CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

BRUCE TWETEN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

RTL ROBINSON ENTERPRISES LTD.

Respondent

REASONS FOR DECISION

MEMBER: Shirish P. Chotalia

2005 CHRT 8
2005/02/11

I. INTRODUCTION

[1] The complainant, Mr. Bruce J. Tweten, began working for the respondent, RTL Robinson Enterprises Ltd. ("RTL") as of November 13, 1995. He began as an apprentice / journeyman. He left RTL for a period of time and was rehired as a heavy duty mechanic from June 13, 1996.

[2] RTL operates a trucking business and has its head office in Yellowknife, Northwest Territories. RTL has a branch office in Edmonton, Alberta with a trucking division that collects, loads and hauls freight. The Edmonton office includes a mechanical repair division where Mr. Tweten repaired heavy duty equipment.

[3] Unfortunately, while working at RTL, Mr. Tweten injured his back.

II. DISCRIMINATION COMPLAINT - AUGUST 25, 1997

[4] Mr. Tweten injured his back while working on a trailer on August 25, 1997. He began to experience back pain. Mr. Tweten saw his physician, Dr. Seto, the

following day. He then made a workers' compensation board ("WCB") claim. This claim was accepted by the WCB on the basis of his back injury, and he began receiving WCB compensation benefits as of August 26, 1997.

[5] Mr. Tweten then attended at a rehabilitation center and was assessed by an Orthopaedic Specialist. In November 14, 1997 WCB determined that Mr. Tweten was capable of "modified" work and advised Mr. Art Brochu of the same in responding to RTL's concerns pertaining to employer contributions. WCB did not provide Mr. Brochu with further details regarding Mr. Tweten's condition. This letter does not outline his limitations or capabilities or alternate or modified work duties.

[6] In accordance with its assessment, WCB terminated Mr. Tweten's benefits as of December 17, 1997. The WCB case manager felt that his complaints of pain were subjective and that WCB could not offer him further treatment to assist his injury, as he had taken two rehabilitation programs without success. Mr. Tweten challenged this decision and was eventually successful in having WCB benefits re-instated from December 18, 1997 to July 2, 1999.

[7] Mr. Tweten alleges that when his WCB benefits were terminated he could lift a maximum weight of 50 pounds. He alleges that he advised RTL of this restriction and that he asked Art Brochu for light duty work. He alleges that RTL denied this request and would only allow him to recommence work if he was at 100% physical ability and could perform 100% of his work duties. He alleges that RTL categorically denied him modified work, and instead terminated his employment.

III. FACTS

[8] In December 1997, after WCB advised Mr. Tweten that his benefits would be terminating, Mr. Tweten contacted Mr. Brochu asking for light duties to return to work. Mr. Brochu advised him that there did not exist a light duty program for a heavy duty mechanic. Mr. Brochu told him that he required a letter from his doctor outlining his physical limitations and what work he could perform without re-injuring himself. Mr. Brochu told him that after receipt of the letter he would determine if RTL could modify a work program for him. Mr. Tweten never provided such a letter to RTL. Nor did he specify to Mr. Brochu that he was capable of lifting a maximum of 50 pounds of weight.

[9] Mr. Tweten was unhappy with this proposal and filed an application for long term disability ("LTD") benefits on January 26, 1998 with UNUM Canada. He asked RTL for the necessary paperwork to complete this LTD claim and RTL

cooperated with him in supplying requested information and forms to UNUM Canada. Mr. Tweten had received interim benefits from UNUM Canada from August 26, 1997 to December 24, 1997. Thereafter, UNUM Canada refused to provide him with further benefits on the basis that he had not demonstrated that he was incapable of performing each of the material duties of his occupation during that 120-day elimination period.

[10] Meanwhile, on February 6, 1998, Mr. Brochu telephoned Mr. Tweten and asked him to come to his office to discuss what might constitute light duty work for a heavy duty mechanic. Mr. Tweten was defensive and refused to cooperate with him. Mr. Brochu asked him to return the company key still in his possession. Mr. Tweten indicated that he would have his father return the key on February 16, 1998.

[11] On February 13, 1998, Mr. Brochu was in Calmar, Alberta where Mr. Tweten resided. He telephoned him and asked him to meet him for a coffee. Mr. Tweten refused to meet him or to return the key. Mr. Tweten provided the key to the RCMP and told the RCMP to advise RTL that he did not want to hear from RTL again unless it was in writing.

[12] After this incident, and in light of the fact that Mr. Tweten had collected his tools from RTL work site at night in January 1998, RTL evaluated Mr. Tweten's actions as being tantamount to Mr. Tweten having quit his employ. RTL thereafter completed a record of employment that Mr. Tweten was no longer employed with RTL as of September 1, 1997.

[13] In short, Mr. Brochu repeatedly asked Mr. Tweten for a medical opinion from his doctor indicating specifically what type of work Mr. Tweten was capable of doing. Thereafter, he was going to determine what, if any, accommodation RTL could make for Mr. Tweten. In spite of numerous requests for such a letter, Mr. Tweten at no time provided Mr. Brochu or anyone at RTL with a medical letter or other information outlining his limitations.

[14] While Mr. Tweten had provided RTL's agent with a release to access his WCB files this was used by RTL only to address cost recovery issues before the WCB Board and Appeal Commission and not to vet his file for medical information about his limitations. The release specifically states that RTL's agent company may access the file to represent RTL's interests for this stated purpose. RTL had not sought the release for other purposes; nor did it have access to the WCB file for other purposes.

IV. BASIS OF MY FACTUAL FINDINGS

[15] The bases for my factual findings are outlined below.

A. LAY WITNESSES

[16] As the events occurred many years ago, and because there is a conflict between the oral testimonies of the witnesses, I place more weight on the letter of February 18, 1998 from Art Brochu to Christine Papenhuyzen.[1] This letter was copied to Mr. Tweten; yet, he failed to dispute its contents in writing at the time. I find that this letter contains the best evidence of the events that transpired at the material time. As well, where there is a discrepancy between the testimony of Mr. Tweten and that of Mr. Art Brochu, a former employee of RTL who worked as a safety manager at the relevant times, I prefer the testimony of the latter RTL witness. I find Mr. Brochu to be a candid and direct witness. I find him to have acted reasonably in his dealings with Mr. Tweten both prior to and following the August 1997 back injury. After the injury and the termination of the WCB benefits he did not advise Mr. Tweten that he could not return to work. To the contrary he tried to meet with him to discuss the situation. Further, he does not currently work for RTL and provided an independent recollection of the events that had transpired. As well, his testimony remained consistent throughout his testimony in chief and under cross-examination.

[17] On the other hand, I do not find the oral testimony of Mr. Tweten reliable given a number of factors. First, he had a more partisan interest in the complaint. He was defensive and had limited memory of the relevant events. His testimony was not logical in material areas: for example he testified that he asked Dr. Seto for a letter outlining his limitations (contrary to the testimony and notes of Dr. Seto) yet did not satisfactorily explain why he never provided such a letter to RTL. Another example is that he testified that he did not understand why he had to return the company's keys to RTL after a 6 month absence. Nor did he provide a logical explanation for why he only recorded selected conversations between himself and Mr. Brochu.

B. TAPED TELEPHONE CONVERSATIONS

[18] Mr. Tweten selectively taped some telephone conversations between himself and Mr. Brochu from January 14, 1998 to February 2, 1998 and filed the transcripts as exhibits. I find that these conversations were deliberately calculated by Mr. Tweten to elicit a specific response by Mr. Brochu: Mr. Tweten wished to tape a statement by Mr. Brochu that he required Mr. Tweten to be capable of 100% of his job duties prior to return to work. I note that in spite of such a statement, Mr. Brochu confirms that he requires a slip from Mr. Tweten's doctor stating that he was fit to return to work. I do not find these conversations helpful and I place no weight on them.

C. DR. SETO

[19] I have serious reservations about the independence of Dr. Seto. At least one of Dr. Seto's medical legal reports refers to items that are not documented in his chart notes. Although I directed him to bring his original chart to the hearing so that RTL's counsel could review it, Dr. Seto did not cooperate with this direction. Eventually, he advised the panel that he could not locate the file and thus avoided producing the same for examination by RTL's counsel. Dr. Seto testified to events that were not documented in his notes. He contradicted himself on several occasions. Overall, I found him evasive and unreliable. Even Mr. Tweten acknowledged that Dr. Seto was open to suggestion and agreed that I could not place any weight on his testimony.[2] Further, I place no weight on his chart and question its authenticity and reliability.

V. ISSUES

[20] Based upon my findings of fact I now address the legal issues that arise.

[21] The jurisdiction of this Tribunal arises from Mr. Tweten's complaint dated September 9, 1998. The crux of Mr. Tweten's complaint centres on the factual determination of whether or not RTL refused to accommodate his back injury.

[22] The issues are:

1) Did RTL discriminate against Mr. Tweten contrary to section 7 of the *Canadian Human Rights Act*?[3]

2) If the answer to this question is in the affirmative, has RTL established a *bona fide* occupational requirement ("*BFOR*") defence further to s. 15(a) of the *Act*? Did RTL refuse to accommodate him as required by law?

3) If RTL was in breach of its duty of accommodation, what remedies should be awarded to Mr. Tweten?

VI. LAW

A. HUMAN RIGHTS LAW

[23] Mr. Tweten filed a complaint pursuant to s. 7 of the *Act* as it stood on September 9, 1998, complaining about events that occurred in the latter portion of 1997. Section 7 of the current *Act* states that 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 employment. One of the prohibited grounds is disability.

Section 15(1)(a) outlines the bona fide occupational requirement defence:

> It is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement.

Section 15(2) states:

> For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Section 15(8) confirms that section 15 applies to both direct and adverse effect discrimination.

[24] The *Act* as it stood at the time of the alleged discrimination, did not contain provisions equivalent to the current section 15(2), 15(8) and 15(9). These amendments came into force and effect as of June 30, 1998.[4]

[25] In 1999, the Supreme Court of Canada released its decisions in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Services Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 [*Meiorin*] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*]. In these

two cases, the Supreme Court of Canada replaced the former jurisprudential distinction between direct and indirect discrimination with a unified approach. Under the unified approach, the onus remains upon the complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one that covers the allegations made, and which, if believed, is sufficient and complete to justify a verdict in the complainant's favour in the absence of an answer from the respondent. Once a *prima facie* case of discrimination has been established by the complainant, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy is a *BFOR*. In order to establish a *BFOR*, the respondent must prove that:

A) it adopted the standard for a purpose or goal that is rationally connected to the function being performed. At this stage, the focus is not on the validity of the particular standard, but on the more general purpose, such as the need to work safely and efficiently to perform 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;

B) it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose, with no intention of discriminating against the claimant. Here, the analysis shifts from the general purpose of the standard, to the standard itself; and

C) the impugned standard is reasonably necessary for the employer to accomplish its purpose; i.e. the safe and efficient job performance. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. The employer must ensure that the procedure, if any, to assess the issue of accommodation, addresses the possibility that it might discriminate unnecessarily on a prohibited ground. As well the *substantive* content of a more accommodating standard offered by the employer must be individually sensitive. Alternatively, the employer must justify his reason for not offering such an alternative standard.

[26] The Supreme Court's rulings in *Meiorin* and *Grismer* are also instructive in assessing whether or not an undue hardship defence has been established. In *Meiorin*, the Supreme Court observed that the use of the word `undue' implies that some hardship is acceptable; it is only `undue' hardship that will satisfy the test.[5] An uncompromisingly stringent standard may be ideal from the employer's perspective. Yet, if it is to be justified under human rights legislation, the standard must accommodate factors relating to the unique capabilities and inherent worth

and dignity of every individual, up to the point of undue hardship. The Supreme Court has further observed that in order to prove that a standard is reasonably necessary, a respondent always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship. It is incumbent on the respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship.

[27] In some cases, excessive cost may justify a refusal to accommodate those with disabilities. However, one must be wary of putting too low a value on accommodation. It is all too easy to cite increased cost as a reason for refusing to accord equal treatment. The adoption of the respondent's standard has to be supported by convincing evidence. Impressionistic evidence of increased cost will not generally suffice.[6] Innovative and practical non-monetary avenues of accommodation ought to be considered. Finally, factors such as the financial cost of methods of accommodation should be applied with common sense and flexibility in the context of the factual situation under consideration.[7] As observed by Cory J. in *Chambly v. Bergevin* [1994] 2 SCR 525, what may be entirely reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession. I note that the term `undue hardship' is not currently defined in the *Act*. Finally, employees have a duty to assist in securing appropriate accommodation and to facilitate the search for accommodation.[8] In *Butler v. Nenqayni Treatment Centre Society* [2002] C.H.R.D. No. 25, the former Chair of this Tribunal, as she then was, ruled that the failure of the complainant to provide the respondent with requested medical information regarding her physical limitations constituted a breach by the complainant of her duty to facilitate the search for accommodation. In short, the quest for accommodation requires give and take by all parties involved in the process. It is a two-way street.

[28] In returning to the threshold question of determining whether the complainant has established a prima facie case of discrimination, this Tribunal is to conduct an inquiry into the complaint further to ss. 49 and 50. This inquiry is to be independent, impartial and have due regard to the evidence presented and the relevant law. This Tribunal is bound by the Federal Court of Appeal's ruling in *Hutchinson v. Canada (Minister of the Environment) (C.A.)* (2003), 4 F.C. 580. The court confirmed that both *Meiorin* and *Grismer* considered the effects of discrete, explicit standards or policies which served as screening tools; i.e., an aerobic capacity standard that adversely discriminated against women, and a visual acuity standard for the issuance of driver's licenses, constituting direct discrimination. The Federal Court of Appeal distinguished those cases from a transaction between the parties that was not driven by a pre-existing policy. Instead, there was a course of dealings in which the parties operated from an understanding of their respective rights and obligations. In *Hutchinson*, it was

difficult to isolate and identify a particular policy or standard. In *Meiorin*, the Court's analysis began from a finding that the policy in question distinguished between people adversely on a prohibited ground. The Federal Court ruled that where one is dealing with a course of conduct, the more appropriate question is, does the transaction between the parties, taken as a whole, result in adverse treatment on a prohibited ground? If the transaction taken as a whole does not disclose adverse treatment, then the inquiry is at an end. If adverse treatment on a prohibited ground is shown, one proceeds to the three questions envisioned by the Supreme Court's analysis in *Meiorin*. In *Hutchinson*, the Court ruled that it was reasonably open to the Commission to find that the transaction between the appellant and the respondent, taken as a whole, did not disclose adverse treatment.

[29] Further, in *Hutchinson* the Court affirmed that a complainant does not have the right to hold out for his or her preferred alternative. In that case, the respondent did attempt to accommodate the complainant's disability by moving her to alternate work sites, employing her on a seasonal basis, promoting a scent free environment and offering telework. The Federal Court adopted the ruling in *Ontario (Ministry of Community and Social Services) v. OPSEU* (2000), 50 O.R. (3d) 560, where the Ontario Court of Appeal found that the employer's "Religious Observance Policy" was sufficient to accommodate the individual needs of adherents of minority religions. An employee claimed the right to paid time off to observe eleven religious holidays. The employer's policy provided for two paid days off for religious observance and allowed for additional days off to be taken via scheduling changes and earned days off accumulated through the employer's compressed workweek option. The employee took the position that his earned days off from the compressed work week were his to use as he saw fit and that the employer could give him 11 paid days off for religious observance without undue hardship. The Court held that since the employer's policy was sufficiently inclusive to accommodate the claimant, the issue of accommodation to the point of undue hardship did not arise. The Federal Court ruled that one of the corollaries of this position is that claimants cannot refuse a reasonable solution on the ground that the alternative, which they favour, will not cause the employer undue hardship.

VII. ANALYSIS

A. *PRIMA FACIE* CASE NOT ESTABLISHED & BREACH OF DUTY BY COMPLAINANT TO FACILITATE ACCOMMODATION

[30] In this case, the transaction as a whole that occurred between Mr. Tweten and RTL did not constitute adverse treatment by RTL against Mr. Tweten. RTL acknowledged Mr. Tweten's disability and diligently sought to meet with him to

discuss accommodation. Mr. Tweten refused to facilitate such a meeting and failed to provide RTL with requested medical information about his limitations.

[31] Specifically, with respect to s. 7(a) of the *Act*, Mr. Tweten had a back injury and thus he had a disability within the meaning of the *Act*. However, RTL did not refuse to employ him due to the injury. Rather, Mr. Tweten voluntarily chose to leave RTL. He failed to communicate with RTL about a return to work. He failed to report to work in December 1997 or thereafter and collected his tools in January 1998.

[32] Neither did RTL contravene s. 7(b) of the *Act*. RTL did not differentiate adversely against Mr. Tweten. Rather RTL cooperated with Mr. Tweten by keeping his position open for him pending his return to work after his injury, and by assisting him with the long term disability forms. As well, RTL tried to meet with him repeatedly without success to discuss the status of his employment and return to work but Mr. Tweten refused to meet with Mr. Brochu.

[33] Thus, the complainant has failed to establish a *prima facie* case of discrimination within the meaning of either section 7(a) or section 7(b) of the *Act*.

[34] Finally, even if RTL had discriminated against Mr. Tweten, as discussed, RTL made every effort to meet with Mr. Tweten to discuss his need for accommodation, even after Mr. Tweten failed to provide it with a letter outlining his physical limitations. In failing to respond to this legitimate request from RTL, Mr. Tweten breached his duty to facilitate the search for meaningful accommodation. RTL's conduct was bona fide throughout. In the circumstances of this case, I do not find that the WCB release entitled RTL or its agent unlimited access to Mr. Tweten's file. Mr. Tweten argues that under the former s. 141 of the *Workers' Compensation Act* of Alberta, RTL was entitled to access his medical file. This section clearly limits the employer's access to information that is relevant to an issue under review or appeal and confines the Workers' Compensation Board's right to release information to an employer to issues pertaining to the same. The issues of an employee's needs for workplace accommodation do not fall within the scope of this section and the statutory scheme contemplated in that legislation. As well, it is not reasonable in the circumstances of this case to require RTL to write to WCB to vet its files to determine Mr. Tweten's limitations. Mr. Brochu made a bona fide effort to obtain the required medical information directly from Mr. Tweten. All Mr. Tweten had to do was to obtain his own physician's statement outlining his limitations. Even after Mr. Tweten's failure to provide such a letter, Mr. Brochu, in good faith, made numerous efforts to meet with him to discuss his job and what accommodation he sought. This is not a case wherein Mr. Tweten suffered from a mental disability that prevented him from cooperating in the search for accommodation. Mr. Tweten failed absolutely to contribute to the multi-party task

of finding meaningful accommodation. He failed to walk at all on a two-way street.

[35] Thus, I dismiss Mr. Tweten's claim in its entirety.

Signed by
Shirish P. Chotalia

OTTAWA, Ontario
February 11, 2005

[1]Exhibit R-1, Tab 10 and also contained in Exhibit R-2.

[2]Transcript, p. 1141, lines 21-25; p. 1142, lines 1 - 23.

[3]R.S.C. 1985, c. H-6 [*Act*]

[4]CIF, 1998, c. 9, ss. 9 to 34 in force 30.06.98 see SI/98-79.

[5]*Meiorin* adopts the decision in *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 984.

[6]*Grismer* at paras. 41 and 42.

[7]*Meiorin*, at para. 63. See also *Chambly v. Bergevin*, [1994] 2.S.C.R. 525 at 546.

[8]*Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970

PARTIES OF RECORD

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APPEARANCES:

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Barry D. Young	For RTL Robinson Enterprises Ltd.