers. The business is very competitive and price driven. The Respondent's contracts involve driving between Canada and the United States.

[7] Drivers are hired on an as needed non-union contractual employment basis. The drivers pick up the Respondent's truck at its yard in Beamsville. Drivers on daily waste disposal routes load the truck from a waste transfer station in Ontario and unload the truck at the waste disposal facility in the United States and then return the truck to the Respondent's yard the same day. Drivers are hired and paid only by the load or trip actually driven. There is no guarantee that there will be work for drivers every day, or any day, as work depends on the availability of loads. Drivers can refuse to work but do not get paid if they do not work for any reason including illness, temporary disability or absence from work for any other reason. There is a high level of turnover among drivers who are hired in the industry to drive owner's trucks.

[8] The Complainant started to drive for the Respondent on or about July 30, 2004. He primarily hauled waste between the Waste Management Inc. facility in Toronto and the Pine Tree Acres Landfill site in Michigan. The Respondent's contract with Waste Management Inc. was terminated in September of 2005. Of the five drivers including the Complainant who drove that route at the time, only one driver was left with any work with the Respondent as a result of the termination of the contract. The one driver was transferred part-time to a Barrie

transfer facility. The Respondent also hauled waste to waste disposal sites in New York State, however, according to the Respondent's evidence, during the time that the Complainant worked for the Respondent, when asked, he always refused to drive routes to New York State for reasons that he did not disclose to the Respondent. He also made it clear that he was not interested in long haul routes.

[9] The Complainant was reprimanded for incidents, in writing, by the Respondent on two occasions during his fourteen months of work. On the first occasion he was given a letter dated December 15, 2004 as a "first written warning ..." for an incident involving his driving at an excessive rate of speed along a service road and passing another truck owned by the Respondent. It was alleged that he caused the other truck to have to slow down to avoid a possible accident. On January 7, 2005 he was given a second written warning concerning an incident at the Waste Management Inc. yard in Toronto where he allegedly refused to load a truck and returned the truck unloaded to the Respondent's yard without contacting the dispatcher for further instructions. The evidence at the Hearing also established that there were further allegations recorded on dispatcher notes respecting poor performance and truculent and uncooperative behaviour by the Complainant in his dealings with customers, colleagues and fellow drivers - one of which allegedly involved him spitting at another driver.

[10] The Complainant was charged on July 28, 2005 with two driving offences while driving a load to Michigan. One of the offences was for driving without a seatbelt and the other offence was for driving without the load properly secured. The Respondent paid the ticket related to the offence for the unsecured load. The Complainant was not allowed to drive briefly following this incident because the State trooper had taken away his licence. During his employment with the Respondent, because of his record and performance, the Complainant did not receive any of the bonuses or incentives that the Respondent provided to other drivers for good safety records and performance on a quarterly and yearly basis.

[11] The Respondent has a policy covering "Disciplinary Action" that provides for it to have the discretion to dismiss an employee for the kind of performance and behaviour record that the Complainant had prior to his injury. The Respondent did not dismiss the Complainant prior to his injury. The Respondent gave evidence that the Complainant was on a "trajectory" to dismissal prior to his injury.

[12] On September 25, 2005 while driving his motorcycle off-duty, the Complainant was involved in an accident in which he broke his leg. He was hospitalized as a result thereof and had surgery and then rehabilitation. Following his accident, the Respondent continued to pay the Complainant's health benefits for just over twelve weeks. Usually, drivers contributed to these payments. The Respondent agreed to pay the full amount for the Complainant's benefits for the twelve weeks on a single coverage basis (as he was single at the time). In a letter to the Complainant dated September 29, 2005, Mrs. Culp wrote as follows:

"Dear David, hope you will soon be feeling better ... You informed me that you might be off for quite some time due to your motorcycle accident ...The company will provide you with single coverage on your benefits at our expense for a period of 12 weeks from the accident date. After that date we will no longer be able to keep you on our benefit program. Hopefully you will be back to work by then."

[13] The Respondent sent the Complainant the letter of September 29, 2005, covering benefits for the twelve weeks, as it had done previously with several other drivers who went off work with illnesses or injuries or for other reasons and couldn't return to work for an extended period of time of more than twelve weeks. In these previous cases, the drivers were re-employed when they returned for work if there was work available and they had acceptable work records. Moreover, the Respondent in the past employed a number of drivers with disabilities. The letter of September 29, 2005 covered only the discontinuation of

benefits since drivers were not paid in any case for any days that they did not actually work. The Respondent received advice from Federal government authorities that its position in this regard was permissible under s. 239 (1) of the *Canada Labour Code R.S.C., 1985, c. L-2* which provides as follows:

239. (1) Subject to subsection (1.1), no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness or injury if

(a) the employee has completed three consecutive months of continuous employment by the employer prior to the absence;

(b) the period of absence does not exceed twelve weeks; and

(c) the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of a qualified medical practitioner certifying that the employee was incapable of working due to illness or injury for a specified period of time, and that that period of time coincides with the absence of the employee from work.

[14] There was no evidence that the Complainant made a complaint under s. 240 (1) of the *Canada Labour Code* that he had been dismissed unjustly as a consequence of the actions of the Respondent under the *Code*. S. 240 (1) of the *Code* reads as follows:

240.1 (1) Subject to subsections (2) and 242 (3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

[15] While recovering, the Complainant had limited contact with the Respondent, however, he let it be known that he was hoping to return to work with the Respondent when his injuries had healed. During this time the Respondent no longer had the Waste Management contract to haul waste to Michigan that had provided the Complainant with work prior to his injury which had formed the basis of the Complainant's duties.

[16] During the time that the Complainant was recovering, the Respondent caused some flyers to be published and distributed and some radio ads to be run advertising for work opportunities for drivers. According to the Complainant, these flyers and ads indicated that the Respondent had positions available for drivers at about the same time as the Respondent maintained that there were no jobs available for the Complainant. The Respondent, on the other hand, gave evidence that these flyers and ads were either for routes to New York State that the Complainant had indicated he could not drive or were general advertisements for drivers in accordance with industry practices to obtain the names of people who might be available to drive at some time in the future. As well, the Respondent's evidence was that at one point during the Complainant's absence, it hoped to attract a new contract that would require a number of new drivers, however, the new contract did not materialize and new drivers were not hired as a result thereof. The Respondent's evidence was that no new drivers were hired during the time the Complainant was recovering except for routes to New York State where the Complainant had previously indicated he would not cross the border.

[17] In February of 2006 the Complainant had sufficiently recovered that he felt he was ready to return to work with the Respondent as a truck driver. He made his availability known to the Respondent. According to the Complainant's evidence he was advised by the Respondent that there was no work available for him. He was examined by Dr. Rittenhouse and received a clean bill of health with a note and a letter from the doctor dated March 14th and March 15th, 2006, respectively, noting the Complainant *"... may return to work fulltime regular duties"*. It was both the Complainant's and the Respondent's evidence that, at this stage, the Complainant was not disabled. Upon submitting the Doctor's letter and note in March of 2006, the Complainant again requested that the Respondent provide him with work as a driver, but was told there was no work available for him to Michigan and that the Respondent

was hiring only drivers to do border crossing into New York. According to the Respondent there were no routes available for the Complainant to drive since only routes to New York existed at the time and the Complainant had previously refused to drive to New York State. There was no evidence adduced at the Hearing that the Complainant indicated to the Respondent that he would be prepared to drive to New York State when he was ready to return to work in March of 2006.

[18] At some point between approximately four and six weeks after he was told by the Respondent that it had no work for him in March the Complainant obtained other employment as a driver with another firm in April or early May of 2006. He has continued to work as a driver since that time with other trucking companies.

[19] It is clear that the Complainant was not rehired by the Respondent when he was cleared by his Doctor to return to work and indicated to the Respondent that he wished to return to work on or about March 15th, 2006. There is also no doubt that the Complainant, at that time, did not have a disability. The Respondent's evidence was that there was, therefore, no basis for a complaint under either s. 7 or s. 14 of the *Act* since the Complainant had no disability at that time. There was no evidence that the Respondent perceived the Complainant as being disabled in March of 2006 or that he viewed him as being "injury prone" or in any way still vulnerable as a truck driver because of his prior injuries or anything else.

[20] The Respondent's evidence was that it had a workplace non-discrimination policy and had hired or rehired people with physical disabilities in various other cases. The Respondent's evidence was that its decision to discontinue the Complainant's benefits after the twelve week period from the date of the motorcycle accident was consistent with its normal practice in this regard whenever there were long term absences from the workplace as permitted under s. 234 of the *Canada Labour Code*. The Respondent's evidence was that it advised the Complainant that he was not being rehired when his injury had healed, on or about March 15, 2006, because of two reasons, namely:

(1) there was no work available for him as a result of his refusal to take routes to New York State - those being the only routes then available; and

(2) his temper, safety record and attitude as described in previous reprimands and recorded in dispatcher notes which had put him on a "trajectory" to be fired at the Respondent's discretion.

[21] The Complainant's position is that he was discriminated against and harassed on the basis of a disability by virtue of not being rehired as a driver when he was able to drive again either in February of 2006 when he felt he could return or following the clearance from his doctor as being fit for work on or about March 15th, 2006. The Complainant's view is that the Respondent's reasons for not rehiring him, as outlined in the previous paragraph, were merely a pretext to obscure the fact that the Respondent effectively terminated him when he became temporarily disabled as a result of his motorcycle accident and his health benefits were cancelled. In this regard, the Complainant points to the fact that his performance record and the discipline issues cited by the Respondent did not lead to the Respondent terminating him prior to his motorcycle accident. Further, the Complainant points to the fact that the Respondent was advertising for drivers at about the same time as it was advising him that there was no work available for him as evidence that the reasons given by the Respondent based upon there being no available contracts/routes were a pretext. The Complainant does not dispute the fact that he was not disabled when he requested to return to the workplace in February or March of 2006 but takes the position that, in essence, by that time the "die had already been cast", so to speak, by virtue of the termination of benefits based, in his view, upon his temporary disability in December of 2005 when the benefits ceased following the letter from the Respondent of September 29, 2005.

V. ISSUES

[22] There are two issues that need to be determined:

1. Has the Complainant demonstrated a *prima facie* of discrimination on the basis of a disability?
2. Has the Respondent provided a reasonable explanation that is not a pretext for discrimination?

VI. ANALYSIS/CONCLUSIONS

[23] A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent". That answer or explanation must be believed and not shown to be a pretext *CHRC v. Canada 2005 FCA 154, para. 26.* Once a Complainant establishes a *prima facie* case of discrimination, he is entitled to relief in the absence of justification by the Respondent. *Ontario Human Rights Commission v. Etobicoke (1982) 1 S.C.R. 202* and *Ontario Human Rights Commission and O'Malley v. Simpson Sears [1985] 2 S.C.R. 36); Lincoln v. Bay Ferries Ltd. 2004 FCA 204, at para. 18.*

[24] Once a *prima facie* case of discrimination is established, the burden of proof shifts to the Respondent to demonstrate that the alleged discrimination either did not occur as alleged or that the conduct was somehow non-discriminatory or justified. It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint 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)

[25] 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, "*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 what was described in the *Basi* case as the *"subtle scent of discrimination."*

[26] The Complainant has failed to make out a *prima facie* case on the evidence. The decision by the Respondent to not rehire or continue to hire the Complainant in either February or March of 2006 was not based on a disability since he had no disability when he was ready to return to the workplace.

[27] The decision by the Respondent to terminate health benefits twelve weeks after the Complainant became temporarily disabled following his motorcycle accident outside of work is authorized by s. 239 of the *Canada Labour Code*. By following the *Canada Labour Code* the Respondent has not violated the provisions of s. 7 or s. 14 of the *Act*. The evidence did not establish that the termination of health benefits was effectively tantamount to the termination of employment of the Complainant on the basis of his temporary disability at that time. Nor was there any evidence of a perceived disability as the reason for not rehiring or continuing to hire the Complainant. Further, the Complainant has not established in any way that the termination of health benefits constitutes an adverse differentiation or a refusal to continue to employ or harassment.

[28] The adherence to the provisions of the *Code* does not automatically lead to a conflict with the *Act*. The Complainant could have filed a complaint under s. 240 of the *Code* had he been dissatisfied with the termination of benefits but he chose not to do so. Besides, the actions of the Respondent in this regard only applied to the termination of health benefits not the termination of employment or any adverse differentiation in relation to employment since after his motorcycle accident the Complainant was not available to drive and therefore would not have been paid in any case while he was injured. The evidence did not establish a *prima facie* case that the termination of health benefits (despite compliance with s. 239 of the *Canada Labour Code*) constituted discrimination under ss. 7 or 14 of the *Act*.

[29] As noted, one must consider all the circumstances to determine if there exists what was described in the *Basi* case as the "*subtle scent of discrimination*". For the reasons noted in the

facts outlined above, it is clear why the Respondent did not offer the Complainant further work in February and March of 2006 when he was ready to drive again and these did not relate to discrimination. There were no contracts available which required his services. He had previously indicated he could not drive into New York State. And there had been concerns about his previous conduct and behaviour at work, which amongst other things also made it difficult to place him on any of the existing routes. This evidence does not support a *prima facie* case of discrimination due to the leg injury.

[30] It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. It is the link between that group membership and the arbitrariness that triggers the possibility of a remedy. The essence of discrimination is in the arbitrariness of its impact. It is the Complainant who bears this threshold burden. The issue is whether the Complainant has satisfied the threshold onus of demonstrating that there is *prima facie* discrimination, namely that he has been disadvantaged by the Respondent's conduct based on stereotypical or arbitrary assumptions about persons with disabilities. *McGill University Health Centre v. Syndicat des Employés (2007) 1 SCR 161*.

[31] For the reasons noted above, in all the circumstances, the threshold test has not been met.

[32] I am completely satisfied on the evidence that the Respondent would have rehired the Complainant following his recovery from his injuries but for the two reasons it gave for not rehiring the Complainant.

[33] These were legitimate reasons and the Respondent steadfastly held to these reasons at all times. These reasons provide a reasonable explanation and are not a pretext.

[34] Once a reasonable explanation is provided the onus then shifts back to the Complainant to demonstrate that the explanation is merely a pretext for discrimination *St. John v. Canada Post, 2007 CHRT 19*. The Complainant has not satisfied that onus.

[35] As I have found that the complaint is not substantiated, it is hereby dismissed.

"Signed by"

Edward Peter Lustig

OTTAWA, Ontario
May 25, 2009