CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

TELECOMMUNICATIONS EMPLOYEES ASSOCIATION OF MANITOBA INC.,

BARBARA CUSTANCE, CARMEN GIROUX, CHUCK HANDO, KATHLEEN MULLIGAN, JANICE SIRETT

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MANITOBA TELECOM SERVICES

Respondent

RULING

MEMBER: Michel Doucet 2007 CHRT 29
2007/07/16

[1] The Respondent made an oral motion at the start of the hearing asking the Tribunal not to allow the Complainants to lead evidence or argue in the alternative to their main arguments that they were "perceived to be disabled" in the manner in which the layoffs were implemented. The Respondent took specific issue with the Complainants' solicitor's argument in a letter dated July 6, 2007, in which they suggested that the Respondent had a duty to accommodate to the point of undue hardship.

[2] The solicitor for the Respondent argued that these allegations constituted additional allegations which had the effect of amending the complaints.

[3] Having reviewed the Complaints and the Statement of Particulars and Amended Statement of Particulars, I note that in every one of these, the Complainants referred to a "perceived disability." This being the case, I fail to see how the Respondent would be prejudiced by the allegations or the arguments contained in the letter of July 6, 2007.

[4] On the issue of "undue hardship" and accommodation, I think it is important that we review the law as it relates to human rights. The complaints are brought pursuant to sections 7 and 10 of the *Act*. Section 7 makes it a discriminatory practice to refuse to employ, or to continue to employ, an individual, on a prohibited ground of discrimination. Section 10 makes it a discriminatory practice for an employer to establish or pursue a policy that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. In contrast to complaints under section 7 of the *Act*, which relate to employer actions affecting specific, named individuals, section 10 of the *Act* addresses the discriminatory effect that employer policies or practices may have on an individual or a class of individuals.

[5] Section 3 of the *Act* designates disability as a prohibited ground of discrimination. Furthermore, it is now well-established that the protection of the *Act* extends to those who are mistakenly perceived to have a disability. (See *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Montréal (Ville)*, [2000] 1 S.C.R. 665, at para. 49.)

[6] Since the Supreme Court decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [also called "*Meiorin*"] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [also called "*Grismer*"], the conventional distinction between direct discrimination and indirect discrimination has given way to a unified approach to processing human rights complaints. According to this approach, it is incumbent first on the complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in favour of the complainant, in the absence of an answer from the respondent. To do this the Complainant must satisfy the Tribunal that the Respondent has acted in a discriminatory manner in regards to the Complainant's disability or perceived disability.

[7] Once a *prima facie* case of discrimination has been established, the onus shifts to the Respondent to prove, on the balance of probabilities, that there is a *bona fide* justification for the discriminatory policy or standard. Thus, the Respondent must prove that:

i) it adopted the standard for a purpose or goal rationally connected to the performance of the job. The focus at this step is not on the validity of the particular standard, but rather on the validity of its more general purpose, such as the safe and efficient performance of the job. Where the general purpose is to ensure the safe and efficient performance of the job, it will not be necessary to spend much time at this stage;

ii) it adopted the particular standard in good faith, in the belief that it was necessary to the fulfillment of the legitimate work-related goal, with no intention of discriminating against the claimant. At this stage, the focus shifts from the general purpose of the standard to the standard itself;

iii) the impugned standard is reasonably necessary to accomplish its goal, that is, the safe and efficient performance of the job. The employer must demonstrate that it cannot accommodate the claimant and others affected by the standard without suffering undue hardship. It must ensure that any procedure that has been adopted to assess the issue of accommodation considers the possibility that it may unduly discriminate on a prohibited ground of discrimination. Moreover, the substantive content of a more accommodating

standard offered by the employer must be adapted to each case. Subsidiarily, the employer must justify why it has not offered such a standard.

[8] The *Meiorin* and *Grismer* decisions include parameters for determining whether a defence based on undue hardship has been established. In *Meiorin*, the Supreme Court pointed out that the use of the term "undue" infers that some hardship is acceptable. In order to meet the standard, the hardship imposed must be "undue". It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

[9] Considering the state of the law and considering the fact that the Complainants have referred to "perceived disabilities" from the start, I reject the Respondent's argument that the letter of July 6, 2007, raises new grounds.

"*Signed by*"

Michel Doucet

OTTAWA, Ontario
July 16, 2007

PARTIES OF RECORD

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APPEARANCES:	
R. Ivan Holloway Luke Bernas	For the Complainants
No one appearing	For the Canadian Human Rights Commission
Gerry Parkinson Paul McDonald	For the Respondent